

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED

MAY 05 2010

Clerk of the Courts

**IN RE: PETITION TO AMEND RULE 13
OF THE RULES OF THE SUPREME COURT OF TENNESSEE
TO INCREASE HOURLY RATE PAID APPOINTED COUNSEL
OF INDIGENT DEFENDANTS**

No. M2010-00502-SC-RL1-RL

ORDER

The Tennessee Association of Criminal Defense Lawyers ("TACDL") has petitioned this Court for amendments to Rule 13 of the Rules of the Supreme Court of Tennessee. The TACDL's petition and the Exhibits thereto are attached to this Order.

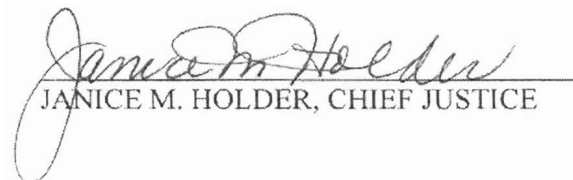
In the interest of providing prompt and fair consideration of the important public policy issues raised by the petition, the Court hereby solicits written comments from judges, lawyers, bar associations, members of the public, and any other interested parties. The deadline for submitting written comments is December 31, 2010. Written comments should be addressed to:

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

The Clerk shall provide a copy of this order, including the attached Petition and Exhibits thereto, to LexisNexis and to Thomson Reuters (Westlaw). In addition, this order, including the attached Petition and Exhibits thereto, shall be posted on the Tennessee Supreme Court's website.

IT IS SO ORDERED.

FOR THE COURT:


JANICE M. HOLDER, CHIEF JUSTICE

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

TENNESSEE ASSOCIATION OF)
CRIMINAL DEFENSE LAWYERS,)
)
 Petitioner)
)
IN RE:)
)
PETITION TO AMEND RULE 13 OF)
THE RULES OF THE SUPREME COURT)
OF TENNESSEE TO INCREASE)
HOURLY RATE PAID APPOINTED)
COUNSEL OF INDIGENT DEFENDANTS)

I. Opening

Comes now the Petitioner and respectfully moves this Court to amend Supreme Court Rule 13 in order to establish a constitutional, adequate, and effective system for the appointment and compensation of private attorneys appointed to represent indigent persons accused of crimes in the State of Tennessee by increasing the hourly rates and caps for court-appointed counsel cases, by adding an overhead component to the rate increases, and by creating standards for appointment of counsel based on the severity of the offense charged. The Tennessee Association of Criminal Defense Lawyers is a non-profit statewide organization with over 800 members, including private criminal defense lawyers, public defenders, law professors and law students. Founded in 1973, TACDL is the state's leading organization advancing the mission of criminal defense lawyers to protect and ensure the individual rights of citizens accused of crime guaranteed by the United States and Tennessee constitutions. TACDL has as its mission statement advocacy of "fair and effective justice in the courts, the legislature, and wherever justice demands."

II. The History of Compensation for Court Appointed Counsel in Tennessee.

Before 1986, indigent criminal defendants obtained counsel primarily through a court-appointed counsel system coordinated through the office of the Executive Secretary to the Tennessee Supreme Court. Attorneys were compensated \$30.00 for work in court and \$20.00 per hour for work out of court. There was a \$1000.00 cap per case.¹

Beginning in 1986, the Tennessee Legislature established an indigent defense system that became a statewide public defender system. The public defender system is augmented by court-appointed counsel who serve when the public defender's office cannot. This mechanism was criticized by members of the Tennessee Bar as "woefully inadequate."² As a result, the Tennessee Bar Association, the Tennessee Association of Criminal Defense Lawyers, the Criminal Justice Funding Crisis Group, the Tennessee District Public Defenders Conference, and the Capital Case Resource Center, filed a petition with the Tennessee Supreme Court seeking an amendment to Rule 13 including adequate compensation for court-appointed counsel in those case in which the public defender's office cannot serve as counsel.³ The Supreme Court considered the petition and responses from the executive and legislative branches of government. The Court created the Indigent Defense Commission, headed by former Attorney General William Leech. The Court directed the Commission to develop and recommend a comprehensive plan for delivery of legal services to indigent citizens charged with criminal law violations in the state court system.⁴

¹ *Indigent Defense Commission Report to the Supreme Court*, p. 1 (August, 1996) (Hereinafter Report). (Attached as Exhibit A.)

² Report, p. 1.

³ The petition is included in Exhibit A.

⁴ *Ibid.*

The plan was to include “[a] schedule of reasonable compensation to be paid private attorneys appointed to represent indigent defendants.”⁵

The Commission was told that the plan should include a schedule of reasonable compensation to be paid private attorneys in court-appointed cases, a determination of the total funds to be budgeted each year for the payment of private attorneys appointed by the courts to represent indigents, and a statement of appropriate procedures for reviewing claims submitted for compensation by these private attorneys. The Commission was also charged with determining reasonable caseloads for public defenders and for setting standards for criminal defense attorneys appointed to represent indigent defendants.⁶

The Commission undertook an extensive study of the indigent defense system. In its report to the Court it stated:

The provision of competent counsel is a constitutional mandate. The responsibility of meeting this mandate is not limited to the criminal defense bar of this state, but is a societal responsibility. The criminal justice system suffers from a shortage of competent lawyers who are qualified and willing to accept appointments in criminal matters. Neglecting this problem, seriously undermines public confidence in the criminal justice system. What is needed is a system which (1) rewards attorneys appropriately for becoming qualified to accept appointments in criminal cases and for making themselves available for such appointments, and (2) exacts an appropriate cost from attorneys who either are not qualified or not willing to handle these cases.⁷

⁵ Supreme Court Order 01501-9307-OT-00144 § III (4) d (Tenn. 1994).

⁶ Report at p. 3.

⁷ Report at p. 15.

Although the Commission was unable to agree on caseload standards and monitoring of public defender cases, the Commission cited a study by the Spangenberg Group which found that in 1992 the average overhead for attorneys accepting appointments in criminal cases was \$47.26 per hour. Eventually the Court modified Rule 13 and set rates at \$40.00 for trial preparation and \$50.00 for in-court-time, and placed maximum compensation rates depending on the type of case handled by the court-appointed attorney. Except for capital cases, this amount has not been increased in 16 years, since 1994.

III. Argument

1. The Current Hourly Rate for Private Court-Appointed Counsel in Criminal Cases Is Preventing Competent Attorneys from Continuing to Provide Representation to Indigent Defendants.

Justice is not free. If we want a fair and just criminal system we must be willing to pay for it. This petition seeks to address the problem with the failure to fairly and adequately compensate court appointed counsel. It is critical that the criminal justice system attract and retain private court-appointed attorneys. As the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice⁸ stated in 1963:

[It] should be understood that governmental obligation to deal effectively with problems of poverty in the administration of criminal justice does not rest or depend upon some hypothetical obligation of government to indulge in acts of public charity. . . .

[The] obligation of government in the criminal case rests on wholly different considerations and reflects principles of much more limited application. The essential point is that the problems of poverty with which this Report is concerned arise in a process *initiated* by government for the achievement of basic governmental purposes. It is, moreover, a process that has as one of its consequences the imposition of severe disabilities on the persons proceeded against. Duties arise from action. When a course of conduct, however legitimate,

⁸ Often called the *Allen Report*, after the Chairman of the Committee Francis A. Allen.

entails the possibility of serious injury to persons, a duty on the actor to avoid the reasonably avoidable injuries is ordinarily recognized. When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice. . . .

[The] essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depend upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions. It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system.

The Indigent Defense Commission recognized the need for experienced court appointed counsel in criminal cases. The Commission recommended qualification standards for counsel appointed in criminal cases. More serious cases require more experienced and more qualified counsel. The Commission differentiated between the qualifications necessary for counsel appointed in a misdemeanor case, a minor felony or a major felony case.⁹ The bottom line is that one size does not fit all. It is imperative that the criminal justice system not only provide someone with a law license to represent the accused but an attorney with the requisite experience to ensure the effective assistance of counsel. The low compensation rates for court appointed counsel make it financially impossible for experienced lawyers to continue to accept state court appointments.

⁹ Report, pp. 17-18.

The rates set in 1994 did not enable court-appointed counsel to meet overhead expenses. Those same rates exist in 2010. The Commission found a need to suggest increasing fees sixteen years ago to permit “more competent attorneys to perform more competent work without feeling they are undermining their practices in the process.”¹⁰ Since 1994, the pool of qualified, experienced attorneys has continued to evaporate. The stagnant rates do not permit experienced lawyers to accept state court appointed work because the rate of pay does not even enable counsel to meet overhead expenses.

What is happening to indigent defense in Tennessee is identical to the findings of the the American Bar Association Standing Committee on Legal Aid and Indigent Defense. SCLAID held a series of public hearing in 2003, the 40th anniversary of *Gideon*, to determine the extent to which the promise of *Gideon* was being met by state indigent defense systems.¹¹ “Overall, our hearings support the disturbing conclusion that thousands of persons are processed through America’s courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation. . . . While there are many reasons why our justice systems far too often convict innocent persons, clearly one of the best bulwarks against mistakes is having effective, well-trained lawyers.”¹²

The major culprit in the failure to provide the effective assistance of counsel is the failure to adequately fund indigent defense. “Quality legal representation cannot be rendered unless indigent defense systems are adequately funded. Attorneys who do not receive sufficient compensation have a disincentive to devote the necessary time and effort to provide meaningful representation or even participate in the system at all. With fewer attorneys available to accept

¹⁰ Report, pp 15-16.

¹¹ *Gideon's Broken Promise: American's Continuing Quest for Equal Justice*, A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings.

¹² *Gideon's Broken Promise*, Executive Summary p. iv.

cases, the lawyers who provide services often are saddled with excessive caseloads, further hampering their ability to represent their clients effectively.”¹³

Inadequate funding leads to fewer competent attorneys available for court appointed work and leads to a shortage of attorneys to serve as mentors and role models for younger attorneys who are willing to accept court appointments. The result is that the pool of attorneys available for court appointments often is left to lawyers who cannot find other work. The ABA reports concludes “[t]aken as a whole, glaring deficiencies in indigent defense services result in a fundamentally unfair criminal justice system that constantly risks convicting persons who are genuinely innocent of the charges lodged against them.”¹⁴

2. Compensation for Court-Appointed Counsel Should Be Increased Immediately to a Rate Sufficient to Recruit and Retain Experienced Attorneys With a Built in Cost of Living Increase.

The rate of compensation for court appointed counsel in Tennessee has not changed in sixteen years. The rate was inadequate in 1994 and the problem of inadequate compensation has not been addressed since 1994. There is only one solution: adequate compensation. As the ABA report notes, “assigned counsel should be paid a reasonable hourly fee in addition to actual overhead and expenses. . . .”¹⁵ The ABA report includes testimony from Judge Michael Spearman, Chief Criminal Judge, King County Superior Court, Seattle, Washington:

In a time of tight budgets, it is easy to be shortsighted and think that a public defender office staffed with less expensive, inexperienced attorneys is a better option. But my experiences as a staff attorney, a supervisor, and a judge tell me that experienced attorneys more than compensate for the expense in what they bring to the justice system. Experienced attorneys encourage prompt resolutions

¹³ *Gideon's Broken Promise*, p. 7.

¹⁴ *Gideon's Broken Promise*, p. 7.

¹⁵ *Gideon's Broken Promise*, p. 9.

of criminal cases. They are able to evaluate cases and make reasonable plea agreements more quickly. Their experience is recognized by their clients and contributes to good attorney-client relationships. With experienced attorneys, the cases that go to trial are more likely to be the cases that need to be tried and should be tried. Trials are more efficiently done because the lawyers are better prepared and more focused, and any judge will tell you that the best trials are those done with experienced lawyers on both sides. The results are more fair. There are fewer mistrials and fewer reversals on appeal because appropriate motions and objections give the trial court the opportunity to prevent or correct errors in a timely manner. All of these are advantages to the system that result in financial savings and enhance public confidence in criminal justice.¹⁶

3. Federal CJA Compensation Rates Serve as a Guideline for an Acceptable Rate of Compensation.

Many of the lawyers who formerly accepted criminal court appointments in state court still accept appointments in federal court because the hourly rate for non-capital cases continues to attract and retain competent criminal defense attorneys. A recent review of Criminal Justice Act (CJA) compensation in federal court reveals that as of March 11, 2009, the hourly rate for non-capital cases is \$110 per hour, with a cap of \$8,600 for felony offenses.¹⁷ The hourly rate scheme recognizes the fact that there is no meaningful distinction between out-of-court and in-court work performed by defense counsel. In fact, often the most difficult and most important work performed in any criminal case is performed outside the courtroom.

On March 19, 2009, Circuit Judge Julia Smith Gibbons of the Sixth Circuit Court of Appeals addressed Congress concerning the federal judiciary's request for an increase in CJA rates.

¹⁶ *Gideon's Broken Promise*, p. 17.

¹⁷ CJA Panel Rates Information Sheet, United States District Court, Eastern Division of Tennessee, http://www.tned.uscourts.gov/cja_rates.php. The rate for CJA attorneys was increased to \$125 per hour with a cap of \$9700 in 2010.

We request your consideration of the program enhancement in our budget that will ensure effective representation for criminal defendants who cannot afford to retain their own counsel. We are requesting \$10.2 million to increase the non-capital rate

to \$142.00 per hour, effective January 2010. A panel attorney is a private attorney who serves on a panel of attorneys maintained by the district or appellate court and is assigned by the court to represent financially eligible defendants in federal court in accordance with the Criminal Justice Act (CJA). In the fiscal year 2009 omnibus spending bill, the Subcommittee approved an increase in the noncapital rate paid to these panel attorneys from \$99 to \$110 per hour, and provided a cost-of-living adjustment to the capital rate from \$170 to \$175 per hour. These new rates took effect for work performed on or after enactment of the fiscal year 2009 appropriation. While we are very appreciative of the increase to \$110 per hour for non-capital work, we believe a more significant increase is required to enable the courts to attract and retain enough qualified attorneys to accept appointments and to provide them a fair rate of pay. This is critical in order for the Judiciary to ensure that persons represented by panel attorneys are afforded their constitutionally guaranteed right to effective assistance of counsel.

We believe there is a direct relationship between the lack of qualified panel attorneys available to take CJA appointments and the significant financial difficulties panel attorneys encounter maintaining their legal practices. Predominantly solo and small-firm lawyers take on CJA cases, and these panel attorneys must first cover their overhead costs. With overhead costs of approximately \$70 per hour, at the \$110 rate, that leaves a net average of only \$40 per hour, before taxes. We believe that this net rate of \$40 per hour, when compared to the net national average 'market rate' of \$176 per hour for non-CJA private criminal cases, prevents courts from attracting sufficient numbers of qualified attorneys to take CJA appointments because those attorneys can obtain higher pay on non-CJA cases. Each time a panel attorney is asked by the court to accept a non-capital CJA appointment, he or she must consider the inherent "opportunity" cost associated with the higher hourly rate he or she could otherwise bear on a non-CJA case. . . .

I will close on this topic by reiterating that the Judiciary greatly appreciates the \$110 non-capital rate Congress provided in fiscal year 2009, but the concern remains that, after overhead is considered, the rate still does not provide compensation that will attract enough qualified panel attorneys to take on the complex work involved in federal criminal cases. I urge the Subcommittee to provide the funding necessary to increase the non-capital panel attorney rate to \$142 per hour in fiscal year 2010.¹⁸

¹⁸ Statement of Honorable Julia S. Gibbons, Chair Committee on the Budget of the Judicial Conference of the United States before the Subcommittee on Financial Services and General Government of the Committee on Appropriations of the United States House of Representative, March 19, 2009.

The experienced lawyers who accept federal non-capital CJA appointments are the same lawyers needed to accept appointments in state cases. The overhead is the same. The need for a fair rate of compensation is the same. The need to attract these attorneys in order to provide the constitutionally guaranteed effective assistance of counsel is the same. If state court rates are far outstripped by the federal rates most, if not all, of the experienced private attorneys will be across the street.¹⁹

4. Comparison of Compensation for Court-Appointed Counsel with District Attorneys, Public Defenders, and Judges.

District Attorneys and District Public Defenders are employed by the State of Tennessee and their wages are paid by the State of Tennessee. The court-appointed attorney, although not technically a government employee, serves the government in the performance of the government's duty to provide the effective representation of counsel to the accused in criminal cases. The work provided by court-appointed counsel is no less essential to the proper functioning of the criminal justice system than that provided by district attorney generals and district public defenders.

District Attorney Generals' salaries are regulated by T.C.A. § 8-7-201, *et. seq.* Their salaries are increased based on pay increases provided to all state employees by the general appropriations act. T.C.A. § 8-7-201(e)(2). In 1994, the District Attorney General's annual salary was \$81,749.52.²⁰ Annual raises were approximately 2% until 2006 when a District Attorney General received approximately a 25% increase. In December of 2007, District

¹⁹ CJA rate was increased to \$125.00 per hour with a case cap of \$9700 in 2010.

²⁰ Tennessee District Attorney General Conference.

Attorney Generals were receiving \$136, 392 per year. Since 1994 to 2007, the salary has increased \$54,643 or 66%.

In 1994 a District Public Defender's salary was 88% of that of a District Attorney General or \$71,939.12. In 1995, the District Public Defender received the same salary as the District Attorney General. In 2007, the District Public Defender made \$136,392 per year. From 1994 to 2007, the District Public Defender has received an increase in salary of \$64,453, which is an increase of approximately 90%.

Judges' salaries are set forth in T.C.A. § 8-23-103 and are based on the salaries set for trial judges with appellate judges receiving adjusted salaries based on the level of the appellate court. Pay increases for judges are calculated by using the Consumer Price Index. In 1990, a trial judge's salary was \$78,000. Effective in 2006, the base pay for trial judges was \$140,000, approximately a 78% increase from 1990.

The increases in the respective salaries of judges, district attorney generals and public defenders reflect the economic necessity and practice of compensating these public servants at a rate that will attract and retain competent, qualified persons for these offices. It is equally important to attract and retain private attorneys to accept court appointments in criminal cases.

The goal in providing lawyers, as Gideon emphasized, is to assure fairness in our adversary system of justice and prevent the conviction of innocent persons. Yet, forty years after Gideon, this nation is still struggling to implement the right to counsel in state criminal and juvenile proceedings. Sadly, there is abundant evidence that systems of indigent defense routinely fail to assure fairness because of underfunding and other problems. It is also more evident now than ever before that innocent persons, sometimes represented by incompetent, unqualified, or overburdened defense lawyers, are convicted and imprisoned.²¹

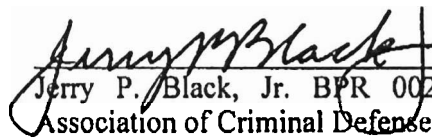
²¹ Norman Lefstein, In Search of Gideon's Promise: Lessons from England and the Need for Federal Help, 55 Hastings L.J. 835, 838 (2004).


Prayer for Relief

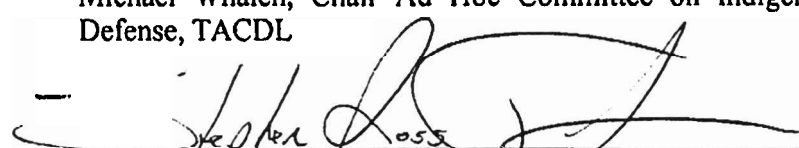
For the foregoing reasons, the Petitioner respectfully prays that this Court:

1. Entertain this Petition and the supporting materials setting out the jurisdictional, factual, and legal basis for this claim and any other matters that this Court deems appropriate;
2. Set this matter for hearing.
3. Invite the participation of other interested parties, if it deems it appropriate.
4. Implement amendments to Supreme Court Rule 13 proposed by the Petitioner consistent with the spirit and letter of the law and consistent with this Petition.

Respectfully submitted,


Jerry P. Black, Jr. BPR 002069, President Tennessee
Association of Criminal Defense Lawyers


Michael Whalen, Chair Ad Hoc Committee on Indigent
Defense, TACDL


Stephen Ross Johnson, Treasurer, TACDL

PEACE

LIBERTY

JUSTICE

*Indigent Defense Commission
Report to the Supreme Court*

AUGUST 1996

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VIII. **Exhibits**.....

Exhibit A Petition for Amendments to Supreme Court Rule 13 In Order to Establish a Constitutional, Adequate, and Effective Indigent Criminal Justice System.

Exhibit B Petition for the Adoption of Proposed Supreme Court Rule 13.1

Exhibit C Supreme Court Order, August 18, 1994, In Re: The Indigent Criminal Justice System.

Exhibit D Supreme Court Order, November 29, 1994 (naming the members of the Indigent Defense Commission).

Exhibit E Supreme Court Order, December 29, 1995 (naming two new members to the Indigent Defense Commission).

Exhibit F ABA Guidelines: Appointment & Performance of Counsel in Death Cases

Exhibit G Proposed Rule 13.1

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Introduction

CHAPTER ONE

Introduction

Prior to 1986, the delivery of defense services to indigent criminal defendants in Tennessee was provided primarily through a court-appointed counsel system in which attorneys were compensated \$30 per hour for work in court and \$20 per hour for work out of court, with a cap of \$1,000 per case. The system was coordinated through the office of the Executive Secretary to the Tennessee Supreme Court.

There were two notable exceptions to this approach. Residents in the state's two largest counties, Shelby and Davidson, had been served by county-based public defender programs since 1914 and 1962, respectively.

Recognizing the limitations of the court-appointed system, the Tennessee legislature in 1986 created the District Public Defenders Conference. The Conference first operated as a pilot program in 7 of the state's 31 judicial districts and received administrative support from the Executive Secretary to the Supreme Court. In September 1989, the Public Defender Act (Tenn. Code Ann. § 8-14-201 et. seq.) established 22 additional public defender offices and the Conference's administrative office of the Executive Secretary. All 31 judicial districts in Tennessee are now served by public defenders, and all but two are served by the District Public Defenders Conference. Indigent criminal defendants in the 20th and 30th judicial districts, Shelby and Davidson counties, continue to be served by public defenders with financial support from both the state and local government.

Constitutional, Adequate, and Effective Indigent Criminal Justice System The mechanism established by the State of Ten-

nessee to provide defense services to its indigent citizens charged with violations of criminal statutes was criticized as woefully inadequate by various members of the Tennessee Bar. Consequently, in June, 1993, the Tennessee Bar Association, the Tennessee Association of Criminal Defense Lawyers, the Tennessee Trial Lawyers Association, the Criminal Justice Funding Crisis Group, the Tennessee District Public Defenders Conference, and the Capital Case Resource Center of Tennessee filed a petition with the Tennessee Supreme Court asking, among other

things, that the Tennessee Supreme Court amend Supreme Court Rule 13 to provide workload standards for public defenders and private counsel; standards for the provision of extra-legal resources and costs of litigation; standards for the appointment of qualified counsel in capital cases and other complex litigation; performance standards for counsel, particularly in capital cases and other complex litigation; standards for the training of counsel; stan-

dards for the early entry and continuous representation of counsel; standards for conflict of interest problems; standards for indigency, i.e., eligibility for representation by court-appointed counsel; standards for the recoupment of costs of indigent defense from defendants and other sources; and standards for adequate supervisory staff, support staff, library, equipment, and materials for the public defender offices.

In addition, those same petitioners asked the Court to adopt Proposed Supreme Court Rule 13.1, concerning the certification of counsel in death penalty cases.

In direct response to the petitions, the Tennessee Supreme Court invited a response from the Governor's office, the Lieutenant Governor and Speaker of the Senate, the

The mechanism established by the State of Tennessee to provide defense services to its indigent citizens charged with violations of criminal statutes was criticized as woefully inadequate by various members of the Tennessee Bar

Speaker of the House of Representatives, the Attorney General's Office, the Comptroller's Office, as well as the Executive Secretary to the District Attorney General's Conference. The matter was later scheduled for hearing in June of 1994. After consideration of the petitions, responses and arguments of counsel, the Tennessee Supreme Court entered an order dated August 18, 1994, recognizing that the Judicial, Legislative and Executive branches of state government all bear administrative responsibility for providing effective assistance of counsel for indigent persons charged by the State with criminal offenses. The Court recognized that neither of the three branches of government, independently, could provide such services without the assistance and cooperation of the other.

The Indigent Defense Commission The Tennessee Supreme Court, in its order dated August 18, 1994, created the Indigent Defense Commission of the Supreme Court of Tennessee. Each of the petitioners was asked to submit to the Court the names of three persons qualified to serve as Commission members. The Tennessee Supreme Court selected eleven members from separate organizations and appointed them to terms of continuous service for varying terms of years. The Supreme Court ordered that the Commission have a chairperson, vice-chairperson, and secretary. The Honorable Bill Leech was appointed chairperson by the Court. Mark Stephens was elected by the Commission members to serve as vice-chairperson, and Jim Weatherly was elected secretary.

The original Commission members were:

Mr. William M. Leach, Jr.
Waller, Lansden, Dortch & Davis
Nashville City Center
511 Union Street, Suite 2100
Nashville, TN 37219-8966

Mr. Comer L. Donnell

District Public Defender
213 North Cumberland Street
Lebanon, TN 37088-0888

Ms. Sherry J. Brown
Assistant District Public Defender
Shelby County Government
Room 201 Poplar Avenue
Memphis, TN 38103

Ms. Ardena Garth
District Public Defender
701 Cherry Street
Suite 300
Chattanooga, TN 37403

Mr. Robert W. Ritchie
Ritchie, Fels & Dillard, P.C.
Suite 300, Main Place
606 W. Main Street
Knoxville, TN 37901-1126

Ms. Ann C. Short
Law Offices of Herbert S. Moncier
Suite 775, Nations Bank
550 Main Avenue
Knoxville, TN 37902

Mr. Tarik B. Sugarmon
Noel & Sugarmon
65 Union Avenue, Suite 200
Memphis, TN 38103

Ms. Martha Yoakum
District Public Defender
Tazewell, TN 37879

Judge Andrew J. Shookhoff
Juvenile Court of Davidson County
100 Woodland Street
Nashville, TN 37213

Mr. Mark Stephens
District Public Defender
1209 Euclid Ave.
Knoxville, TN 37921

Mr. James L. Weatherly, Jr.

Hollins, Wagster, & Yarbrough, P.C.
22nd Floor,
Third National Financial Center
424 Church Street
Nashville, TN 37219

Two original members of the Commission, Mr. Tarik Sugarmon and Ms. Sherrye Brown, have been replaced by:

Ms. Jan Rochester Patterson,
225 W. Baltimore, Suite B
Jackson, TN 38301,

Mr. W. J. Michael Cody
130 N. Court Ave.
Memphis, TN 38103-2217

Commission member, Martha Yoakum, has tendered her resignation from the commission.

During the deliberations of the Commission, the Commission experienced a grave loss in the passing of its chairman, Bill Leach. Bill's insights into the issues and his commitment to liberty and the Bill of Rights served as great inspiration not only to Commission members, but to all who knew him. Bill Leach will be missed.

Duties of the Commission The Supreme Court directed the Commission to develop and recommend a comprehensive plan for the delivery of legal services to indigent citizens charged with criminal law violations in the state court system. The plan, the Commission was told, should include, but not necessarily be limited to:

- The collection of information regarding cases in which an indigent defendant is represented by a district public defender or a private attorney paid by the State;

A determination of a reasonable caseload for each district public defender;

- A statement of standards for criminal defense attorneys appointed to represent indigent defendants including additional standards for complex and capital cases;
- A schedule of reasonable compensation to be paid private attorneys appointed to represent indigent defendants;
- A determination of the total funds to be budgeted for each fiscal year for the payment of private attorneys appointed by the courts to represent indigent defendants; and,

The Supreme Court directed the Commission to develop and recommend a comprehensive plan for the delivery of legal services to indigent citizens charged with criminal law violations in the state court system

- A statement of appropriate procedures for reviewing claims submitted by private attorneys, the auditing of those claims, and the payment of the claims.

The Commission met for a period of eighteen months during which time an organizational structure was created to "integrate" all service providers. The organizational model contemplates the creation of a body referred to as the "Commission on Public Advocacy" whose job it will be to draft the state's "Legal Representation Plan" which will provide the blueprint for the delivery of legal services to indigent defendants in our state court system. This Legal Representation Plan, among other things, will establish and publish standards: caseload, qualification, and performance, applicable to all attorneys providing defense services; develop a system of gathering accurate case statistics to more accurately assess and plan for appropriate levels of state funding; and determine appropriate rates of compensation for private attorneys as well as experts providing services in appointed cases.

Furthermore, the organizational model contemplates the creation of the position of "Public Advocate General," whose responsibilities will include implementation of the Legal Representation Plan created by the Commission on Public Advocacy and will include fiscal, technological, legislative, personnel, training and performance oversight within the system.

Legal services will be provided by two independent

"Divisions:" Public Defenders and Assigned Counsel. Support divisions are recommended: Appellate, Capital Litigation, and, Capital Post-Conviction.

The organizational model contemplates the creation of a body referred to as the "Commission on Public Advocacy" whose job it will be to draft the state's "Legal Representation Plan" which will provide the blueprint for the delivery of legal services to indigent defendants in our state court system

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Commission on Public Advocacy

CHAPTER TWO

The Commission on Public Advocacy

Introduction The Commission on Public Advocacy will serve as an oversight committee to all components of the indigent defense system. The Commission will meet at designated times each year and will work closely with the Public Advocate General. While the day-to-day management of the state's indigent defense system will be coordinated through the Public Defender and Assigned Council Divisions, working in conjunction with the Public Advocate General, the Commission on Public Advocacy will set policy for providing state-wide services.

Composition The Indigent Defense Commission recommends that all three branches of government have significant input into the composition of the Commission on Public Advocacy. Its members should be appointed by recommendation of all branches of government. Private citizens should be considered for service on the Commission.

It is recommended that there be thirteen (13) members on the Commission on Public Advocacy. Those Commission members should have no conflict, by employment or otherwise, which would affect the independence of the Commission. Other than public defenders, the Indigent Defense Commission recommends that no elected officials or any deputy or member of their staff be eligible for service on the Commission nor any present district attorney general, state attorney general nor member of their staff. It is recommended that the Commission be provided with the flexibility of having *ex officio* members, and it is strongly recommended that the Commission have *ex officio* members from the University of Tennessee, Vanderbilt University and Memphis University Schools of Law.

Term of Office It is recommended that seven (7) members of the Commission be appointed for a term of three years, three (3) of the beginning terms should be for two

years and three (3) should be for one year. The Indigent Defense Commission believes the terms of each office should expire on January 1 next following the last year of the members term.

Commission Structure The Commission should have a chairperson, vice-chairperson and secretary. It is recommended that the chairperson be appointed by the Supreme Court. The other officers should be elected by the members of the Commission at the first meeting of each year. The Commission should adopt rules that should govern the day-to-day operation of the Commission.

Meetings Meetings of the Commission may be held upon reasonable notice to the Commission members by any officer of the Commission. The Commission should be required to meet at least once during each calendar year. The Commission may meet by telephone conference call. A majority of the Commission members present and voting would constitute a quorum. The affirmative vote of a majority of the Commission members present and voting would constitute action by the Commission.

Compensation Members of the Commission would receive no compensation for their services as members of the Commission, but they may be reimbursed for travel and other expenses in accordance with regulations adopted by the Judicial Department.

Duties The Commission on Public Advocacy is charged with the responsibility of developing a comprehensive plan for the delivery of legal services not only to indigent citizens charged with criminal violations of the law in the State court system, but in all other areas where the State is required by rule, statute, constitution or otherwise to provide legal services to its citizens. The Commission shall have the authority to determine policies for the provision of appointed legal representation.

The comprehensive Legal Representation Plan should establish at a minimum;

- Qualification standards for the appointment of all attorneys providing criminal defense services in all cases including complex cases¹, death penalty cases, appellate cases, juvenile cases and post-conviction proceedings;
- Procedures for the systematic assignment of counsel in all cases. This "system" for the assignment of counsel established by the Commission on Public Advocacy should be published to the courts and public by the Public Advocate General and administratively implemented by the public defender offices within each judicial district;
- The Commission on Public Advocacy should retain the discretion to formulate policy and design a working plan regarding the issue of recruitment of counsel for the Assigned Counsel Division;
- A training component for all attorneys providing defense services;
- Performance standards, published statewide by the Public Advocate General, to all attorneys providing services as well as all sessions, circuit and appellate judges to assist counsel involved in the representation of citizens in all cases including complex cases death penalty cases, appellate cases, juvenile cases and post-conviction proceedings;
- A mechanism for "performance evaluation" to assess the level of services being

provided by counsel, whether that be assigned counsel or a public defender office. The "performance evaluation" plan should be carefully structured so as to provide an accurate assessment of an individual attorney's performance in a given case, while at the same time not interfere with the attorney/client relationship or with counsel's independence in the representation of his or her client;

- Reasonable compensation rates for assigned counsel at all stages, as well as a reasonable rate of compensation for technical assistance, investigative services and expert services to assist counsel in these cases. The Indigent Defense Commission believes that support services available to assigned counsel should "mirror" those services available to public defenders.

Furthermore, The Commission on Public Advocacy should employ the Public Advocate General to implement the Legal Representation Plan and to vest in that position those powers necessary for the effective discharge of the duties of that office.

¹ "complex cases" shall include, but not be limited to: murder in the first degree, murder in the second degree, especially aggravated kidnapping, aggravated kidnapping, especially aggravated robbery, aggravated rape, rape, aggravated sexual battery, rape of a child, aggravated arson, and aggravated child abuse.

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Public Advocate General

CHAPTER THREE

The Public Advocate General

Introduction The Public Advocate General will manage and coordinate delivery of high-quality indigent defense services in Tennessee. The office should have ultimate responsibility to the Commission on Public Advocacy for providing these services through Public Defenders and Assigned Counsel. In addition, the Public Advocate General will provide the necessary administrative, fiscal, and technical support services for all indigent defense components.

Duties The Public Advocate General will be appointed by the Commission on Public Advocacy to serve as Chief Executive Officer of the integrated indigent defense system. The Public Advocate General will implement policies established by the Commission on Public Advocacy and manage delivery of indigent defense services on a daily basis. The Public Advocate General will submit annual budget requirements for operating the indigent defense system to the all branches of state government. Within budgetary constraints, the Public Advocate General will balance delivery of indigent defense services among its various components to ensure that high-quality, effective indigent defense services are provided statewide.

The Indigent Defense Commission recommends that the Public Advocate General be vested with the authority to employ component heads for the Appellate Defender, Capital Litigation Unit, and Post-Conviction Defender components within qualifications established by the Commission on Public Advocacy. In addition, the Public Advocate General will employ sufficient staff for carrying out the duties of his or her office.

In addition, the Public Advocate General will provide assistance in the following areas:

Fiscal Services The Public Advocate General will provide accounting, payroll, purchasing, and budgetary support for all indigent defense components. His or Her duties will include payroll support for all full and part-time state employees as well as processing assigned counsel fees claims and expense reimbursements for private assigned counsel. The Public Advocate General will process all accounts payable/accounts receivable transactions, assist in purchasing decisions, and monitor expenditures for all independent system components. In conjunction with each independent component, the Public Advocate General will develop budget estimates for each component based on projected need, actual and forecasted expenditures and current policies which will be integrated into an annual departmental budget for presentation to the Governor and General Assembly.

Technology Support The Public Advocate General will design and implement a uniform system utilizing technology to maximize the indigent defense system's efficiency and effectiveness in processing information. Whether reporting caseload information or conducting legal research, reliable information is an essential ingredient for successful indigent defense systems. Modern technology demands extensive use of computers, networks, and the Internet. The technology support provided by the Public Advocate General will help forecast, plan, implement, and evaluate information systems, including hardware and software required by each independent component. The Public Advocate General will coordinate training activities regarding computer systems, software, and other technology-related areas and will provide assistance, field inquiries, and make

The Public Advocate General will be appointed by the Commission on Public Advocacy to serve as Chief Executive Officer of the integrated indigent defense system

recommendations to assist any system component.

Legislative Services On behalf of the indigent defense system, the Public Advocate General will serve as a liaison and coordinate all legislative activities at the state and federal level. Such activities could include responding to legislative inquiries, providing caseload information to state or federal legislators, developing annual budget requests, coordinating indigent defense testimony before legislative committees, and drafting proposed legislation. This Public Advocate General will actively solicit recommendations from all components concerning proposed systemic or procedural legislative changes. The Public Advocate General will assist all Indigent defense components in preparing and administering grant applications for federal and state assistance.

Personnel The Public Advocate General will provide ongoing personnel support for all state employees working within the indigent defense system. The Public Advocate General or his or her staff will accept and process applications for employment within the system and serve as the Equal Opportunity/Affirmative Action and Title VI Coordinating office for indigent defense. All job descriptions and qualifications not otherwise specified within the system will be developed and maintained by the Public Advocate General. The Public Advocate General, or his or her staff, will conduct new employee orientation programs and distribute information about various state employee benefit programs, including insurance, retirement, and deferred compensation. With input from other system components, the Public Advocate General will actively recruit, promote, and develop internship programs with statewide institutions of higher education and law schools.

Training and Performance The Public Advocate General, or his or her staff, will de-

velop, plan, organize, schedule, execute, and critique training programs for all components. In addition, The Public Advocate General, or his or her staff, will qualify and maintain lists of private assigned counsel in each judicial district eligible for appointment in misdemeanor, felony, juvenile, capital, and appellate cases. The Public Advocate General will receive, investigate, and, if necessary, refer to the Public Advocate General of Professional Responsibility complaints made against any attorney within the indigent defense system.

Appointment, Term, and Compensation

The Indigent Defense Commission recommends that the Commission on Public Advocacy should appoint the Public Advocate General most qualified from among a list of applicants obtained after an extensive search and aggressive solicitation for the position. The Public Advocate General should be selected on the basis of qualifications, experience, and potential for success in the job, keeping issues of cultural, racial, and gender diversity in the forefront. The successful candidate should be a licensed attorney in good standing with extensive knowledge of the criminal justice system, particularly indigent criminal defense. Knowledge of indigent defense standards as promulgated by the American Bar Association and the National Legal Aid and Defender Association is crucial.

The Public Advocate General should be appointed for a fixed term in office of four (4) years with annual performance reviews by the Commission on Public Advocacy. In order to minimize the potential for any outside influences on the Public Advocate General, the Public Advocate General should not be subject to removal during the term of office except for gross malfeasance or criminal conviction while in office.

Compensation of the Public Advocate General should be fixed by the Commission on Public Advocacy.

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Public Defender Division

CHAPTER FOUR

Public Defender Division

Introduction Each of Tennessee's thirty-one judicial districts is equipped with an existing public defender office. The public defender offices in Shelby and Davidson counties, the two largest in the state, were created and funded primarily by their respective counties many years before the inception of the state-wide public defender system and still receive significant funding contributions from their counties. Consequently, at the time of the creation of the state-wide system, those offices were not made a part of the Tennessee District Public Defenders Conference.

The difference in the organizational structure of those offices allows them to operate in a manner unlike the twenty-nine other district offices in that they do not experience the same limitations in funding and, consequently, staffing. The Shelby county public defender is an appointed, part-time position which allows the public defender to pursue a private practice, among other variances. While it is understandable, in light of the severe funding limitations experienced by the Tennessee District Public Defenders Conference and the ever-present risk of providing less than quality representation as a result of insufficient funding, the Shelby and Davidson County offices have shown little interest at being made an equal component in the state-wide system. At the same time, however, it is generally the feeling among the remaining twenty-nine district offices, that not having the two largest public defender offices in the state as a part of the state-wide system causes inequities that result in clients being treated differently based on the geographic region within the state wherein they happen to reside, rather than on the conduct they are alleged to have committed. Additionally, the two largest offices, from the two largest met-

It is a belief shared by many of the public defenders within the Conference that all thirty-one public defender offices should be part of one unified Conference, subject to the same organizational and management structure

ropolitan areas in the state, with the two largest legislative delegations, do not necessarily have the same legislative interests as the remaining twenty-nine offices. Consequently, the legislative effectiveness of those twenty-nine offices can be compromised by the non-inclusion of the Shelby and Davidson county offices.

It is a belief shared by many of the public defenders within the Conference that all thirty-one public defender offices should be part of one unified Conference, subject to the same organizational and management structure. While the Indigent Defense Commission is not ready to take a position regarding Conference structure, the Commission believes that uniformity among all public defender offices is important. Some uniform structure that provides continuity in staffing, funding etc., should be implemented to avoid the individual evolution of each of the thirty-one offices. At a minimum, that organizational /management structure should provide:

- All of the thirty-one public defenders as well as all full-time salaried employees of a public defender office should be prohibited from engaging in the private practice of law;
- The number of assistant public defenders in each public defender office, as well as the salary they are to be paid, should be statutorily established; and,
- Each public defender should be elected, and his or her term in office should be an eight-year term.

Staffing Each of Tennessee's thirty-one Public Defender offices needs to be adequately staffed in order to implement any of

the changes contemplated in the Legal Representation Plan. In 1996, the General Assembly passed (but failed to fund) a population-based staffing ratio authorizing one assistant public defender for every 26,675 persons within a particular judicial district. While that "formula" does not take into account the higher incidents of crime in the metropolitan areas and, consequently, does not meet the staffing needs for those districts, it nevertheless shows the level of understaffing presently existing within the public defender offices across the state. There can be no doubt that until the critical problem of public defender understaffing is addressed and sufficiently remedied, performance standards, designed to increase the quality of legal services provided to our indigent citizens, will never be more than aspirational.

It is a belief shared by most public defenders within the Conference that the building of a "constituency" that necessarily flows from the electoral process is an integral part of a successful state-wide Conference

Management Structure The Indigent Defense Commission believes that the present Office of the Executive Secretary of the Public Defender's Conference should merge with and assist the Public Advocate General in fulfilling the duties of that office.

Public Defender's Elected Status There are presently only two states that elect their public defenders. It is a belief shared by most public defenders within the Conference that the building of a "constituency" that necessarily flows from the electoral process is an integral part of a successful state-wide Conference. The public defenders wish to maintain their status as elected public servants and the Indigent Defense Commission would recommend retaining that practice.

Qualification Standards to Hold the Office of Public Defender The Indigent Defense Commission discussed the possibility of imposing qualification standards on individuals who seek to hold the office of public defender.

It is the consensus of the Indigent Defense Commission that no such qualification standards should be imposed on an individual who wishes to seek the office of public defender. However, the IDC contemplates imposing qualification standards for the appointment of all attorneys providing criminal defense services in all cases including complex cases, capital cases, appellate cases, juvenile cases and post-conviction proceedings. Before an elected public defender may provide criminal defense services in cases wherein qualification standards have been imposed upon counsel, the elected public defender should also meet the established qualification standards.

Cases Eligible for Public Defender Services The public defenders in this state should continue to provide legal services pursuant to Tennessee Code Annotated § 8-14-205: when any person appears without counsel before any court in this state exercising original jurisdiction (whether magistrate, general sessions, municipal, juvenile, circuit, criminal or any other court empowered to deprive the person of liberty) upon a criminal prosecution or juvenile delinquency proceeding involving a possible deprivation of liberty as well as habeas corpus and post-conviction proceedings.

Assignment of Counsel Providing for the systematic assignment of counsel in all cases is critical. The "system" for the assignment of counsel should be established, initially, by the Commission on Public Advocacy, published to the courts and public by the Public Advocate General and administratively implemented by the Public Defender in each judicial district acting in concert with the Assigned Counsel Division. The appointment "system" should assure that "qualified counsel" is appointed as quickly as possible, while also al-

lowing for "case tracking" to maintain and report caseload statistical information through the Public Advocate General.

Since "eligible cases" are defined by statute (T.C.A § 8-14-205), and that statute *requires* the court to appoint the district public defenders' office to represent eligible clients, there does not seem to be any logical reason for not designating the responsibility of appointing counsel within the local public defenders' office in all cases.

When a citizen is arrested and charged with a non-capital crime, one of two systems could be implemented:

System A for the Appointment of Counsel

The district public defender would immediately contact the client before his or her release from custody and determine if the individual is seeking public defender services. If the client is requesting court-appointed counsel, the client's "eligibility" for defender services would be determined in compliance with "indigency standards" established and published by the Commission on Public Advocacy. If the individual qualifies for services from the public defender office, and the public defender has no impediment to representation (e.g., conflict of interest or caseload limitations) the local office would prepare and submit for filing a proposed order for judicial ratification by the court naming the public defender as counsel of record for the defendant.

In the event the public defender has an impediment with representation in the particular case, the public defender would designate from a published roster of "eligible" assigned counsel the next available attorney to render services to the defendant, prepare and forward a proposed order for judicial ratification

by the court naming the particular assigned counsel as counsel of record for the defendant.

The Public Advocate General will establish and publish rosters of "eligible attorneys" for appointment in all cases in each judicial district. Deviation from the policy of appointing the non-conflicted public defender office in that judicial district or the next attorney on the eligibility list will be authorized only with judicial approval accompanied by a formal statement as to why there has been some deviation.

System B for the Appointment of Counsel

System B differs from System A only to the extent that "eligibility determinations" or "indigency determinations" are judicially determined. The district public defender con-

tacts the client only after his or her eligibility has been judicially determined. Once that determination has been made, the public defender would then undertake the process of "assigning counsel" for the client. The same "process" as discussed in System A would begin in that the public defender would first determine that

the office has no impediment to representation (e.g., conflict of interest or caseload limitations) wherein the local office would prepare and submit for filing a proposed order for judicial ratification by the court naming the public defender as counsel of record for the defendant.

In the event the public defender has an impediment with representation in the particular case, the public defender would designate from a published roster of "eligible" assigned counsel within the district, the next available attorney to render services to the defendant, prepare and forward a proposed order for judicial ratification by the court naming the par-

The appointment "system" should assure that "qualified counsel" is appointed as quickly as possible, while also allowing for "case tracking" to maintain and report caseload statistical information through the Public Advocate General

particular assigned counsel as counsel of record for the defendant.

As with System A, deviation from the policy of appointing the non-conflicted public defender office in that judicial district or the next attorney on the eligibility list will be authorized only with judicial approval accompanied by a formal statement as to why there has been some deviation.

Caseload Standards There has been considerable discussion among members of the Indigent Defense Commission about establishing numerical caseload standards for public defender offices. Some members of the Commission believe that numerical caseloads are too rigid and do not contemplate such factors as: the quality and experience of the personnel within a given office; the technical support in the form of computer case management systems; computer research and internet access; the quantity, quality and experience of investigative assistance available to counsel; the relationship with the local judiciary, district attorney general's office, and police departments in the district.

Other Commission members believe that objective caseload standards are an essential part of any "Legal Representation Plan" and that the Public Advocate General should be vested with the authority to delineate those objective standards.

It is clear to all Commission members that caseload standards present an extremely complex issue that calls for expertise beyond that possessed by the Commission. Further study is certainly warranted.

There was a consensus among Commission members, however, that the number of cases

assigned to a given public defender's office or individual attorney, however one chooses to define a case, will ultimately dictate the quality of legal services provided to the client. When the number of cases assigned to the office or private attorney becomes so overwhelming that the "quality" of legal services provided begins to decline, the ability of the judiciary to protect the integrity of the judicial proceeding is adversely affected. The judiciary's ability to afford full and fair hearings to indigent litigants who come before it is placed in jeopardy. A decline in public confidence in the judicial system is one of the natural consequences that flows from this dilemma.

When the number of cases assigned to the office or private attorney becomes so overwhelming that the "quality" of legal services provided begins to decline, the ability of the judiciary to protect the integrity of the judicial proceeding is adversely affected

In the interim, it is clearly the responsibility of appointed counsel, whether a member of a public defender office or private counsel, to provide the effective assistance of counsel to which the party represented is entitled under the provisions of Article I, Section 9 of the Constitution of the State of Tennessee and the Sixth Amendment to

the United States Constitution.

While this issue is being considered further, the Indigent Defense Commission recommends that every attorney look to the ABA Standards For Criminal Justice Providing Defense Services (Third Edition), as providing the only sensible approach to managing caseloads:

**Standard
5-5.3 Workload**

(a) Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special considerations should

be given to the workload created by representation in capital cases.

(b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments. Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.

The Indigent Defense Commission is not prepared at this time to make a definitive statement as to the propriety of numerical caseload standards, flexibility within a system imposing numerical limitations, whether those standards would apply to assigned counsel as well as public defenders and their assistants, or any mechanism for reviewing and/or sanctioning those defender offices that choose to exceed recommendations. The IDC will continue to meet and work through this issue and will make a recommendation to the court before the end of the year.

Performance Standards In *Baxter v. Rose*, 523 S.W. 2d 930 (Tenn. 1975), the Tennessee Supreme Court addressed the appropriate legal standard for assessing the level at

which counsel's performance becomes a violation of the Sixth Amendment:

We depart from the farce and mockery standard. All cases adhering to this standard are overruled, Pro tanto. We believe a better standard, expressed in the generalities of *McMann*, supra, is simply whether the advice given, or the services rendered by the attorney, are within the range of competence demanded of attorneys in criminal cases. We would measure that range of competence by the duties and criteria as set forth in *DeCoster*, supra, and by our own Sixth Circuit case of *Beasley*, supra. We do not consider it to be either necessary or proper, that we establish any precise nomenclature or that we lay down any specific standards or guidelines. We are content to leave the matter resting on a foundation of reasonable competence as tested by the authorities as herein set out. Trial courts and defense counsel should look to and be guided by the American Bar Association's Standards relating to the Administration of Criminal Justice in general, and specifically to those portions of the Standards which relate to the Defense Function. *Id* at 936.

While the Court may well be right that "precise nomenclature" or "specific (performance) standards or guidelines," may not be necessary, the Indigent Defense Commission believes it is appropriate to establish at least aspirational performance standards

While the Court may well be right that "precise nomenclature" or "specific (performance) standards or guidelines," may not be necessary, the Indigent Defense Commission believes it is appropriate to establish at least aspirational performance standards. These standards should address counsel's performance in the following areas:

- investigation
- client contacts

-
- motions
 - plea negotiations
 - discovery
 - jury selection
 - sentencing
 - expert services
 - appellate practice
 - post-conviction

Any attempt to establish performance guidelines should necessarily include a system of enforcement in the event counsel's performance is deficient. Additionally, the guidelines should provide for a removal mechanism vesting with the Public Advocate General subject to review by the Commission on Public Advocacy.

The Indigent Defense Commission is not prepared at this time to publish a set of performance standards or to design a system for performance review or removal. The IDC has reviewed various performance standards, including the ABA standards, and will continue to meet and work through these issues and will make a recommendation to the court before the end of the year.

Training A training component should be designed by the Public Defender Division and be administered by the Public Advocate General's Office. The training should include intensive practice-oriented litigation for public defenders and assigned counsel in trial, appellate and post-conviction proceedings offered by local and national experts. The training component should also include manuals, brief banks, and motions. Additionally, the training component should focus on the utilization of investigators and social scientists.

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Assigned Counsel Division

CHAPTER FIVE

Assigned Counsel Division

Introduction While all thirty-one judicial districts in Tennessee have a public defender office, T.C.A. § 8-14-205 limits the availability of public defender participation to "...criminal prosecutions or juvenile delinquency proceedings involving a possible deprivation of liberty...habeas corpus and post-conviction proceedings." This statutory limitation on public defender involvement necessarily requires private counsel to provide legal representation to indigent citizens where the right to counsel attaches and public defenders are excluded from participation. To provide counsel in proceedings such as dependent and neglected cases, termination of parental rights, unruly child proceedings, guardian ad litem cases for both children and adults, contempt proceedings as well as mental health commitments all require the active participation of the private lawyer.

Management Structure The Assigned Counsel Division will operate under the aegis of the Public Advocate General who should take all necessary steps to assure the independence of assigned counsel so that the interests of the clients served by these lawyers will not be compromised.

Recruitment of Counsel The Commission on Public Advocacy along with the Public Advocate General should work in conjunction with the Tennessee Judiciary, the Tennessee District Public Defenders Conference, the Tennessee Bar Association and the Tennessee Association of Criminal Defense Lawyers to design an effective system for recruitment of counsel. The discussion should include

some minimum annual hourly contribution to indigent defense services, possibly with some "financial buyout" option for those who are unwilling or not qualified to assist.

The provision of competent counsel is a constitutional mandate. The responsibility of meeting this mandate is not limited to the criminal defense bar of this state, but is a societal responsibility. The criminal justice system suffers from a shortage of competent lawyers who are qualified and willing to accept appointments in criminal matters. Neglecting this problem, seriously undermines public confidence in the criminal justice system. What is needed is a system which (1) rewards attorneys appropriately for becoming qualified to accept appointments in criminal cases and for making themselves available for such appointments,

The provision of competent counsel is a constitutional mandate. The responsibility of meeting this mandate is not limited to the criminal defense bar of this state, but is a societal responsibility. The criminal justice system suffers from a shortage of competent lawyers who are qualified and willing to accept appointments in criminal matters. Neglecting this problem, seriously undermines public confidence in the criminal justice system

and (2) exacts an appropriate cost from attorneys who either are not qualified or not willing to handle these cases.

The Spangenberg report cited a survey by the Tennessee Association of Criminal Defense Lawyers which revealed that the average overhead for attorneys accepting appointments in criminal cases, in 1992, was \$47.26 per hour. The fee schedule for assigned counsel set out in Rule 13 of the Tennessee Supreme Court calls for \$40.00 per hour for non-trial activities and \$50.00 per hour for trial, subject to caps ranging from \$200 to \$2,000 for non-capital cases.

A number of options were discussed by the Commission including a reasonable increase in the fees paid to appointed counsel in criminal cases which would help to reflect the im-

portance of this work in making the criminal justice system function fairly, and would allow more competent attorneys to perform more competent work without feeling that they are undermining their practices in the process. A modest increase in fees could be financed by restructuring attorney licensing fees to encourage the accepting of appointments in criminal cases, as outlined below.

It is likely that more attorneys would be motivated to become qualified and to accept appointments in criminal cases if there were wider recognition, both professionally and among the public at large, of the ideals of criminal justice. The Tennessee Supreme Court could promote such recognition by noting outstanding achievement and dedication to the ideals of criminal justice. An award might be inaugurated, perhaps in the memory of a Tennessee lawyer who exemplified these ideals, and presented annually to a person—whether defender, prosecutor, judge or other citizen—who has made a significant contribution to the field.

One of the greatest impediments to availability of attorneys for appointment in criminal cases is the fact that many attorneys choose to concentrate their practices in other areas. Because the single greatest need for state-supported or *pro bono* legal work, after the U.S. Supreme Court's decision in *Gideon v. Wainwright*, has been the provision of counsel to indigent criminal defendants, the Indigent Defense Commission thinks further exploration might be warranted in a proposal to the Court to consider amending Rule 21 of the Tennessee Supreme Court to require continuing legal education in the criminal law for all Tennessee lawyers.

The purpose of such a recommendation is to enlarge the pool of lawyers who can accept criminal appointments. Accordingly, the CLE requirements relating to criminal law should be specific. For example, the Tennessee Commission on Continuing Legal Education

might be mandated to establish a "core curriculum" necessary to minimal criminal law literacy and require that every lawyer demonstrate mastery of this core curriculum by passing appropriate CLE courses within a limited number of years.

The Commission could also require that at least two of the fifteen hours of annual CLE be in the area of criminal law. While this may at first glance appear unduly to favor criminal law over other areas of practice, it seems justified by the fact that an indigent citizen's access to competent criminal representation is required by the Constitution. By comparison, when it became apparent that too few lawyers fully understood the ethics of their profession, Rule 21 was drafted to require that three hours of annual CLE be devoted to professional responsibility. The Indigent Defense Commission believes the current disrepair of the criminal justice system calls for comparable measures.

The Spangenberg report of 1992 suggests that mandatory *pro bono* representation has not worked effectively. However, attorneys may be willing to participate in an assigned counsel program voluntarily if sufficient incentive exists to do so. One such incentive might be to create a differential in the annual fees paid by attorneys under Rule 9, Sec. 20.1. For example, attorneys who certify that they are on the approved list of attorneys available for appointment in criminal cases might be assessed the regular annual fee. Attorneys who cannot certify their participation in the appointment scheme would pay a slightly greater amount, and the difference would be used to defray the cost to the state of paying for assigned counsel.

Lawyers who are versed in criminal law and are otherwise willing to accept appointments might nevertheless be deterred, rightly or wrongly, by a feeling of inadequacy. Such reservations might be greatly reduced if a directory of experienced criminal attorneys who

would be willing to provide limited consultation at no cost is available. Although a system of differential licensing fees, as outlined above, might be necessary to attract attorneys to be available as mentors, it is likely that a spirit of altruism would provide sufficient incentive.

Existing resources available in public defender offices should be shared and made available to assigned counsel where possible. Additionally, most local bar associations have a criminal law section. They should be encouraged to compile and maintain a directory of resource materials for the local assigned counsel. Such a directory would consist not only of specific resources, such as investigators and experts, but also of a network of attorneys knowledgeable in specific areas who might help assigned counsel to obtain necessary resources.

It may also be helpful for the Public Advocate General to create a handbook for assigned counsel, to be available to all attorneys through the judicial district. Such a handbook would include basic information relating to the handling of assigned criminal cases, including a brief directory of resources.

Roster of Eligible Counsel For Appointment The Public Advocate General, working in conjunction with the Commission on Public Advocacy, should categorize by levels of seriousness and difficulty the types of cases where assigned counsel will be providing legal services. Additionally, the Public Advocate General should establish standards detailing the qualifications attorneys must have before being assigned cases from the established "level." The Public Advocate General, in conjunction with the recruitment efforts initiated by the various components and organizations, will solicit applications from attorneys who wish to be certified and designated as eligible for appointment at the various levels. Rosters of Eligible Counsel for each judicial district will be forwarded to the Commission

on Public Advocacy who will review and approve each roster and have them published through the Public Advocate General.

Assignment of Counsel Providing for the systematic assignment of counsel in all cases is critical. The "system" for the assignment of counsel should be established, initially, by the Commission on Public Advocacy, published to the courts and public by the Public Advocate General and administratively implemented by the Public Defender in each judicial district acting in concert with the Assigned Counsel Division. The appointment "system" should assure that "qualified counsel" is appointed as quickly as possible, while also allowing for "case tracking" to maintain and report caseload statistical information through the Public Advocate General.

Since "eligible cases" are defined by statute (T.C.A § 8-14-205), and that statute *requires* the court to appoint the district public defenders' office to represent eligible clients, there does not seem to be any logical reason for not designating the responsibility of appointing counsel within the local public defenders' office in all cases.

The Indigent Defense Commission recommends to the Court that System A or B, discussed under the Public Defender Division section, be implemented as the mechanism for the assignment of counsel.

Performance Standards The Indigent Defense Commission believes that the discussion relative to performance standards in the Public Defender Division is applicable to assigned counsel as well. We wish to reiterate; In *Baxter v. Rose*, 523 S.W. 2d 930 (Tenn. 1975), the Tennessee Supreme Court addressed the appropriate legal standard for assessing the level at which counsel's performance becomes a violation of the Sixth Amendment:

We depart from the farce and mockery standard. All cases adhering to this standard are overruled, *Pro tanto*. We believe a better standard, expressed in the generalities of *McMann, supra*, is simply whether the advice given, or the services rendered by the attorney, are within the range of competence demanded of attorneys in criminal cases. We would measure that range of competence by the duties and criteria as set forth in *DeCoster, supra*, and by our own Sixth Circuit case of *Beasley, supra*. We do not consider it to be either necessary or proper, that we establish any precise nomenclature or that we lay down any specific standards or guidelines. We are content to leave the matter resting on a foundation of reasonable competence as tested by the authorities as herein set out. Trial courts and defense counsel should look to and be guided by the American Bar Association's Standards relating to the Administration of Criminal Justice in general, and specifically to those portions of the Standards which relate to the Defense Function. *Id* at 936.

While the Court may well be right that "precise nomenclature" or "specific (performance) standards or guidelines," may not be necessary, it would seem appropriate that the IDC establish at least aspirational performance standards. These standards should address counsel's performance in the following areas:

- investigation
- client contacts
- motions
- plea negotiations
- discovery
- jury selection
- sentencing
- expert services
- appellate practice
- post-conviction

Reviewing Attorney Performance The Public Advocate General should establish a system for reviewing the performance of the attorneys on the roster(s). The Public Advocate General, having published the performance standards by which the effectiveness of counsel's performance will be measured, should develop and publish a process by which that performance will be monitored. The Public Advocate General should publicize the criteria used in reviewing and should inform monitored attorneys of results upon request, upon the decision to impose penalties, or to seek removal. This reviewing process however, should not allow access to privileged work product nor should it invade the attorney-client confidentiality.

The Standards for the Administration of Assigned Counsel Systems adopted by the Board of Directors of the National Legal Aid and Defender Association in November of 1989, describes the reviewing process in the Commentary to Standard 4.4.2:

The need for supervision of attorneys should be considered along with the need for financial accountability in establishing the documentation that attorneys must provide to the program in all cases to which they are assigned. Administrative records such as case summaries or vouchers that detail attorneys' actions in their cases may be used not only to establish that attorneys are entitled to the money they are paid, but also as a way of determining whether functions necessary to quality defense are being carried out. (footnote omitted).

In other words, evaluation of attorney performance cannot be done solely by review of the acts for which attorneys seek compensation and/or reimbursement. The existence or lack of pretrial motions, use of investigative resources, appearance at preliminary court proceedings, etc. may say nothing about the quality of repre-

sensation in the given case without information about the facts of that case. However, a pattern of avoidance of preliminary court proceedings, a failure to use investigative resources, failure to file pretrial motions, and/or a seemingly excessive number of cases resulting in guilty pleas may indicate a need for active review of an attorney's practice in assigned cases.

The reviewing system should include the gathering, maintenance and examination of records such as those pertaining to: attorneys' performance of duties in their assigned cases (e.g. vouchers or other documentation of actions taken, pleadings filed, transcripts, etc.); caseloads (e.g. listing of all assignments to a given attorney during a given period); and complaints received (including written complaints, notes of telephone complaints, and notes of investigation and/or follow-up).

The reviewing system should include a personal observation component. Whether personal observations are made by the administrator, his or her designee, or by others whose opinions are then sought, objective criteria for evaluating what is observed should be established. Personal observations concerning attorneys' work, especially if sought from persons with an institutional or personal bias (e.g. the prosecutors whom attorneys frequently oppose) may present objectivity problems. These can be tempered by consulting several sources.

Complaints and negative reports from outside the program, including client complaints, should be investigated. The administrator should insist that facts, not conclusions, be included in complaints before investigation will begin, and should investigate to determine the accuracy of critical comments.

Attorneys for complaining clients should be notified of the complaints and asked to respond. The clients should be informed of the results of the investigation.

Attorneys must be assured that information compiled during reviewing is for internal program use only. Information about attorneys' performance should not be made public, at least before an attorney is removed from the roster(s) ... when reviewing and/or investigation reveal conduct or omissions by an attorney that could be considered a breach of the attorney's professional obligations, that information should be provided to the disciplinary Public Advocate General of the jurisdiction in question.

Disciplinary Policy and Procedures Including Removal The Public Advocate General should develop and publish a mechanism for the imposition of penalties, including removal from the roster of eligible attorneys, for attorneys who fail to comply with the performance and/or qualification standards established by the Public Advocate General. An established disciplinary policy is necessary in order to empower the Public Advocate General to ensure quality legal representation to poor people. However, the threat of sanctions, including removal, should never be used to violate the attorneys' professional independence.

Courts have held that the attorney-client relationship is as inviolable when counsel is appointed as when counsel is retained.² Therefore, clients of an attorney being investigated, with possibility of removal, should not (unless complaints from those clients are involved) be informed unless and until removal

² *Smith v. Superior Court*, 68 Cal. 2d 547, 562; 68 Cal. Rpt. 1, 10; 440 P.2d 65, 75 (1968) and *McKinnon v. State*, 526 P.2d 18 (Alaska, 1974).

occurs.³ No attorney should be removed from a case in which representation has already begun except with the consent of the client.

The Public Advocate General may establish a schedule of penalties apart from removal from the roster of eligible attorneys. However, such penalties should be coupled with a requirement that the attorney correct the deficiencies in question.

Where an attorney has failed to correct deficiencies for which penalties have been imposed, or where egregious deficiencies in performance have occurred, the Public Advocate General should give the attorney notice, in writing, that removal of the attorney from the roster is contemplated. The Public Advocate General may wish to develop a mechanism which provides for the temporary suspension of further assignments to the attorney pending the Public Advocate General's investigation.⁴

The Public Advocate General should develop a mechanism providing for hearings before the Commission on Public Advocacy to determine whether cause exists for removal of the attorney from the program roster. Where the decision to remove is made by the Commission on Public Advocacy, that decision should be final. Where removal has been for failure to provide competent representation to one or more clients, a representative from the Public Advocate General may seek, in court, substitution of counsel in cases already assigned to the attorney in question, if there is

³ See: Commentary to Standard 4.5.2, *Standards for the Administration of Assigned Counsel Systems*, National Legal Aid & Defender Association, November 14, 1989

⁴ *Id.* Standard 4.5.2,

reason to believe competent representation is not being provided in those cases.⁵

The Public Advocate General should establish a procedure for consideration of a removed attorney's application for reinstatement to the program roster.

Compensation The Indigent Defense Commission wishes to emphasize its belief that reasonable compensation must be paid to private counsel in appointed criminal cases. The Indigent Defense Commission concluded that "reasonable" compensation is a rate no less than that paid for other contracted government legal work (e.g. work contracted for by attorneys general, county legislatures or commissions, etc.) or with prevailing rates for similar services performed by retained counsel in the jurisdiction.

Unreasonably low compensation rates drive accomplished counsel from the assigned counsel program. The Indigent Defense Commission is concerned that unreasonably low compensation rates may directly effect the delivery of competent representation

The State of Tennessee is constitutionally required to provide effective assistance of counsel to poor persons accused of crime. Prosecutors and judges are not asked to work without pay during the trial of an indigent accused. Nor are court personnel or expert witnesses whose services are provided as a necessary part of the right to counsel. The Indigent Defense Commission believes the issue is not whether assigned counsel is entitled to compensation, but how much compensation is reasonable.

Unreasonably low compensation rates drive accomplished counsel from the assigned counsel program. The Indigent Defense Commission is concerned that unreasonably low compensation rates may directly effect the delivery of competent representation.

⁵ *Id.*

The Public Advocate General should design a system for the periodic review of compensation rates.

Training A training component should be designed by the Public Advocate General for assigned counsel in conjunction with the Public Defender Division. The training should include intensive practice-oriented litigation for assigned counsel in trial, appellate, and post-conviction proceedings offered by local and national experts. The training component should also include manuals, brief banks, and motions. Additionally, the training component should focus on the utilization of investigators and social scientists.

PEACE
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Appellate Defender

CHAPTER SIX

Appellate Defender

Introduction It was the consensus of the members of the Indigent Defense Commission that the present public defender system is not the most cost-effective way to provide quality representation before the appellate courts of this state. It is believed that a state-wide appellate division, similar to the one operated by the Attorney General of this state, would provide a more cost-effective way to provide quality legal representation to citizens whose cases are before our appellate courts. However, the IDC believes that any discussion of a centralized appellate division needs to be structured in such a way so as to achieve the goal of providing high quality, cost-effective appellate services (which would suggest the implementation of a centralized office) while still recognizing the importance of the attorney/client relationship and the benefits derived from continuity in representation. The IDC members, in structuring an Appellate Defender model, wanted to honor that attorney/client relationship. Consequently, the model attempts to "build in" flexibility so as to allow attorneys, albeit as the exception, to maintain their representation on appeal.

Management Structure The Appellate Defender Division will be managed by the Appellate Defender who will be appointed by the Public Advocate General with the concurrence of the Commission on Public Advocacy. It is recommended that the Division have a staff of attorneys and maintain offices in Knoxville, Nashville, and Jackson.

Cases Eligible for Appellate Defender Services The Appellate Defender Office should provide all direct and interlocutory ap-

pellate representation through the state Supreme Court in non-capital cases involving indigent citizens charged with, or having been convicted of, criminal violations. These cases should flow from both the Public Defender Division and the Assigned Counsel Division.

The Indigent Defense Commission is of the opinion that in multiple defendant cases, "traditional" conflicts of interest that might bar trial counsel from representing multiple de-

The Indigent Defense Commission is of the opinion that in multiple defendant cases, "traditional" conflicts of interest that might bar trial counsel from representing multiple defendants at the trial of the cause, may not continue to exist to the degree that multiple defendant representation, at the appellate level, should necessarily be precluded

fendants at the trial of the cause, may not continue to exist to the degree that multiple defendant representation, at the appellate level, should necessarily be precluded. This model contemplates the Appellate Defender's Office handling cases from both the Public

Defender Division and the Assigned Counsel Division, even in multiple defendant cases.

Exceptions; Retention of Cases by Public Defender Office The Indigent Defense Commission recognizes that there may be cases where the public defender's office wishes to continue representation at the appellate level. The Commission recognizes that while those circumstances most certainly will exist, they should be the exception, not the rule. This model provides the authority within a public defender office to maintain "counsel of record" status on appeal, in the event that the public defender, or the staff member handling the case on appeal, meets the qualification standards established by the Appellate Defender.

Exceptions; Retention of Cases by Assigned Counsel Division The Indigent Defense Commission also recognizes that there may be cases where private counsel wishes to continue representation at the appellate level. The Commission recognizes

that while those circumstances most certainly will exist, they should be the exception, not the rule. This model provides the authority for private counsel to maintain "counsel of record" status on appeal in the event that the private attorney meets the qualification standards established by the Public Advocate General.

Roster of Eligible Counsel For Appointment The Appellate Defender, working with the Public Advocate General, should categorize by levels of seriousness and difficulty the types of cases where assigned counsel will be providing appellate legal services. Additionally, the Appellate Defender should establish standards detailing the qualifications attorneys must have before being assigned cases from the established "level." The Appellate Defender, in conjunction with the recruitment efforts initiated by the various components and organizations, will solicit applications from attorneys who wish to be certified and designated as eligible for appointment at the various levels. A Roster of Eligible Counsel will be forwarded to the Commission on Public Advocacy who will review and approve each roster and have them published through the Public Advocate General.

Compensation The Public Advocate General will establish caseload standards for the Appellate Defender Division staff. In the event that the Appellate Defender staff has maximized its caseload, assigned counsel may be appointed to provide legal services for the indigent client on appeal. Furthermore, the Appellate Defender Division will, from time to time, find it necessary to decline representation of a particular individual due to a conflict of interest. In those cases, assigned counsel may be appointed to provide legal services for the indigent client on appeal.

The IDC wishes to emphasize its belief that reasonable compensation must be paid to private counsel providing legal representation

in appointed criminal cases at the appellate level

Performance Standards The IDC recognizes the unique legal skills necessary to effective advocacy at the appellate level and would recommend that the Commission on Public Advocacy publish, performance standards that reflect the experience, skill and training necessary to be an effective appellate advocate.

Reviewing Attorney Performance The Public Advocate General should establish a system for reviewing the performance of the attorneys within his or her staff as well as those attorneys on the roster for appointment. The Public Advocate General, having published the Performance Standards by which the effectiveness of counsel's performance will be measured, should develop and publish a process by which that performance will be reviewed. The Public Advocate General should publicize the criteria used in case reviews and should inform attorneys of results upon request, upon the decision to impose penalties, or to seek removal. This reviewing process, however, should not allow access to privileged work product, nor should it invade the attorney-client confidentiality.

Disciplinary Policy and Procedures Including Removal The Public Advocate General should develop and publish a mechanism for the imposition of penalties, including removal from the roster of eligible attorneys, for attorneys who fail to comply with the performance and/or qualification standards established by the Public Advocate General. An established disciplinary policy is necessary in order to empower the Public Advocate General to ensure quality legal representation to poor people. However, the threat of sanctions, including removal, should never be used to violate the attorneys' professional independence.

Courts have held that the attorney-client relationship is as inviolable when counsel was appointed as when counsel is retained.⁶ Therefore, clients of an attorney whose performance is being reviewed with possibility of removal, should not (unless complaints from those clients are involved) be informed unless and until removal occurs.⁷ No attorney should be removed from a case in which representation has already begun except with the consent of the client.

The Public Advocate General may establish a schedule of penalties apart from removal from the roster of eligible attorneys. However, such penalties should be coupled with a requirement that the attorney correct the deficiencies in question.

Where an attorney has failed to correct deficiencies for which penalties have been imposed, or where egregious deficiencies in performance have occurred, the Public Advocate General should give the attorney notice, in writing, that removal of the attorney from the roster is contemplated. The Public Advocate General may wish to develop a mechanism which provides for the temporary suspension of further assignments to the attorney pending the Public Advocate General's complete review.⁸

The Public Advocate General should develop a mechanism providing for hearings before the Commission on Public Advocacy to determine whether cause exists for removal of the attorney from the program roster. All decisions made by the Commission should be final. Where removal has been for failure to provide competent representation to one or more clients, a representative from the Public Advocate General's office may seek, in court, substitution of counsel in cases already assigned to the attorney in question, if there is

reason to believe competent representation is not being provided in those cases.⁹

The Public Advocate General should establish a procedure for consideration of a removed attorney's application for reinstatement to the program roster.

Training A training component should be designed by the Appellate Defender Division in conjunction with the Public Defender Division and the Assigned Counsel Division and the Public Advocate General's Office. The training component should include manuals, brief banks, oral advocacy skills, and appellate motion practice.

⁶ *Supra*, note 2

⁷ *Supra*, note 3

⁸ *Id.* Standard 4.5.2,

⁹ *Id.*



PEACE
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Capitol Litigation Defender

CHAPTER SEVEN

Capital Litigation Defender

Introduction The United States Supreme Court has repeatedly stated that death is a different kind of punishment from any other which may be imposed in this country. Because "death is different," the Court requires more safeguards to be implemented and requires extraordinary procedures in the processing of capital cases. Since few defendants plead guilty and accept a death sentence, capital cases require jury trials--two in fact, one to determine guilt or innocence, and a second to determine the appropriate sentence. Furthermore, those jury trials tend to be longer than normal jury trials and tend to be more complex and more expensive.

As is the case with capital trials, the appellate process in capital cases is also more expensive and will more frequently result in retrials. Historical experience in death cases teaches that appellate courts are more likely to find errors in capital cases, and that those errors are characteristically more likely to be found prejudicial. Post-conviction actions in capital cases are the norm. New counsel must be found to handle those cases. Many post-conviction cases will require additional expert assistance.

In 1995, there were approximately 385 first degree murder indictments returned in this state. In approximately 102 of those, district attorneys general asked for a death sentence. Three death sentences were returned in this state last year. The Administrative Office of the Courts paid over one million dollars for defense services in capital cases last year. Capital litigation is an expensive proposition that has a direct impact on the state's ability to provide defense services to the indigent citizen accused of crime in our state.

Capital litigation is an expensive proposition that has a direct impact on the state's ability to provide defense services to the indigent citizen accused of crime in our state

Presently in this state, there is no systematic approach to providing defense services in capital cases. There are no objective criteria to apply to identify those murder cases which are, or will become, capital cases. There are no incentives for district attorneys general to identify those cases in which they will seek death at the early stages of the prosecution. There is presently no system in place for the recruitment or training of attorneys who would be available for appointment to represent indigent citizens accused of capital offenses, nor are there qualification or performance standards to guide the courts or counsel during the course of their representation. Compensation rates are inadequate. The same holds true for capital representation on appeal or in post-conviction proceedings.

Defense services in capital cases are presently being provided on an *ad hoc* basis from judicial district to judicial district.

It seems there is a limited number of ways to decrease costs in the area of capital litigation yet still provide quality legal representation that withstands constitutional scrutiny. The state legislature could repeal the legal authority to impose death as a penalty to criminal activity in this state or, somehow limit the number of times a district attorney general seeks the death sentence over any given period of time (maybe by requiring the county wherein the prosecution lies to fund or partially fund the prosecution). Since neither of those options seem likely to happen, possibly the most feasible option would be to increase the quality of defense services provided the citizen accused at the trial stage of the proceeding. Competent counsel at trial would restore the trial as the "main event" in the criminal process because constitutional issues would be first recognized, aired, and resolved at that level, rather than later. As a result, there would be fewer colorable claims

of ineffective assistance of counsel and fewer reversals and retrials that now so frequently and substantially prolong the process. Moreover, quality representation at this stage would tend to decrease the number of cases that actually proceed to trial, as it would have the dual effect of revealing weaknesses in the state's case to the prosecutor and, at the same time, showing the citizen accused the areas of the prosecution that tend to show his or her culpability. These pretrial revelations should encourage both sides to reach some mutually acceptable resolution that does not require a trial. Further, quality representation at the trial level should decrease the number of convictions reversed on appeal, decreasing the number of retrials or resentencing hearings.

Post-conviction proceedings should likewise be decreased with a noticeable decrease in successful post-conviction claims that require a new prosecution.

In 1988, the American Bar Association formed a Task Force on Death Penalty Habeas Corpus. The mission of the Task Force was to "formulate comprehensive recommendations that, when implemented, would enhance both the efficiency and the fairness of state and federal review procedures." The Task Force, chaired jointly by Chief Justice Malcolm Lucas of the California Supreme Court and Circuit Judge Alvin Rubin of the Fifth Circuit Court of Appeals, held public hearings in Atlanta, Dallas, and San Francisco and heard from over eighty witnesses representing diverse points of view. The Task Force report was adopted by the ABA House of Delegates on February 13, 1990. The first five provisions of the resolution adopted by the ABA deal with the appoint-

ment and compensation of counsel. The following are but a few of the recommendations:

Because many of the defects and delays in habeas corpus procedure are due to the fact that the accused was not represented by competent counsel, particularly at the trial level, the state and federal governments should be obligated to provide competent and adequately compensated counsel for capital defendants/appellants/petitioners, as well as to provide sufficient resources for investigation, expert witnesses, and other services, at all stages of capital punishment litigation. The ABA Guidelines for the Appointment and Performance of Counsel in Death

Penalty Cases should govern the appointment and compensation of counsel.

- The individual or organization responsible for appointing counsel should enlist the assistance of the local bar association and resource centers to seek the best qualified attorneys available.
- Jurisdictions that have the death penalty should establish and fund organizations to recruit, select, train, monitor, support and assist attorneys involved in all stages of capital litigation and, if necessary, to participate in the trial of such cases.

The American Bar Association Criminal Justice Section's Report to the House of Delegates in their publication *Toward a More Just and Effective System of Review in State Death Penalty Cases* stated:

Competent counsel at trial would restore the trial as the "main event" in the criminal process because constitutional issues would be first recognized, aired, and resolved at that level, rather than later. As a result, there would be fewer colorable claims of ineffective assistance of counsel and fewer reversals and retrials that now so frequently and substantially prolong the process

Indigent capital defendants and prisoners should not have to run the risks of having inexperienced, ill-prepared counsel appointed to represent them, thereby increasing the chances that a person innocent of the capital crime may be convicted or that one convicted of a capital crime may inappropriately be sentenced to death. Judges and jurors should not have to bear the immense moral burden of imposing the death penalty based on an incomplete factual record or without the assertion of all of the defendant's rights.

Furthermore, the public and the victim's families should not have to bear the costs of protracted litigation often caused by inadequate counsel. Indeed, virtually all of the information presented to and collected by the American Bar Association Task Force on Death Penalty Habeas Corpus strongly suggests that, if competent trial counsel were appointed initially and given the resources to represent their clients properly, and if competent counsel represented petitioners from the earliest stages of state post-conviction review, then the entire capital litigation process would be shortened, perhaps greatly.

Management Structure The Indigent Defense Commission recommends that the Commission on Public Advocacy create a state-wide Capital Litigation Division. Further, the Commission on Public Advocacy, working in conjunction with the Public Advocate General should appoint an individual to serve in the capacity of Capital Litigation Defender and to supervise and manage the day-to-day affairs of the Division. The IDC recommends

that this Division consist of two components: a litigation component and a resource component.

Litigation Component There is no definitive answer as to the number of attorneys necessary to perform the work of the Litigation component. It is believed, however, that initially, a seven-attorney litigation component could provide direct representation as "co-counsel" in the general sessions and circuit/criminal courts across the state. The Litigation Component would be notified by public

...virtually all of the information presented to and collected by the American Bar Association Task Force on Death Penalty Habeas Corpus strongly suggests that, if competent trial counsel were appointed initially and given the resources to represent their clients properly, and if competent counsel represented petitioners from the earliest stages of state post-conviction review, then the entire capital litigation process would be shortened, perhaps greatly

defenders across the state of the existence of capital cases in their respective districts. The public defender notification will contain the name of counsel of record, whether it be the public defender office or private counsel. The staff member of the Litigation Component will notify "lead counsel" of the litigation component's intention to serve as "co-counsel" and will

file a proposed order to that effect with the appropriate court.

Resource Component The Resource Component could serve as an information gatherer and disseminator regarding pending cases, eligible attorneys, and expert services. It could provide research assistance to the litigation component of the Capital Litigation Division, as well as to the Post-Conviction Defender-Appellate Component. Additionally, it could assist in recruiting eligible attorneys for future direct representation. Furthermore, the resource component could provide state-wide training and design and implement an "Expert Services" plan that assists counsel in determining the need, availability and appropriate levels of compensation for case related expert services.

Qualification Standards The IDC recommends that the Commission on Public Advocacy establish and publish qualification standards for attorneys eligible to represent an indigent citizen charged with a capital case in Tennessee. The IDC offers for consideration the following:

Trial Lead Counsel The Indigent Defense Commission recommends that before an attorney serves as "lead counsel" in the trial of an indigent citizen charged with a capital offense that the attorney have a minimum of:

1. Three years of substantially criminal, competent, trial experience; and,
2. Have served as lead counsel in the jury trial of at least 1 capital case, or served as co-counsel in 2 capital cases, or co-counsel in 1 capital case and lead counsel in 1 murder case, or lead counsel in the trial of 3 murder cases, or lead counsel in 1 murder trial as well as 3 felony trials; and,
3. Possess a certain degree of familiarity in the utilization of expert witnesses and evidence including psychiatric and forensic; and,
4. Have participated in a minimum of 12 hours of specialized training in the defense of persons accused of capital crimes; and,
5. Have demonstrated the necessary proficiency and commitment which exemplifies the quality of representation appropriate to capital cases.
6. An attorney who does not meet the standards contained in 1-5 may, nonetheless, still be appointed if it is clearly demonstrated that competent representation will be afforded by the otherwise non-qualifying attorney. The certifying body may consider: competent experience in

the trial of non-capital criminal jury trials; specialized post-graduate training as defense counsel in criminal jury trials; specialized training in the defense of persons accused in capital trials; or, any other relevant considerations. However, the "non-qualifying counsel" must be certified on the roster for complex cases.

Trial Co-Counsel The Indigent Defense Commission recommends that an attorney may serve as "co-counsel" in the trial of an indigent citizen charged with a capital offense if that attorney:

1. Has been placed on the roster and deemed eligible to serve as "lead counsel" in a capital case; or,
2. Possesses competent experience as "lead" or "co-counsel" in a capital case; or competent experience as "co-counsel" in a murder trial; and,
3. Has successfully completed a minimum of 12 hours of specialized training in the defense of persons accused of capital crimes; and,
4. Has demonstrated the necessary proficiency and commitment which exemplifies the quality of representation appropriate to capital cases.
5. An attorney who does not meet the standards set out in 1-4, may still be appointed "co-counsel" in a capital trial if it is clearly demonstrated that competent representation will be afforded. The Certifying Body may consider competent experience in the trial of criminal jury trials; specialized post-graduate training as defense counsel in criminal jury trials; specialized training in the defense of persons accused in capital trials; or any other relevant considerations. However, the "non-qualifying counsel" must be certified on the roster for complex cases.

Appellate Counsel The Indigent Defense Commission recommends that an attorney may serve as appellate counsel in a capital case of an indigent citizen if that attorney:

1. Has 3 years litigation experience, not restricted to "trial" litigation experience; and,
2. Has competent experience as counsel of record in the appeal of a case where the death penalty was the sentence; or has competent experience as counsel of record in the appeal of 3 felony convictions within the last 3 years and has a minimum of 12 hours specialized training in the trial or appeal of cases in which the death penalty was being sought; or, has submitted to the appointing authority a copy of the briefs prepared by counsel in the cases to be considered for eligibility; and,
3. Has demonstrated the necessary proficiency and commitment which exemplifies the quality of representation appropriate to capital cases.
4. An attorney who does not meet the standards set out in 1-3 may still be appointed if it is clearly demonstrated that competent representation will be afforded. The Certifying Body may consider: specialized training for defense counsel in the trial or appeal of cases in which the death penalty may be imposed; experience in the trial or appeal as defense counsel in criminal cases; any other relevant considerations.

Post-Conviction Counsel The Indigent Defense Commission is not prepared at this time to recommend qualification or performance standards in post-conviction cases, although the Commission recognizes the need to reform the system for providing quality post-conviction representation to prisoners and to design a system that will efficiently "weed out" frivolous claims while effectively

providing relief to those prisoners with legitimate claims for relief.

The Indigent Defense Commission will continue to work through the issues of qualification and performance standards in post-conviction cases and report back to the Court before the end of this calendar year.

Recruitment of Eligible Counsel The Commission on Public Advocacy along with the Public Advocate General should work in conjunction with the Tennessee Judiciary, the Tennessee District Public Defenders Conference, the Tennessee Bar Association and the Tennessee Association of Criminal Defense Lawyers to design an effective system for recruitment of counsel in all criminal cases, but especially capital cases. The discussion should include a minimum annual hourly contribution to indigent defense services, possibly with some "financial buyout" option for those who are unwilling or not qualified to assist.

The criminal justice system suffers from a shortage of competent lawyers who are qualified and willing to accept appointments in criminal matters. Neglecting this problem, however, seriously undermines public confidence in the criminal justice system. What is needed is a system which: (1) rewards attorneys appropriately for becoming qualified to accept appointments in criminal cases, and for making themselves available for such appointments; and (2) exacts an appropriate cost from attorneys who either are not qualified or not willing to handle these cases.

Publication of Roster of Eligible Attorneys The Capital Litigation Defender, working in conjunction with the Public Advocate General and the Commission on Public Advocacy should solicit applications from attorneys wishing to be certified as eligible to provide legal services in some capacity in capital cases. The Capital Litigation Defender should conduct the necessary investigations, interviews and screening and ultimately present a

roster of eligible attorneys to the Commission on Public Advocacy (or the Public Advocate General), who should "certify" the roster of attorneys as eligible, specifying in what capacity, for appointment in capital cases.

Assignment of Counsel Providing for the systematic assignment of counsel in death penalty cases is critical. The "system" for the assignment of counsel should be established, initially, by the Commission on Public Advocacy, published to the courts and public by the Public Advocate General and administered by the Capital Litigation Defender with the assistance of the Public Defender component through the local public defender offices within each judicial district. The appointment "system" should assure that "qualified counsel" is appointed as quickly as possible, while also allowing for "case tracking" through the office of the Capital Litigation Defender. The "system" should also allow for the Capital Litigation Defender Office to create and maintain the appropriate caseload statistical information.

Since the statute (TCA § 8-14-205) defines eligible clients and requires the court to appoint the district public defenders office to represent those clients, there does not seem to be any logical reason for not designating the responsibility of appointing counsel within the local public defenders office in non-capital cases. However, due to the more stringent qualification standards in death cases and the impact caseloads have on "eligibility" as well as the increased need to "monitor" performance and assimilate data in the administration of the death penalty, it appears to the Indigent Defense Commission that it would be best to place the "appointment process" in capital cases within the Capital Litigation Defender Office.

When a citizen is arrested and charged with a capital crime, the district public defender should immediately notify the Capital Litigation Defender Office with case-related infor-

mation regarding that individual and indicate whether the public defender is available for appointment in that case. In the event the Capital Litigation Defender Office confirms that no "conflict of interest" would preclude the public defender from representation in this case, and that the public defender, or a member of his or her staff, meets or surpasses the qualification standards to serve as "lead counsel" in a capital case, the Capital Litigation Defender Office would designate and submit to the public defender for filing a notice of appearance as well as a proposed order for judicial ratification by the court, naming the public defender as "lead counsel" and the Capital Litigation Defender Office as "co-counsel."

In the event the public defender notifies the Capital Litigation Defender Office of the existence of a capital case and further notifies the Capital Litigation Defender Office of the existence of a conflict within the public defender office resulting in that office being unavailable for appointment, or in the event that neither the public defender, nor any assistant in his or her office meets the qualification standards to serve as "lead counsel" in a capital case, Capital Litigation Defender Office would designate an attorney from the roster of eligible attorneys to serve as "lead counsel" in a capital case to so serve and forward a notice of appearance as well as a proposed order for judicial ratification by the court naming the particular assigned counsel as "lead counsel" and the Capital Litigation Defender Office as "co-counsel."

The Capital Litigation Defender should be instructed that any deviation from the policy of appointing the non-conflicted and qualified public defender office in that judicial district or the next attorney on the eligibility roster will be authorized only with judicial approval accompanied by a formal statement as to why there has been some deviation.

Performance Standards The Indigent Defense Commission recommends that, in capital cases, the Commission on Public Advocacy and Capital Litigation Defender should look to the existing performance standards established by the American Bar Association and the National Legal Aid and Defender Association and should draft a comparable set of death penalty performance standards applicable to Tennessee. The Indigent Defense Commission recommends that any performance standards in capital cases should be modeled from these two organizations' existing performance standards. These standards should address counsel's performance in the following areas:

- investigation
- client contacts
- motions
- plea negotiations
- discovery
- voir dire, jury selection
- sentencing
- expert services
- appellate practice
- post-conviction

Any attempt to establish performance guidelines in capital cases should necessarily include a system of enforcement in the event counsel's performance is deficient. Those performance guidelines should provide for a removal mechanism.

Reviewing Attorney Performance The Public Advocate General should establish a system for reviewing the performance of the attorneys on the roster(s). The Public Advocate General, having published the Performance Standards by which the effectiveness of counsel's performance will be measured, should develop and publish a process by which that performance will be monitored. The Public Advocate General should publicize the criteria used in reviewing and should inform monitored attorneys of results upon request, upon the decision to impose penalties, or to seek removal. This reviewing process,

however, should not allow access to privileged work product, nor should it invade the attorney-client confidentiality.

Disciplinary Policy and Procedures Including Removal The Public Advocate General should develop and publish a mechanism for the imposition of penalties, including removal from the roster of eligible attorneys, for attorneys who fail to comply with the performance and/or qualification standards established by the Public Advocate General. An established disciplinary policy is necessary in order to empower the Public Advocate General to ensure quality legal representation to poor people. However, the threat of sanctions, including removal, should never be used to violate the attorneys' professional independence.

Courts have held that the attorney-client relationship is as inviolable when counsel is appointed as when counsel is retained.¹⁰ Therefore, clients of an attorney being investigated, with possibility of removal, should not (unless complaints from those clients are involved) be informed unless and until removal occurs.¹¹ No attorney should be removed from a case in which representation has already begun except with the consent of the client.

The Public Advocate General may establish a schedule of penalties apart from removal from the roster of eligible attorneys. However, such penalties should be coupled with a requirement that the attorney correct the deficiencies in question.

Where an attorney has failed to correct deficiencies for which penalties have been imposed, or where egregious deficiencies in performance have occurred, the Public Advocate General should give the attorney notice, in writing, that removal of the attorney from the roster is contemplated. The Public Advo-

¹⁰ *Supra*, note 2

¹¹ *Supra*, note 3

cate General may wish to develop a mechanism which provides for the temporary suspension of further assignments to the attorney pending the Public Advocate General's investigation. ¹²

The Public Advocate General should develop a mechanism providing for hearings before the Commission on Public Advocacy to determine whether cause exists for removal of the attorney from the program roster. All decisions made by the Commission should be final. Where removal has been for failure to provide competent representation to one or more clients, a representative from the Public Advocate General's office may seek, in court, substitution of counsel in cases already assigned to the attorney in question, if there is reason to believe competent representation is not being provided in those cases. ¹³

The Public Advocate General should establish a procedure for consideration of a removed attorney's application for reinstatement to the program roster.

Compensation The Indigent Defense Commission recognizes that the level of compensation of court appointed private counsel affects the quality of representation. Reasonable compensation of court-appointed private counsel is, therefore, a necessary ingredient to ensure that a capital defendant receives adequate representation. The Indigent Defense Commission has reviewed the opinion of Judge John H. Gassaway, III regarding the rate of compensation for private counsel in indigent capital cases in the case of *State v. Mathews*, and finds it to be well-reasoned.

The Indigent Defense Commission adopts Judge Galloway's finding that \$100.00 per hour is "reasonable compensation" for private counsel appointed to represent indigent citizens in capital cases.

Training The training component should be designed by the Capital Litigation Defender and be administered by the Public Advocate General's Office. The training should include intensive practice-oriented capital litigation for public defenders and assigned counsel in trial, and appellate and post-conviction proceedings offered by local and national death penalty experts. The training component should also include manuals, brief banks, and motions. Additionally, the training component should focus on the utilization of investigators and social scientists, addressing the ABA's requirements that counsel be familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence.

The Indigent Defense Commission recognizes that the level of compensation of court appointed private counsel affects the quality of representation. Reasonable compensation of court-appointed private counsel is, therefore, a necessary ingredient to ensure that a capital defendant receives adequate representation

¹² *Id.* Standard 4.5.2,

¹³ *Id.*.

PEACE

LIBERTY

JUSTICE

EXHIBITS A

IN THE SUPREME COURT OF TENNESSEE

PETITIONERS:

ORIGINAL

FILED
JUL 9 1993
A. B. NEIL, JR., CLERK

THE TENNESSEE BAR ASSOCIATION)
THE TENNESSEE ASSOCIATION OF CRIMINAL)
DEFENSE LAWYERS)
THE TENNESSEE TRIAL LAWYERS ASSOCIATION)
THE CRIMINAL JUSTICE FUNDING CRISIS GROUP)
THE TENNESSEE DISTRICT PUBLIC DEFENDERS)
CONFERENCE)
THE CAPITAL CASE RESOURCE CENTER OF)
TENNESSEE)

No. _____

IN RE:

THE INDIGENT CRIMINAL JUSTICE SYSTEM)

PETITION FOR AMENDMENTS TO SUPREME COURT RULE 13
IN ORDER TO ESTABLISH A CONSTITUTIONAL, ADEQUATE, AND EFFECTIVE
INDIGENT CRIMINAL JUSTICE SYSTEM

IN THE SUPREME COURT OF TENNESSEE

PETITIONERS:

THE TENNESSEE BAR ASSOCIATION)
THE TENNESSEE ASSOCIATION OF CRIMINAL)
DEFENSE LAWYERS)
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INDIGENT CRIMINAL JUSTICE SYSTEM

Opening

Come now the Petitioners and respectfully move this Court to amend Supreme Court Rule 13 in order to establish a constitutional, adequate, and effective indigent defense system for the reasons set out in this Petition and the factual and legal bases as established by this Petition and the supporting briefs, memoranda, studies, and other evidence submitted to this Court in support of this Petition.

Jurisdiction

The Petitioners ask this Court to take the action requested pursuant to its inherent constitutional authority (Tennessee Constitution, Art. II, §§ 1 and 2; Art. VI, § 1), its statutory authority (T.C.A. § 16-3-501, 502, 503, 504, et.seq.), and its rule-made authority (Supreme Court Rule 11) in its supervisory capacity and in its capacity as the highest court of the judiciary of this state.

III. Background

No decisions that officials of this state make are more important as a matter of law than

those that control the life and liberty of its citizens; yet, the infirmities of the indigent defense system in this state are pervasive and long-standing. Despite the considerable efforts and best intentions of all, these infirmities have often resulted in failures of our system of justice and have caused the real, but undeserved, loss of life and liberty to our citizens.

The indigent defense system in this state is inadequately funded and poorly structured and coordinated. Despite the importance that the criminal justice system plays in the fabric of an ordered society in this state, all major components of the criminal justice system (the courts, the prosecution, and the defense) are arguably slighted by the executive and legislative branches of government, notwithstanding the fact that the legislature has authorized very substantial increases in expenditures over the years. The defense function, in particular, however, though an essential ingredient in the criminal justice system and of equal importance under the law with the other two major components, has historically been relatively treated as the lesser step-child of the system. This is detrimental to the good of all and robs this state of an effective adversarial system, of which we can all be proud. The ethos of the defense bar in this state is impaired and discouraged by the weight of the system's infirmities.

Attempts, though substantial and extensive, by the executive and legislative branches of state government to address these enormous problems have not kept pace with the growing structural and systemic demands of indigent criminal defense in this state; nor have these attempts kept pace with the realities of contemporary economics sufficient to meet existing legal standards in this state. Consequently, these problems ultimately must be brought to the judiciary of this state. The minimum limits of criminal defense are not defined only by political vagaries but also by legal and constitutional mandate as dictated by the rights to effective assistance of counsel, due process, equal protection, just compensation, and the overriding mantle of equal justice under the law, which is the cornerstone of our democratic system that protects the citizens of this state regardless of their financial or political status. These minimum constitutional limits are being violated with alarming and excessive frequency.

Due to the inherent constitutional authority of this Court, authority mandated by existing statutes and court rules, and the historical judicial precedent for such recourse, the relief sought by the Petitioners, though substantial, can properly be provided by this Court simply by amending Supreme Court Rule 13 and by adopting proposed Supreme Court Rule 13.1 (See, separate

Petition.).

IV. Public Defenders

Despite an inordinate commitment and effort by the individual public defenders and their staffs, their ability to provide adequate and effective representation has been compromised because they are dramatically overloaded and underpaid. Because of the lack of resources and structural limitations, the public defender offices are often unable to adequately provide specialized services that are required in areas such as complex litigation, particularly capital cases, and appeals.

V. Private Attorneys

Appointed private attorneys are under-compensated. The hourly compensation rate of private appointed counsel is approximately as low as that in any state in the country and is approximately one-half of the average hourly cost of overhead for private practitioners in this state; and, thus, is truly confiscatory in nature.

VI. Coordination of Public Defenders and Private Attorneys

In addition, the lack of planning and coordination between the participation of the private bar and the public defender results in indigent cases being directed to the public defenders with a fixed budget and away from the private bar whose members are paid on a case by case basis. The role of the private bar in indigent representation is, therefore, rapidly diminishing. This phenomenon operates to the general detriment of the quality of representation in this state as a result of: (1) the deficiencies in the funding and the structure of the public defender system; and, (2) regardless of the extent of available resources, the importance of maintaining a relative balance between the participation of the private bar and the participation of the public bar in order to insure optimum representation of indigent criminal defendants.

Portions of the judiciary customarily fail to recognize the necessity for the independence of the defense bar and fail to properly acknowledge the function and obligations of the defense bar. This shortcoming within the state judiciary detrimentally impacts the effectiveness of the process for the appointment of counsel for indigent defendants and interferes with the ability of counsel to perform their function and satisfy their obligations to their clients and to the system.

VII. Death Penalty Cases

Most significantly, the inadequacy of resources provided by this state for defense counsel and support services systemically denies effective representation in capital cases. The decision to take human life is undoubtedly the most important decision that a governmental entity can make; this decision, however, historically has been and continues to be made arbitrarily, capriciously and in a discriminatory manner. This systemic unfairness in capital cases cannot be avoided without the implementation of standards of performance in representation and the provision of adequate resources for the defense. Due to systemic limitations and lack of resources, these cases are not being adequately prepared and effectively pursued by the defense, and the results reflect as much. Assuming that the decision to kill a citizen of this state is a function that the state should perform under any circumstances, for the government to take the life of a single individual without providing effective representation would be unconscionable and a violation of fundamental fairness of the highest order.

The investment of time and resources that is required of the state criminal justice system in the extensive litigation of capital cases, the fiscal and structural crisis that currently exists in the criminal justice system, and the relative inefficacy of the death penalty as a method of crime control or a correctional tool may force this state to make a politically difficult decision concerning whether the sentence of death is a "luxury" that this state can ill afford.

VIII. Standards

Though there is precedent in other states for standards of effective defense representation, this state has adopted no coherent, uniform standards to address crucial considerations such as: (1) caseload standards for public defenders and workload standards for private counsel; (2) standards for the provision of extra-legal resources and costs of litigation; (3) standards for the appointment of qualified counsel in capital cases and other complex litigation; (4) performance standards for counsel, particularly in capital cases and other complex litigation; (5) standards for the training of counsel; (6) standards for the early entry and continuous representation of counsel; (7) standards for conflict of interest problems; (7) standards for indigency; i.e. eligibility for representation by court-appointed counsel; (8) standards for the recoupment of costs of indigent defense from defendants and other sources; and, (9) standards for adequate supervisory staff, support staff, library, equipment, and materials for the public defender offices.

IX. Criminal Justice Funding Crisis Group (CJFCG)

As a result of the urgency of the problems, which culminated in the funding crisis in January, 1992 that threatened the very existence of the state indigent criminal system, an *ad hoc* group was formed and identified as the Criminal Justice Funding Crisis Group (CJFCG), which included representatives of the Tennessee Bar Association (TBA), the Tennessee Association of Criminal Defense Lawyers (TACDL), the Tennessee Trial Lawyers Association (TTLA), the Tennessee Public Defenders Conference (TPDC), and the Capital Case Resource Center (CCRC) with input from other bar associations and interested parties.

X. The Spangenberg Study (1992)

The CJFCG contracted with The Spangenberg Group of Boston, Mass. to do a comprehensive study of the entire indigent defense delivery system in this state. The Spangenberg Group had previously conducted a study in this state of the two year old Public Defender's Conference (A Study of the Tennessee District Public Defender's Conference, June, 1991) and is generally recognized as the most authoritative source of information concerning the delivery of indigent criminal defense services in this country. The Group has conducted state-wide studies of indigent defense systems in 16 other states in 17 years and has provided technical assistance in 47 states of this country for the Bar Information Program of the American Bar Association.

The current study conducted by The Spangenberg Group (A Study of the Indigent Defense System in the State of Tennessee, December 1992) includes information obtained from: (1) an update of the 1991 study of the TPDC; (2) a mail survey of: a) a representative sample of the membership of the Tennessee Bar Association, b) the entire membership of TACDL, and c) all district public defender offices; (3) a comparison of salaries of the public defenders with district attorneys and other state paid attorneys; (4) an analysis of private attorney claims for indigent representation; (5) site visits in Memphis, Nashville, Chattanooga, Knoxville and the 23rd and the 25th judicial districts in which the staff of the Spangenberg Group observed courts in action and interviewed General Sessions and Criminal Court Judges, district attorneys, public defenders, and private attorneys.

Noting that at least *75% of all criminal cases are indigent cases* and that the number of indigent criminal cases in this state has almost *tripled since 1986*, the Spangenberg Study (1992)

summarizes that the overriding concern is the "enormous case overload for public defenders" causing "[b]y comparison to other states which have state-funded public defenders, Tennessee [to be] at or approaching the bottom of the list in all measures related to indigent defense funding and the relationship between funding and caseload". The summary to the Study also notes that "[t]here is no organization or system currently in place for planning, monitoring, administering and developing policy for indigent defense in Tennessee on a statewide basis". Further, "[a]s a result of a number of factors, the role of the private criminal bar in the representation of indigents is rapidly diminishing in Tennessee....inconsistent with American Bar Association standards".

According to the Study (1992) undercompensation causes diminishing participation of the private bar: "[H]ourly fees for court-appointed counsel in Tennessee are near the bottom in the country" and the "[t]he clear trend throughout the country, including many states in the South, is to interpret 'reasonable compensation' to mean average hourly overhead as a base upon which to build the fee for court-appointed counsel". The survey of the TBA membership revealed that the average fee rate charged to clients by individual attorneys in that organization is \$115.84 per hour and the average cost of overhead rate is \$46.81 per hour. The survey of the TACDL membership revealed that the average fee rate charged to clients by individual attorneys in that organization is \$118.79 per hour and the average cost of overhead rate is \$ 47.26. Since 1965 the compensation rate for court appointed private counsel in indigent criminal cases in Tennessee has been \$20 per hour out-of-court and \$30 per hour in-court, Supreme Court Rule 13.

The Spangenberg Study (1992) summary also states that "[r]epresentation in capital cases in Tennessee is uneven across the state and in many instances, below required minimum standards. Public defenders are assigned capital cases without any relief from their already overwhelming caseloads. Private attorneys are appointed without qualification standards in most courts and are unable to provide the proper level of representation".

The Spangenberg Study (1992) is focused on a comparison of the delivery of indigent criminal defense services in this state to the delivery of comparable other legal services in this state and primarily to the delivery of indigent defense services in other states. This Study is hereby adopted by reference as an exhibit to this Petition.

XI. Violations

Due to the foregoing, the statutory and constitutional rights of indigent criminal defendants, whose life and liberty are at stake, and the statutory and constitutional rights of indigent criminal defense counsel, whose time, professional ethics, and property are at stake, are being violated with alarming frequency. Legal rights and principles that are being violated as a result of the inadequacy of the indigent defense system are as follows:

A. Constitutional rights of the defendant and counsel:

- a. Art. I, Sect. 9, Tennessee Constitution; and, Sixth Amendment, United States Constitution: the defendant's right to effective assistance of counsel;
- b. Art. I, Sect. 8, Tennessee Constitution; and, Fifth and Fourteenth Amendment, United States Constitution: the defendant's and counsel's right to due process of law;
- c. Art. XI, Sect. 8, Tennessee Constitution; and, Fourteenth Amendment, United States Constitution: the defendant's and counsel's right to equal protection;
- d. Art. XI, Sect. 16, Tennessee Constitution: the inviolability of the rights secured by Art. I;
- e. Art. I, Sect. 21, Tennessee Constitution; and, Fifth Amendment, United States Constitution: counsel's right to just compensation;

B. Statutory rights of the defendant and counsel:

- a. T.C.A. § 40-14-202(A): time for counsel to have a sufficient opportunity to prepare the case;
- b. T.C.A. § 40-14-207(a)(1): reasonable compensation for counsel;
- c. T.C.A. § 40-14-207(b): investigative or expert services or similar services necessary to ensure that the constitutional rights of the accused are properly protected .

C. Disciplinary Rules (DR) and Ethical Considerations (EC) that may require counsel to refuse an appointment to represent an indigent criminal defendant;

Tennessee Supreme Court Rule 8:

- a. DR 2-110(B)(2): counsel's employment will result in violation of a Disciplinary Rule;
- b. DR 2-110(B)(3): counsel's mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively;
- c. DR 5-101(A): the exercise of counsel's professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests;
- d. DR 5-101(A): the exercise of counsel's independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests;
- e. DR 6-101(A)(1): counsel is being asked to handle a legal matter which he knows or should know that he is not competent to handle;
- f. DR 6-101(A)(2): counsel would be tempted to neglect a legal matter entrusted to him;
- g. EC 2-30: counsel is unable to render competent service;
- h. EC 6-3: counsel is not qualified;

D. American Bar Association (ABA) Standards and Guidelines:

- a. ABA Standards For Criminal Justice:
 - 1. Chapter 4, *The Defense Function*;
 - 2. Chapter 5, *Providing Defense Services*;
- b. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases;

XII. Prayer for Relief

For the foregoing reasons, the Petitioners respectfully pray that this Court:

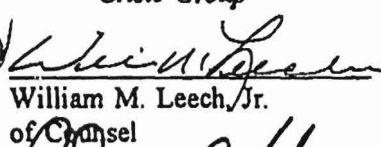
- A. Entertain this Petition and the supporting memoranda, studies, and other evidence setting out the jurisdictional, factual, and legal basis for this claim and any other matters that this Court deems appropriate;
- B. Set this matter for hearing;
- C. Invite the participation of other interested parties, if it deems it appropriate;
- D. Implement amendments to Supreme Court Rule 13 proposed by the Petitioners consistent with the spirit and letter of the law and consistent with this Petition.

Respectfully submitted,

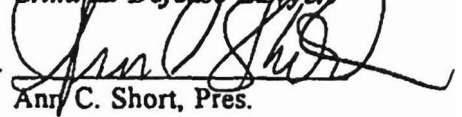
Tennessee Bar Association

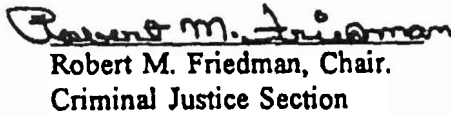

J. Fraser Humphreys, Jr., Pres.

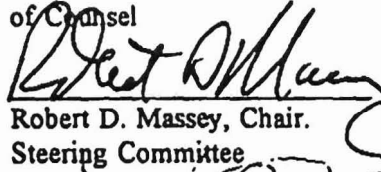
**Criminal Justice Funding
Crisis Group**


William M. Leech, Jr.
of Counsel

**Tennessee Association of
Criminal Defense Lawyers**


Ann C. Short, Pres.


Robert M. Friedman, Chair.
Criminal Justice Section

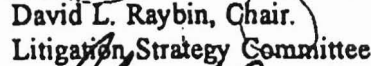

Robert D. Massey, Chair.
Steering Committee

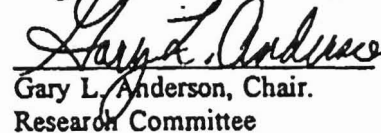
**Tennessee District Public
Defenders Conference**


David A. Doyle, Pres.

**Tennessee Trial Lawyers
Association**

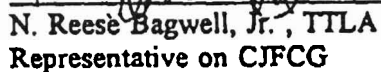

John A. Day, Pres.


David L. Raybin, Chair.
Litigation Strategy Committee


Gary L. Anderson, Chair.
Research Committee

**Capital Case Resource
Center of Tennessee**


William P. Redick, Jr., Dir.


N. Reese Bagwell, Jr., TTLA
Representative on CJFCG

PROPOSED AMENDMENT

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**RULE 13. APPOINTMENT AND COMPENSATION
OF COUNSEL FOR INDIGENT DEFENDANTS**

(All proposed additions to present Rule 13 are indicated by underlining and all proposed deletions from Rule 13 are indicated by language crossed out in [brackets].)

1. Indigent Defense Commission

An Indigent Defense Commission shall be established and maintained.

A. Establishment and Maintenance.

The Committee on Appointment of Counsel for Indigent Defendants in Capital Cases established in Supreme Court Rule 13.1(111) shall also comprise and function as The Indigent Defense Commission.

B. Duties and Responsibilities:

(1) The Commission shall develop a plan for delivery of indigent services in criminal cases consistent with the American Bar Association (ABA) Standards for Criminal Justice; Chap. 4, The Defense Function; and, Chap. 5, Providing Defense Services; as well as the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. This plan shall be an integrated plan including issues concerning both public and private attorneys.

(a) The plan shall include a statutory scheme for the state public defender system, which:

(i) establishes caseload limitations for the appointment of counsel in all cases, including capital cases, consistent with existing standards such as those established by the National Advisory Commission on Criminal Justice Standards and Goals (1972);

(ii) promotes the independence of the public defender; and

(iii) implements the creation of specialized offices, such as for appeals and capital trials, where and when appropriate.

(b) The plan shall encourage the continued participation of the private bar in indigent representation.

(c) The Indigent Defense Commission shall coordinate with the state judiciary the continuing appointment of public defenders and private attorneys in indigent cases at all procedural stages with due regard for the disciplinary rules and ethical considerations applicable to attorneys eligible for appointment in indigent cases and with due regard for satisfying the rights of indigent defendants and court appointed counsel.

(2) The Commission shall establish standards in the following categories:

(a) caseload/workload limitations for counsel, including a uniform definition of "case" that will be consistently applied for record-keeping purposes;

(b) provision of necessary extra-legal resources and costs of litigation;

(c) qualifications of counsel in complex litigation in addition to the qualifications for counsel in capital cases in Rule 13.1;

(d) performance standards for counsel;

(e) training of counsel;

45 (f) early entry and continuous representation by counsel;
46 (g) conflict of interest problems;
47 (h) indigency, i.e., eligibility for representation by court-appointed counsel;
48 (i) recoupment of cost of indigent defense from defendants and other sources; and
49 (j) adequate supervisory staff, support staff, library, equipment, and materials for the
50 public defender offices.

51
52 C. Compensation and Staff.

53 The Commission members shall be adequately and reasonably compensated. The
54 Commission shall appoint a full time administrator and provide adequate support staff.
55

56
57 [1.] 2. Appointment of Counsel.

58 In every criminal case in which an adult is charged with a felony or a misdemeanor where
59 the defendant is in jeopardy of incarceration, or in every criminal case in which a party is
60 charged with juvenile delinquency by the commission of an act which, if committed by an adult,
61 would be a felony, or in contempt proceedings where the defendant is in jeopardy of
62 incarceration, or where a petition for habeas corpus, post-conviction relief, early release,
63 suspended sentence or probation revocation has been filed, or in cases filed under Title 37 of
64 T.C.A. in which allegations against the parents would result in finding the child or dependent
65 neglected, or if there is a petition of termination of parental rights and the parent is determined
66 by the court to be indigent, the Court shall advise the party that he has a right to be represented
67 by counsel throughout the case and that counsel will be appointed to represent him if he so
68 desires and if he is financially unable to obtain counsel.

69 Whenever the party states that he is financially unable to obtain counsel and desires the
70 appointment of counsel, it shall be the duty of the judge to conduct an inquiry and to make a
71 proper finding as to the indigency of the accused in compliance with the provisions of Tenn.
72 Code Ann. §40-14-202. Upon a finding of indigency, counsel shall be appointed. All statements
73 made by the defendant or petitioner in such an inquiry shall be by affidavit sworn to before the
74 judge.

75 The Court shall appoint separate counsel for defendants having interests that cannot be
76 properly represented by the same counsel, or when other good cause is shown. There shall be
77 a rebuttal presumption that counsel cannot simultaneously represent codefendants with potentially
78 conflicting interests, and the court shall not appoint the same attorney to simultaneously represent
79 codefendants unless the court makes an affirmative finding of fact based upon evidence presented
80 ex parte and appearing in the record under seal that the codefendants do not presently have and
81 are unlikely to develop interests that cannot be properly represented by the same attorney.

82 If, after being advised of his right to have an attorney appointed to represent him, the
83 party refuses to accept the services of counsel, such refusal shall also be in writing and signed
84 by the party in the presence of the judge who shall acknowledge thereon the signature of the
85 party. Such refusal shall be made a part of the record in the case.

86 The Court shall, in selecting and appointing such counsel, either designate the Public
87 Defender Service, if such service is available, or private attorney selected from a panel of
88 attorneys approved ~~[by the Court]~~ consistent with this Rule and Rule 13.1. The party shall not

89 have the right to select his appointed counsel from the Public Defender Service, from the panel
90 of attorneys, or otherwise, except that consideration shall be given to: (1) the experience that the
91 defendant has had with previous representation by counsel; and, (2) what will provide the best
92 opportunity for a constitutionally adequate defense.

93 The District Public Defender shall monitor caseload and shall advise the trial court when
94 the caseload of his office exceeds one hundred percent (100%) per attorney of the maximum
95 caseload for appointed attorneys established by the Indigent Defense Commission and reviewed
96 by this Court. The office of the District Public Defender shall be deemed unavailable until such
97 time as the caseload shall be reduced to no more than one hundred percent (100%) of such
98 caseload.

99 Counsel appointed shall, unless excused by the order of the Court, continue to act for the
100 party throughout the proceedings of the trial and of any appeal. The appointment of counsel to
101 represent an indigent person charged in general sessions or municipal court and bound over shall
102 extend beyond the bindover to the grand jury until indictment, and counsel so appointed shall
103 remain responsible for providing such services as may be reasonably necessary to secure the
104 release from custody of the defendant following bindover and prior to grand jury action or such
105 services as may be reasonably necessary to prepare the defense of any indictment resulting from
106 the bindover. Any request for compensation under Part (3) of this Rule for services rendered
107 after bindover and prior to grand jury action shall be submitted to the trial court after the grand
108 jury acts.

109 In a capital case no less than two attorneys [may] shall be appointed for each defendant
110 at all stages including collateral proceedings, absent extraordinary circumstances appearing on
111 the record [for one defendant] and each [is] shall be eligible for compensation. Appointments
112 in a capital case shall be made pursuant to Supreme Court Rule 13.1 and shall be calculated to
113 appoint the best available counsel, public or private, to the case with due consideration for the
114 attorney's training, workload and commitment to the provision of effective representation. For
115 the purposes of this Rule and Rule 13.1, a capital case is defined as:

116
117 ~~[A case in which an individual is indicted for an offense that is punishable by~~
118 ~~death and wherein the attorney general announces to the Court at any time, prior~~
119 ~~to the presentation of proof, that the state will insist upon the death penalty. See~~
120 ~~Tenn. Code Ann. §40-14-207.]~~
121

122 Any case, regardless of the procedural status, involving a sentence of death or a charge
123 of capital murder except a case in which notice not to seek the death penalty has been issued by
124 the state and is in effect. See Tenn. Code Ann. §40-14-207; Supreme Court Rule 13.1; and Rule
125 of Criminal Procedure 12.3(b).

126 Co-counsel or associate attorneys appointed in non-capital cases may ~~[not be~~
127 compensated] be eligible for compensation.
128

129 130 ~~[2.]~~ **3. Compensation for Appointed Private Counsel**

131 **A. General Information.**

132

133 In a single trial of separate indictments and/or defendants, appointed counsel can
134 appropriately file separate claims in each case, but cannot charge separately for time spent on all
135 cases. Time may be prorated, cross-referencing each case on claims, but time spent exclusively
136 on any one case may properly be charged only on the claim for that case.

137 All claims for compensation covering work in a preliminary hearing or for trial
138 preparation shall be specific as to the service performed, the date performed, timed in hours, and
139 tenths of hours, and submitted by the attorney on a form approved by the Executive Secretary
140 to the Supreme Court to the judge having jurisdiction of the case or control over compensation
141 at the time the services were rendered for consideration in determining the compensation to be
142 awarded. The judge must sign the claim and submit it to the Executive Secretary of the Supreme
143 Court within 30 days from the date of submission. A facsimile signature will not be accepted.

144 The Executive Secretary to the Supreme Court shall examine and audit all claims for
145 attorneys' fees and expenses to insure compliance with these rules and other statutory
146 requirements. After such examination and audit [~~and giving due consideration to state revenues~~],
147 the Executive Secretary shall make a determination as to the compensation to be paid to each
148 attorney and/or expert and cause payment to be issued in satisfaction thereof. This audit and
149 determination shall be completed within thirty (30) days of submission to the Executive
150 Secretary. The determination by the Executive Secretary shall be final, except as provided in
151 Section D.

152 In cases in which the amount of compensation approved is less than the amount requested,
153 the reviewing authority shall notify counsel on the record of the reasons for the reduction and
154 give counsel an opportunity to respond on the record within ten (10) days of receipt of such
155 notice. Upon review of counsel's response, the authority shall make its final authorization and
156 counsel's response part of the record submitted to the Executive Secretary of the Supreme Court.

157 Approval shall not depend upon the availability of funds. Counsel and/or experts shall
158 have a legal claim against the state in the amount of compensation approved. Once approved,
159 compensation shall be reliably and promptly paid.

160 Compensation of counsel and support services are subject to predisposition interim
161 payments upon demonstration of need and approval by the court having jurisdiction of the case
162 or control over compensation at the time the services were rendered.

163 All claims must be submitted to the Executive Secretary within ninety (90) days from the
164 final disposition of the case. Final disposition means the last activity of the attorney in relation
165 to the case, not the end of the trial.

167 B. Fee Structure.

168 The following fees are prescribed for appointed counsel. The rate prescribed shall be
169 determined by the original charge in that case:

170 (1) Misdemeanor Cases (Adult and Juvenile). - In cases charged as misdemeanors where
171 the defendant is in jeopardy of incarceration, the maximum hourly rate for an attorney shall not
172 exceed ~~[\$20]~~ \$40 per hour. [~~for time reasonably spent in trial preparation. The maximum rate~~
173 ~~for time expended in court shall not exceed \$30 per hour, with a total not to exceed \$60 for each~~
174 ~~day of trial]. The total maximum compensation for all services in a trial or proceeding shall not~~
175 exceed ~~[\$100]~~ the statutory maximum.

176 (2) Contempt Cases (Adult and Juvenile). - In cases charged as contempt of court where

177 the defendant is in jeopardy of incarceration, the maximum hourly rate for an attorney shall not
178 exceed ~~[\$20]~~ \$40 per hour. [~~for time reasonably spent in trial preparation. The maximum rate~~
179 ~~for time expended in court shall not exceed \$30 per hour.~~] The total maximum compensation
180 for all services in a trial or proceeding shall not exceed ~~[\$250]~~ the statutory maximum.

181 (3) Juvenile-Felony (Non-Capital Cases). - In juvenile cases involving offenses which,
182 if committed by an adult would be classed as felonies, the maximum hourly rate for an attorney
183 shall not exceed ~~[\$20]~~ \$40 per hour. [~~for time reasonably spent in trial preparation. The~~
184 ~~maximum rate for time expended in court shall not exceed \$30 per hour.~~] The total maximum
185 compensation for all services in a trial or proceeding shall not exceed the statutory maximum.
186 [~~of \$500.~~] (Tenn. Code Ann. §37-1-150)

187 (4) Adult-Felony (General Sessions and Municipal Courts). - In cases originally charged
188 as felonies which terminate before a general sessions or municipal court authorized to conduct
189 preliminary proceedings in felony cases, the maximum hourly rate for an attorney shall not
190 exceed ~~[\$20]~~ \$40 per hour. [~~for time reasonably spent in trial preparation. The maximum rate~~
191 ~~for time expended in court shall not exceed \$30 per hour.~~] The total maximum compensation
192 for all services in a trial or proceeding shall not exceed ~~[\$500]~~ the statutory maximum.

193 (5) Adult-Felony (Non-Capital Cases - Trial Courts). - In non-capital cases charged as
194 felonies, the maximum hourly rate for an attorney shall not exceed ~~[\$20]~~ \$40 per hour. [~~for time~~
195 ~~reasonably spent in trial preparation. The maximum rate for time expended in court shall not~~
196 ~~exceed \$30 per hour.~~] The total maximum compensation for all services in a trial or proceeding
197 shall not exceed the statutory maximum. [~~of \$1,000~~] (Tenn. Code Ann. §40-14-207)

198 (6) Appeals (Non-Capital Cases). - Compensation for appellate work, including an
199 interlocutory appeal, will be determined by the appropriate appellate court. The maximum
200 compensation for services rendered in the Court of Criminal Appeals shall be ~~[\$1,000]~~ the
201 statutory maximum and a like maximum amount for services rendered in the Supreme Court.
202 (Tenn. Code Ann. §40-14-207)

203 (7) Early Release or Suspended Sentence Hearings. - In early release or suspended
204 sentence hearings, the maximum hourly rate for an attorney for an attorney shall not exceed
205 ~~[\$20]~~ \$40 per hour. [~~for time reasonably spent in trial preparation. The maximum rate for time~~
206 ~~expended in court shall not exceed \$30 per hour.~~] The total maximum compensation for all
207 services in a proceeding shall not exceed ~~[\$500]~~ the statutory maximum.

208 (8) Post-Conviction Relief and Habeas Corpus Cases (Non-Capital Cases). - In non-
209 capital, post-conviction relief and habeas corpus proceedings, the maximum hourly rate for an
210 attorney shall not exceed ~~[\$20]~~ \$40 per hour. [~~for time reasonably spent in trial preparation. The~~
211 ~~maximum rate for time expended in court shall not exceed \$30 per hour.~~] The total maximum
212 compensation for all services in a proceeding shall not exceed ~~[\$500]~~ the statutory maximum.

213 (9) Probation Revocation Hearings. - In probation revocation hearings, the maximum
214 hourly rate for an attorney shall not exceed ~~[\$20]~~ \$40 per hour. [~~for time reasonably spent in~~
215 ~~preparation. The maximum rate for time expended in court shall not exceed \$30 per hour.~~] The
216 total maximum compensation for all services in a proceeding shall not exceed ~~[\$500]~~ the
217 statutory maximum.

218 (10) Capital Cases. - In capital cases, the ~~[maximum]~~ minimum hourly rate for an
219 attorney shall ~~[not exceed \$20]~~ be \$60 per hour. [~~for time reasonably spent in trial preparation.~~
220 ~~The maximum rate for time expended in court shall not exceed \$30 per hour.~~] The compensation

221 of counsel shall reflect the extraordinary responsibilities inherent in death penalty cases.

222 A two-step procedure must be followed in obtaining authorization for compensation in
223 a capital case. First, the appropriate court, trial or appellate, shall determine reasonable
224 compensation to be allowed the attorney based upon the services rendered in that court. Second,
225 the claim will be submitted to the Executive Secretary to the Supreme Court for final approval
226 by the Executive Secretary and Chief Justice.

227 In capital cases, ~~[the court]~~ any state court having jurisdiction of the case, regardless of
228 the court or the procedural status may determine that investigative or expert services, or other
229 similar services are necessary to ensure the protection of the constitutional rights of a defendant.
230 (Supreme Court Rule 13.1 (IV)(C) and Tenn. Code Ann. §40-14-207). The defense counsel must
231 seek prior approval for such services by submitting a written motion to the Court setting forth:

232 (a) the name of the proposed expert or service;

233 (b) how, when and where the examination is to be conducted or the services are to
234 be performed;

235 (c) the cost of the evaluation and report thereof; and

236 (d) the cost of any other necessary services, such as court appearances.

237 If the motion for expert services is granted, the court must grant the prior authorization
238 for these expert services in a reasonable amount to be determined by the court. The authorization
239 shall be evidenced by a signed order of the court. The order shall be made part of the record
240 in the case and a certified copy included with the attorney's claim for compensation and
241 reimbursement. Payment may be made directly to the individuals rendering the expert services
242 upon certification by the attorney that the services have been rendered and approved by the court.
243 If the attorney is to be reimbursed, the expense shall be included on the attorney's claim for
244 compensation and reimbursement and supported by such receipts as may be required by the
245 Executive Secretary.

246 (11) Dependent Neglect or Termination of Parental Rights cases. - In dependent neglect
247 or termination of parental rights cases, the maximum hourly rate for an attorney shall not exceed
248 [20] \$40 per hour. ~~[for time reasonably spent in preparation. The maximum rate for time~~
249 ~~expended in court shall not exceed \$30 per hour.]~~ The maximum compensation for all services
250 in a proceeding shall not exceed ~~[400]~~ the statutory maximum unless the case is determined by
251 the Court to be complex and/or lengthy. Forms for reimbursement (Supreme Court Form I-75-
252 revised 1991) may be obtained through the court clerk's office or the executive secretary's office.

253 C. Expenses.

254
255 (1) ~~[Out-of-Pocket]~~ Overhead Expenses. - ~~[Out-of-pocket expenses reasonably incurred~~
256 ~~for long distance telephone calls and copying and printing will be reimbursed if approved by the~~
257 ~~appropriate court as reasonably incurred. A telephone log must accompany the reimbursement~~
258 ~~request and must contain the date the call was made, the city called, and the purpose of the call.~~
259 ~~These expenses are not included in the statutory maximums.]~~ An attorney appointed under this
260 rule shall be entitled to a reasonable allowance for office overhead expenses, which allowance
261 shall not be deemed "compensation for services" within the meaning of Part (3)(B) of this rule,
262 nor within the meaning of Tenn. Code Ann. Sections 37-1-150(e), 40-14-207, or any similar
263 statute. Such reasonable allowance for overhead expenses shall not exceed \$40 per hour
264 expended by the appointed attorney. This allowance for overhead expenses must be cumulative

265 to any other compensation or reimbursement provided by this rule or any applicable statute.

266 (2) Travel Expenses. - Prior authorization for reasonable travel expenses must be obtained
267 from the judge of the court having jurisdiction of that stage of the proceeding. Such
268 authorization shall be made part of the record in the case and a certified copy included with the
269 attorney's claim for compensation and reimbursement. If authorization is granted by the trial
270 judge for travel expenses, the order of authorization must contain sufficient findings of fact to
271 justify the travel, including a finding that there are no alternative methods of obtaining the
272 information sought or of obtaining statements of witnesses that are less expensive. Reasonable
273 travel expenses, which have received prior authorization, will be reimbursed in accordance with
274 the Judicial Travel Regulations and no exceptions will be allowed.

275 (3) ~~[Other]~~ Extraordinary Expenses. - ~~[All other expenses of any nature will not be~~
276 ~~considered out-of-pocket expenses].~~ An attorney may seek reimbursement of extraordinary out-
277 of-pocket expenses. For reimbursement to be made, prior authorization for such expenditures
278 must be obtained from the judge of the court having jurisdiction of that stage of that proceeding
279 and from the Executive Secretary to the Supreme Court. Such authorization shall be made part
280 of the record in the case and a certified copy included with the attorney's claim for compensation
281 and reimbursement.

282
283 **D. Review of Claims for Compensation.**

284 (1) Petition for Review. - Any person aggrieved by any action of the Executive Secretary
285 may petition this Court for a review thereof as under the common law writ of certiorari. On the
286 grant of the writ, the Executive Secretary shall certify and forward to the Court a complete record
287 of the proceedings before his office in the matter. Any such petition must be filed within 60
288 days after the action complained of.

289 (2) Costs. - The Court may make such orders as it may consider appropriate with respect
290 to the payment of or security for costs and other expenses of hearings before the Court.

291 (3) Exhaustion of Remedies. - The Court will not entertain a petition under this rule
292 unless the petitioner has first exhausted his remedy before the Executive Secretary.

293
294 **E. Fee and Expense Rate Computations.**

295 The compensation rates established in Part (3)(B) and maximum over head expense rate,
296 Part (3)(C) apply as of state fiscal year 1994. These rates in subsequent fiscal years shall be
297 computed and adjusted by the Executive Secretary in order to reflect the percentage of change
298 in the current real purchasing power of the 1994 rate in consideration of changes in the cost of
299 living as reflected by the consumer price index (all items - United States city average) as
300 published by the United States Department of Labor, Bureau of Labor Statistics. [See Tenn.
301 Code Ann. §16-15-205(a)(1), (2) on consumer price index adjustments to the compensation of
302 general sessions judges].

PEACE

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JUSTICE

EXHIBITS B

IN THE SUPREME COURT OF TENNESSEE

IN RE:)
)
CERTIFICATION OF)
COUNSEL IN DEATH)
PENALTY CASES)

PETITION FOR THE ADOPTION OF PROPOSED
SUPREME COURT RULE 13.1

Comes now the petitioners and respectfully ask this Court to adopt proposed Supreme Court Rule 13.1 (Attached hereto: Appendix A), concerning the certification of counsel in death penalty cases, as considered and unanimously recommended to this Court by the Advisory Commission to the Tennessee Supreme Court on Criminal Rules.

The petitioners represent the most active members of the Tennessee bar, who would be affected by the proposed rule, and are:

- (1) The Tennessee Bar Association;
- (2) The Tennessee Association of Criminal Defense Lawyers;
- (3) The State Public Defender's Conference;
- (4) The Napier-Looby Bar Association;
- (5) The Nashville Bar Association;
- (6) The Capital Case Resource Center of Tennessee.

The certification of counsel in death penalty cases has also been recommended by:

- (1) The Advisory Commission to the Tennessee Supreme Court on Criminal Rules, per a unanimous recommendation in the Spring of 1990.
- (2) The Sixth Circuit Task Force, Tennessee Committee. See, *Report of Tennessee Committee*, June 1987. (Attached hereto: Appendix B);
- (3) The American Bar Association, Standards for Criminal Justice, Chap. 5 *Providing Defense Services*, Section 5-2.2 *Eligibility to Serve*, August 1990. (Attached hereto: Appendix C);
- (4) The American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guidelines 4.1 *Selection of Counsel*, and 5.1 *Attorney Eligibility*, February 1989. (Attached hereto: Appendix D).

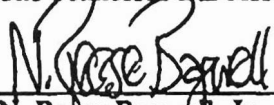
The adoption of proposed Supreme Court Rule 13.1 is among the relief sought by separate petition: Petition for an Amendment to Supreme Court Rule 13 in Order to Establish a Constitutional Indigent Criminal Defense System. (Attached hereto: Appendix E).


As reflected by the above referred to petition, it is perceived by the petitioners that the provision of defense services in indigent capital cases in the state of Tennessee is currently inadequate implicating the defendant's right to counsel (Tennessee Constitution, Article I, Section 9; United States Constitution, Sixth Amendment), the attorney's right to just compensation (Tennessee Constitution, Article I, Section 21; United States Constitution, Fifth Amendment), and the rights to the law of the land/due process (Tennessee Constitution, Article I, Sections 8 and 17; United States Constitution, Fifth and Fourteenth Amendments) and equal protection (Tennessee Constitution, Article XI, Section 8; United States Constitution, Fourteenth Amendment) of both the defendant and the attorney.

The petitioners submit that the passage of proposed Supreme Court Rule 13.1, concerning the certification of counsel in death penalty cases, will address these constitutional infirmities and should be adopted as unanimously recommended by the Advisory Commission to the Supreme Court on Criminal Rules.

Respectfully submitted,

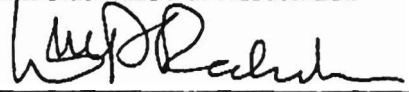

Paul Campbell III, President
The Tennessee Bar Association


N. Reese Bagwell, Jr., President
The Tennessee Association of Criminal
Defense lawyers


Tom Crider, President
The State Public Defender's Conference


Monte D. Watkins, President
The Napier-Looby Bar Association


Steve Cobb, President
The Nashville Bar Association


William P. Redick, Director
The Capital Case Resource Center of
Tennessee

PEACE

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EXHIBITS C

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
AUG 18 1994
Cecil Crowson, Jr.

THE TENNESSEE BAR ASSOCIATION;)
THE TENNESSEE ASSOCIATION OF)
CRIMINAL DEFENSE LAWYERS;)
THE TENNESSEE TRIAL LAWYERS)
ASSOCIATION; THE CRIMINAL)
JUSTICE FUNDING CRISIS GROUP;)
THE TENNESSEE DISTRICT PUBLIC)
DEFENDERS CONFERENCE; THE CAPITAL)
CASE RESOURCE CENTER OF TENNESSEE,)
Petitioners.)

No. 01S01-9307-OT-00144

IN RE:)
THE INDIGENT CRIMINAL JUSTICE)
SYSTEM)

ORDER

I

Petitioners have filed in this Court a "Petition for Amendments to Supreme Court Rule 13 in Order to Establish a Constitutional, Adequate, and Effective Indigent Criminal Justice System" and a "Petition for the Adoption of Proposed Supreme Court Rule 13.1." The Court invited responses to said petitions in its order entered October 5, 1993, and the following parties have filed responses: The Honorable Ned McWherter, Governor; Lieutenant Governor John Wilder, Speaker of the Senate; the Honorable Charles Burson, Attorney General; Mr. Patrick H. McCutchen, Executive Secretary of the Tennessee District Attorney Generals Conference; Mr. David A. Doyle, President, Tennessee District Public Defenders Conference;

1 and Mr. Allan F. Ramsaur, Executive Director, Nashville
2 Bar Association. In an order entered March 1, 1994, this
3 matter was set for hearing for the June, 1994 session of
4 this Court at Nashville. Oral argument was heard June 1,
5 1994.

6
7 II

8
9 After consideration of the petitions and
10 responses, argument of counsel, and the entire record in
11 this matter, the Court, finds:

12
13 (1) The Judicial Department, the Legislative
14 Department, and the Executive Department, respectively,
15 bear administrative responsibility for providing effective
16 assistance of counsel for indigent persons charged by the
17 state with criminal offenses (hereinafter "indigent
18 defendants") and neither of the three departments can
19 provide such services without the assistance and
20 cooperation of the other departments;

21
22 (2) The allegations of the petitions addressing
23 the administrative structure and operation of the Judicial
24 Department for providing counsel for indigent defendants
25 are appropriate for consideration by the Court in this
26 proceeding; and

27
28 (3) The petitions contain allegations which are
29 not appropriate for consideration by the Court in this
30 proceeding.

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III

It is, therefore, ORDERED:

(1) The petitions are accepted for filing, but only as to those issues specifically addressed in this order and only to the extent that those issues are specifically addressed;

(2) There is hereby created the Indigent Defense Commission of the Supreme Court of Tennessee;

(3) The Commission created shall be structured and shall operate as follows:

a. The Commission shall consist of eleven members appointed by the Court. Each of the separate organizations which joined as a petitioner in this matter is requested to submit to the Court the names of three persons qualified to serve as Commission members.

b. Each member of the Commission shall be appointed for a term of three years, except four of the beginning terms shall be for two years and three for one year. Continuous service will be

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limited to the beginning or any unexpired term plus one full term. The terms of each office will expire on January 1 next following the last year of each term.

c. The Commission shall have a chairperson, vice-chairperson, and secretary. The chairperson shall be appointed by the Supreme Court. The other officers shall be elected by the members of the Commission at the first meeting in each calendar year.

d. The Commission shall adopt rules for the operation of the Commission, which rules shall not be inconsistent with the provisions of this order.

e. Meetings of the Commission may be held upon reasonable notice to the Commission members by any officer of the Commission. The Commission shall meet at least once during each calendar year. The Commission may meet by telephone conference. Six Commission members shall constitute a quorum. The affirmative vote of not less than six members of the Commission shall constitute action

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by the Commission.

f. Members of the Commission shall receive no compensation for their services as members of the Commission, but they may be reimbursed for travel and other expenses in accordance with regulations adopted by the Judicial Department.

g. The Commission, with the consent of the Court, may employ a director and other personnel. The Commission may delegate to such director the authority to conduct the routine business of the Commission, subject to the provisions of this order, rules of the Court, and supervision by the Commission. With the consent of the Court, the Commission may enter into an agreement with the director of the Administrative Office of the Courts whereby that office shall furnish staff services.

(4) 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. The plan shall

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include, but not necessarily be limited to,
the following:

a. The collection of information
regarding cases in which an indigent
defendant is represented by a district
public defender or a private attorney
paid by the state.

b. A determination of a reasonable case
load for each district public
defender.

c. A statement of standards for criminal
defense attorneys appointed to
represent indigent defendants,
including additional standards for
complex and capital cases; provided,
the Commission may defer to the
Supreme Court Commission on
Continuing Legal Education and
Specialization with regard to
standards which may be adopted
by that commission.

d. A schedule of reasonable compensation
to be paid private attorneys appointed
to represent indigent defendants.

1 e. A determination of the total funds to
2 be budgeted for each fiscal year for
3 the payment of private attorneys
4 appointed by the courts to represent
5 indigent defendants.

6
7 f. A statement of appropriate procedures
8 for reviewing claims submitted by
9 private attorneys, the auditing of
10 those claims, and the payment of the
11 claims. Such procedures shall insure,
12 to the extent practical, the
13 responsible and efficient
14 administration of funds appropriated
15 for the representation of indigent
16 defendants.

17
18 (5) The Commission shall develop and recommend
19 to the Supreme Court such rules or
20 amendments thereto as may be appropriate to
21 implement the plan approved by the Court.

22
23 IV

24
25 Effective September 1, 1994, Rule 13(2)(B) of
26 the Supreme Court Rules is amended as follows:

27
28 (1) The maximum hourly rate to be paid private
29 attorneys for time spent in preparation for
30 trial shall be \$40 per hour and the maximum

1 hourly rate to be paid for time spent in
2 court shall be \$50 per hour for services
3 rendered in cases described in subsections
4 (1), (2), (3), (4), (5), (7), (8), (9),
5 (10), and (11);
6

7 (2) The total maximum compensation to be paid
8 private attorneys for all services rendered
9 in the cases described shall be as follows:
10 subsection (1) \$200; subsection (2) \$500;
11 subsection (3) \$1,000; subsection (4)
12 \$1,000; subsection (5) \$2,000; subsection
13 (6) \$2,000 in each appellate court;
14 subsection (7) \$1,000; subsection (8)
15 \$1,000; subsection (9) \$1,000; and
16 subsection (11) \$200.
17


18 (3) This amendment shall apply to work
19 performed after 12 midnight August 31,
20 1994.
21

22 It is so ORDERED, ADJUDGED, AND DECREED
23 17th day of August, 1994.
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25
26 
27 Lyle Reid, Chief Justice

28
29 
30 Frank F. Drowota, III, Justice

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Charles H. O'Brien, Justice

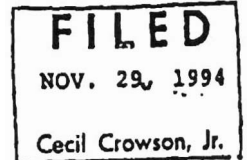

E. Riley Anderson, Justice


Adolpho A. Birch, Jr., Justice

PEACE
LIBERTY
JUSTICE

EXHIBITS D

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE



IN RE: THE INDIGENT CRIMINAL JUSTICE SYSTEM
(No. 01S01-9307-OT-00144)

O R D E R

In furtherance of the order entered by the Court on August 18, 1994, regarding the indigent criminal justice system it is hereby ORDERED:

(1) The following persons are appointed to serve as members of the Indigent Defense Commission:

Mr. William M. Leech, Jr.
Waller, Lansden, Dortch & Davis
Nashville City Center
511 Union Street, Suite 2100
P. O. Box 198966
Nashville, TN 37219-8966

Ms. Sherrye J. Brown
Assistant Public Defender
Shelby County Government
Room 2-01, 201 Poplar Avenue
Memphis, TN 38103

Mr. Comer L. Donnell
District Public Defender
213 North Cumberland Street
P. O. Box 888
Lebanon, TN 37088-0888

Ms. Ardena J. Garth
District Public Defender
701 Cherry Street, Suite 300
Chattanooga, TN 37402

Mr. Robert W. Ritchie
Ritchie, Fels & Dillard, P.C.
Suite 300, Main Place
606 W. Main Street

P. O. Box 1126
Knoxville, TN 37901-1126

Judge Andrew J. Shookhoff
Juvenile Court of Davidson County
100 Woodland Street
Nashville, TN 37213

Ms. Ann C. Short
Law Offices of Herbert S. Moncier
Suite 775, Nations Bank
550 Main Avenue
Knoxville, TN 37902

Mr. Mark E. Stephens
District Public Defender
1209 Euclid Avenue
Knoxville, TN 37921

Mr. Tarik B. Sugarmon
Noel & Sugarmon
65 Union Avenue, Suite 200
Memphis, TN 38103

Mr. James L. Weatherly, Jr.
Hollins, Wagster & Yarbrough, P.C.
22nd Floor, Third National Financial Center
424 Church Street
Nashville, TN 37219

Ms. Martha Yoakum
District Public Defender
P. O. Box 386
Tazewell, TN 37879

(2) The following persons shall serve for a period of one year, said term to begin upon entry of this order and expiring January 1, 1996:

1. Ms. Ann C. Short
2. Mr. Tarik B. Sugarmon
3. Ms. Martha Yoakum

(3) The following members are appointed for a period of two years, said term commencing with the entry of this order and expiring January 1, 1997:

1. Mr. Comer L. Donnell
2. Judge Andrew J. Shookhoff
3. Mr. Mark E. Stephens
4. Mr. James L. Weatherly, Jr.

(3) The remaining members are to serve for a period of three years. The terms shall commence upon entry of this order and expire January 1, 1998.

(4) The Court is pleased to appoint the Honorable William M. Leech, Jr., as chairperson of the Commission.

(5) The Commission shall convene at the call of the chairperson and shall adopt rules of operation consistent with the Court's order of August 18, 1994.

(6) The Commission is requested to submit to the Court a comprehensive plan for providing legal services to indigent defendants in the state court system.

It is so ORDERED, ADJUDGED, AND DECREED this 18th day of November, 1994.


E. Riley Anderson, Chief Justice


Frank F. Drowota, III, Justice

Isle Reid
Isle Reid, Justice

Adolpho A. Birch, Jr.
Adolpho A. Birch, Jr., Justice

This Order is entered nunc pro tunc,
same having been signed on the 18th
day of November, 1994, and is entered
now for then. 11/29/94.

I, Cecil Crowson, Jr., Clerk hereby certify that
this is a true and exact copy of the original

Order
filed in the court.

This 29th day of Nov. 1994.
CLERK OF COURT

By: Wynette M. Shattman
Deputy Clerk

PEACE

LIBERTY

JUSTICE

EXHIBITS E

FILED

DEC 29 1995

Cecil Crowson, Jr.

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

**IN RE: THE INDIGENT DEFENSE COMMISSION
(No. 01S01-9307-OT-00144)**

ORDER

It appearing to the Court that Indigent Defense Commission members Sherrye J. Brown and Tarik B. Sugarmon have resigned from the Commission, the Court is pleased to appoint the following members to the Indigent Defense Commission for the designated terms:

Jan Rochester Patterson
Jackson, Tennessee
(to fill the unexpired term of Sherrye J. Brown, which will
expire on January 1, 1998)

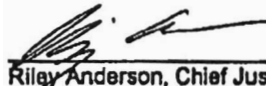
Michael Cody
Memphis, Tennessee
(for a one-year term beginning January 1, 1996)

The Court wishes to recognize and thank Ms. Brown and Mr. Sugarmon for their faithful and exemplary service to the Indigent Defense Commission.

In addition, the Court is please to reappoint Ms. Ann C. Short and Ms. Martha Yoakum to a second one-year term on the Commission, beginning January 1, 1996.

Enter this the 28th day of December, 1995.

FOR THE COURT


Riley Anderson, Chief Justice

PEACE

LIBERTY

JUSTICE

EXHIBITS F

ABA GUIDELINES: APPOINTMENT & PERFORMANCE OF COUNSEL IN DEATH CASES

GUIDELINE 1.1 OBJECTIVE

The objective in providing counsel in cases in which the death penalty is sought should be to ensure that quality legal representation is afforded to defendants eligible for the appointment of counsel during all stages of the case.

GUIDELINE 2.1 NUMBER OF ATTORNEYS PER CASE

In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant. In cases where the death penalty has been imposed, two qualified appellate attorneys should be assigned to represent the defendant.- In cases where appellate proceedings have been completed or are not available and the death penalty has been imposed, two qualified post-conviction attorneys should be assigned to represent the defendant.

GUIDELINE 3.1 THE LEGAL REPRESENTATION PLAN

The legal representation plan for each jurisdiction should include measures to formalize the process by which attorneys are assigned to represent capital defendants. To accomplish this goal, the plan should designate a body (appointing authority) within the jurisdiction which will be responsible for performing all duties in connection with the appointment of counsel as set forth by these Guidelines. This Guideline envisions two equally acceptable approaches for formalizing the process of appointment:

- a. The authority to recruit and select competent attorneys to provide representation in capital cases may be centralized in the defender office or assigned counsel program of the jurisdiction. The defender office or assigned counsel program should adopt standards and procedures for the appointment of counsel in capital cases consistent with these Guidelines, and perform all duties in connection with the appointment process as set forth in these Guidelines.
- b. In jurisdictions where it is not feasible to centralize the tasks of recruiting and selecting competent counsel for capital cases in a defender office or assigned counsel program, the legal representation plan should provide for a special appointments committee to consist of no fewer than five attorneys who:
 - i. are members of the bar admitted to practice in the jurisdiction;

- ii. have practiced law in the field of criminal defense for not less than five years;
- iii. have demonstrated knowledge of the specialized nature of practice involved in capital cases;
- iv. are knowledgeable about criminal defense practitioners in the jurisdiction; and
- v. are dedicated to quality legal representation in capital cases.

The committee should adopt standards and procedures for the appointment of counsel in capital cases, consistent with these Guidelines, and perform all duties in connection with the appointment process.

GUIDELINE 4.1 SELECTION OF COUNSEL

A. The legal representation plan should provide for a systematic and publicized method for distributing assignments in capital cases as widely as possible among qualified members of the bar.

B. The appointing authority should develop procedures to be used in establishing two rosters of attorneys who are competent and available to represent indigent capital defendants. The first roster should contain the names of attorneys eligible for appointment as lead defense counsel for trial, appeal or post-conviction pursuant to the qualification requirements specified in Guideline 5.1; the second roster should contain the names of attorneys eligible for appointment as assistant defense counsel for trial, appeal or post-conviction pursuant to the qualification requirements specified in the same Guideline.

C. The appointing authority should review applications from attorneys concerning their placement on the roster of eligible attorneys from which assignments are made, as discussed in subsection (b). The review of an application should include a thorough investigation of the attorneys background, experience, and training, and an assessment of whether the attorney is competent to provide quality legal representation to the client pursuant to the qualification requirements specified in Guideline 5.1 and the performance standards established pursuant to Guidelines 11.1 and 11.2. An attorney's name should be placed on either roster upon a majority vote of the committee.

D. Assignments should then be made in the sequence that the names appear on the roster of eligible attorneys. Departures from the practice of strict rotation of assignments may be made when such departure will protect the best interests of the client. A lawyer should never be assigned for reasons personal to the committee members making assignments.

In jurisdictions where a defender office or other entity by law receives a specific portion of or all assignments, the procedures in (b) through (d) above should be followed for cases which the defender office or other entity cannot accept due to conflicts of interest or other reasons.

GUIDELINE 5.1 ATTORNEY ELIGIBILITY

The appointing authority should distribute assignments to attorneys who qualify under either of the alternative procedures detailed below in paragraphs I. TRIAL, II. APPEAL, and III. POSTCONVICTION.

I. TRIAL

- A. Lead trial counsel assignments should be distributed to attorneys who**
- i. are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and**
 - ii. are experienced and active trial practitioners with at least five years litigation experience in the field of criminal defense; and**
 - iii. have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and an additional five were felony jury trials; and**
 - iv. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and**
 - v. are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and**
 - vi. have attended and successfully completed, within one year of their appointment, a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and**
 - vii. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.**

- B. Trial co-counsel assignments should be distributed to attorneys who:**
- i. are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and**
 - ii. who qualify as lead counsel under paragraph (A) of this Guideline or meet the following requirements:**
 - a. are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and**
 - b. have prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases which were tried to completion, at least two of which were trials in which the charge was murder or aggravated murder; or alternatively, of the three jury trials, at least one was a murder or aggravated murder trial and one was a felony jury trial; and**
 - c. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and**
 - d. have completed within one year of their appointment at least one training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and**
 - e. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.**

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial experience or extensive civil litigation experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

- i. Experience in the trial of death penalty cases which does not meet the levels detailed in paragraphs A or B above;**
- ii. Specialized post-graduate training in the defense of persons accused of capital crimes;**

- iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

II. APPEAL

A. Lead appellate counsel assignments should be distributed to attorneys who:

- i. are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and
- ii. are experienced and active trial or appellate practitioners with at least three years experience in the field of criminal defense; and
- iii. have prior experience within the last three years as lead counsel or co-counsel in the appeal of at least one case where a sentence of death was imposed, as well as prior experience within the last three years as lead counsel in the appeal of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of murder or aggravated murder conviction; or alternatively, have prior experience within the last three years as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder or aggravated murder conviction; and
- iv. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and
- v. have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the appeal of cases in which a sentence of death was imposed; and
- vi. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Appellate co-counsel assignments may be distributed to attorneys who have less experience than attorneys who qualify as lead appellate counsel. At a minimum, however, appellate co-counsel candidates must demonstrate to the satisfaction of the appointing authority that they:

- i. are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and

- ii. have demonstrated adequate proficiency in appellate advocacy in the field of felony defense; and
- iii. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and
- iv. have attended and successfully completed within two years of their appointment a training or educational program on criminal appellate advocacy.

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial and/or appellate experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

- i. Experience in the trial and/or appeal of death penalty cases which does not meet the levels detailed in paragraphs A or B above;
- ii. Specialized post-graduate training in the defense of persons accused of capital crimes;
- iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

III. POSTCONVICTION

A. Assignments to represent indigents in post-conviction proceedings in capital cases should be distributed to attorneys who:

- i. are members of the bar admitted to practice in the jurisdiction or admitted to practice Pro hac vice; and
- ii. are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and
- iii. have prior experience as counsel in no fewer than five jury or bench trials of serious and complex cases which were tried to completion, as well as prior experience as post-conviction counsel in at least three cases in state

or federal court. In addition, of the five jury or bench trials which were tried to completion, the attorney should have been counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the five trials, at least one was a murder or aggravated murder trial and an additional three were felony jury trials; and

- iv. are familiar with the practice and procedure of the appropriate courts of the jurisdiction; and
- v. have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the post-conviction phase of a criminal case, or alternatively, a program which focused on the trial of cases in which the death penalty is sought; and
- vi. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

In addition to the experience level detailed above, it is desirable that at least one of the two post-conviction counsel also possesses appellate experience at the level described in II.B. above (relating to appellate co-counsel).

B. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial, appellate and/or post-conviction experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

- i. Experience in trial, appeal and/or post-conviction representation in death penalty cases which does not meet the levels detailed in paragraph A above;
- ii. Specialized post-graduate training in the defense of persons accused of capital crimes;
- iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

GUIDELINE 6.1 WORKLOAD

Attorneys accepting appointments pursuant to these Guidelines should provide each client with quality representation in accordance with constitutional and professional standards. Capital counsel should not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

GUIDELINE 7.1 MONITORING; REMOVAL

A. The appointing authority should monitor the performance of assigned counsel to ensure that the client is receiving quality representation. Where there is compelling evidence that an attorney has inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to the client's case, the attorney should not receive additional appointments. Where there is compelling evidence that an unalterable systemic defect in a defender office has caused a default in the basic responsibilities of an effective lawyer, resulting in prejudice to a client's case, the office should not receive additional appointments. The appointing authority shall establish a procedure which gives written notice to counsel or a defender office whose removal is being sought, and an opportunity for counsel or the defender office to respond in writing.

B. In fulfilling its monitoring function, however, the appointing authority should not attempt to interfere with the conduct of particular cases. Representation of an accused establishes an inviolable attorney-client relationship. In the context of a particular case, removal of counsel from representation should not occur over the objection of the client.

C. No attorney or defender office should be readmitted to the appointment roster after removal under (a) above unless such removal is shown to have been erroneous or it is established by clear and convincing evidence that the cause of the failure to meet basic responsibilities has been identified and corrected.

GUIDELINE 8.1 SUPPORTING SERVICES

The legal representation plan for each jurisdiction should provide counsel appointed pursuant to these Guidelines with investigative, expert, and other services necessary to prepare and present 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 representation at every stage of the proceedings, including the sentencing phase.

GUIDELINE 9.1 TRAINING

Attorneys seeking eligibility to receive appointments pursuant to these Guidelines should have completed the training requirements specified in Guideline 5.1. Attorneys seeking to remain on the roster of attorneys from which assignments are made should continue, on a periodic basis, to attend and successfully complete training or educational programs which focus on advocacy in death penalty cases. The legal representation plan for each jurisdiction should include sufficient funding to enable adequate and frequent training programs to be conducted for counsel in capital cases and counsel who wish to be placed on the roster.

GUIDELINE 10.1 COMPENSATION

A. Capital counsel should be compensated for actual time and service performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation.

B. Capital counsel should also be fully reimbursed for reasonable incidental expenses.

C. Periodic billing and payment, during the course of counsel's representation should be provided for in the representation plan.

GUIDELINE 11.1 ESTABLISHMENT OF PERFORMANCE STANDARDS

A. The appointing authority should establish standards of performance for counsel appointed in death penalty cases.

B. The standards of performance should include, but should not be limited to, the specific standards set out in Guidelines 11.3 through 11.9.

C. The appointing authority should refer to the standards of performance when assessing the qualification of attorneys seeking to be placed on the roster from which appointments in death penalty cases are to be made (Guideline 4.1) and in monitoring the performance of attorneys to determine their continuing eligibility to remain on the roster (Guideline 7.1).

GUIDELINE 11.2 MINIMUM STANDARDS NOT SUFFICIENT

A. Minimum standards that have been promulgated concerning representation of defendants in criminal cases generally, and the level of adherence to such standards required for non-capital cases, should not be adopted as sufficient for death penalty cases.

B. Counsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation.

GUIDELINE 11.3 DETERMINING THAT DEATH PENALTY IS BEING SOUGHT

Counsel appointed in any case in which the death penalty is a possible punishment should, even if the prosecutor has not indicated that the death penalty will be sought, begin preparation for the case as one in which the death penalty will be sought while employing strategies to have the case designated by the prosecution as a non-capital one.

GUIDELINE 11.4.1 INVESTIGATION

A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

B. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

C. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

D. Sources of investigative information may include the following:

1. **Charging Documents:** Copies of all charging documents in the case should be obtained, and examined in the context of the applicable statutes and precedents, to identify (inter alia):

- a. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;
 - b. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;
 - c. any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) which can be raised to attack the charging documents.
2. **The Accused:** An interview of the client should be conducted within 24 hours of counsel's entry into the case, unless there is a good reason for counsel to postpone this interview. In that event, the interview should be conducted as soon as possible after counsel's appointment. As soon as is appropriate, counsel should cover a-e below (if this is not possible during the initial interview, these steps should be accomplished as soon as possible thereafter):
- a. seek information concerning the incident or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights;
 - b. explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors;
 - c. Collect information relevant to the sentencing phase of trial including, but not limited to: medical history, (mental and physical illness or injury, alcohol and/or drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior) special educational needs including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct or supervision and in the institution/education or training/clinical services); and religious and cultural influences.
 - d. seek necessary releases for securing confidential records relating to any of the relevant histories.

- e. Obtain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in (c) above.
3. **Potential Witnesses:** Counsel should consider interviewing potential witnesses, including:
- a. eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;
 - b. witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death;
 - c. members of the victim's family opposed to having the client killed. Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.
4. **The Police and Prosecution:** Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.
5. **Physical Evidence:** Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing.
6. **The Scene:** Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g. weather, time of day, and lighting conditions).
7. **Expert Assistance:** Counsel should secure the assistance of experts where it is necessary or appropriate for:
- a. preparation of the defense;
 - b. adequate understanding of the prosecution's case;
 - c. rebuttal of any portion of the prosecution's case at the guilt/ innocence phase or the sentencing phase of the trial;

- d. presentation of mitigation. Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information.

GUIDELINE 11.4.2 CLIENT CONTACT

Trial counsel should maintain close contact with the client throughout preparation of the case, discussing (inter alia) the investigation, potential legal issues that exist or develop, and the development of a defense theory.

GUIDELINE 11.5.1 THE DECISION TO FILE PRETRIAL MOTIONS

A. Counsel should consider filing a pretrial motion whenever there exists reason to believe that applicable law may entitle the client to relief or that legal and/or policy arguments can be made that the law should provide the requested relief.

B. Counsel should consider all pretrial motions potentially available, and should evaluate them in light of the unique circumstances of a capital case, including the potential impact of any pretrial motion or ruling on the strategy for the sentencing phase, and the likelihood that all available avenues of appellate and post-conviction relief will be sought in the event of conviction and imposition of a death sentence. Among the issues that counsel should consider addressing in a pretrial motion are:

1. the pretrial custody of the accused;
2. the constitutionality of the implicated statute or statutes;
3. the potential defects in the charging process;
4. the sufficiency of the charging document;
5. the propriety and prejudice of any joinder of charges or defendants in the charging document;
6. the discovery obligations of the prosecution including disclosure of, aggravating factors to be used in seeking the death penalty, and any reciprocal discovery obligations of the defense;

7. the suppression of evidence gathered as the result of violations of the Fourth, Fifth or Sixth Amendments to the United States Constitution, including:
 - a. the fruits of illegal searches or seizures;
 - b. involuntary statements or confessions; statements or confessions obtained in violation of the accused's right to counsel, or privilege against self-incrimination;
 - c. unreliable identification testimony which would give rise to a substantial likelihood of irreparable misidentification;
 - d. suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;
8. access to resources which may be denied to the client because of indigency and which may be necessary in the case, including independent and confidential investigative resources, jury selection assistance, and expert witnesses concerning not only the charged offense(s) and the client's mental condition, but also the criminal justice system itself;
9. the defendant's right to a speedy trial;
10. the defendant's right to a continuance in order to adequately prepare his or her case;
11. matters of evidence or procedure at either the guilt/innocence or penalty phase of trial which may be appropriately litigated by means of a pretrial motion in limine. including requests for sequestered, individual voir dire as to the death qualification of jurors and any challenges to overly restrictive rules or procedures;
12. matters of trial or courtroom procedure;
13. change of venue;
14. abuse of prosecutorial discretion in seeking the death penalty;
15. challenges to the process of establishing the jury venire.

GUIDELINE 11.6.1 THE PLEA NEGOTIATION PROCESS

- A.** Counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to a trial. In so doing, counsel should fully explain the rights that would be waived by a decision to enter a plea instead of proceeding to trial, and should explain the legal and/or factual considerations that bear on the potential results of going to trial.
- B.** Counsel should ordinarily obtain the consent of the client before entering into any plea negotiations.
- C.** Counsel should keep the client fully informed of any continued plea discussion or negotiations, convey to the client any offers made by the prosecution for a negotiated settlement and discuss with the client possible strategies for obtaining an offer from the prosecution.
- D.** Counsel should not accept any plea agreement without the client's express authorization.
- E.** The existence of ongoing plea negotiations with the prosecution does not relieve counsel of the obligation to take steps necessary to prepare a defense. If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate.

GUIDELINE 11.6.2 THE CONTENTS OF PLEA NEGOTIATIONS

- A.** In order to develop an overall negotiation plan, counsel should be fully aware of and make sure the client is fully aware of:
 - 1.** the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included offenses;
 - 2.** where applicable, any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation and civil liabilities, as well as direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good-time credits;
 - 3.** the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing guidelines or mandatory sentencing requirements.

B. In developing a negotiation strategy, counsel should be completely familiar with, inter alia:

- 1. concessions that the client might offer, such as:**
 - a. an agreement not to proceed to trial on the merits of the charges;**
 - b. an agreement not to assert or further litigate particular legal issues;**
 - c. an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;**
 - d. an agreement to engage in or refrain from any other conduct, appropriate to the case.**

- 2. benefits the client might obtain from a negotiated settlement, including inter alia:**
 - a. a guarantee that the death penalty will not be imposed;**
 - b. an agreement that the defendant will receive, with the assent of the court, a specified sentence;**
 - c. an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;**
 - d. an agreement that one or more of multiple charges will be reduced or dismissed;**

 - e. an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;**
 - f. an agreement that the client may enter a conditional plea to preserve the right to further contest certain issues affecting the validity of the conviction.**

C. In conducting plea negotiations, counsel should be familiar with:

1. the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere or other plea which does not require the client to personally acknowledge guilt;
2. the advantages and disadvantages of each available plea according to the circumstances of the case;
3. whether a plea agreement can be made binding on the court and on penal/parole authorities.

D. In conducting plea negotiations, counsel should attempt to become familiar with the practice and policies of the particular jurisdiction, the judge and prosecuting authority, the family of the alleged victim and any other persons or entities which may affect the content and likely results of plea negotiations.

GUIDELINE 11.6.3 THE DECISION TO ENTER A PLEA OF GUILTY

A. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement along with the advantages, disadvantages and potential consequences of the agreement.

B. The decision to enter or to not enter a plea of guilty should be based solely on the client's best interest.

GUIDELINE 11.6.4 ENTRY OF THE PLEA BEFORE THE COURT

A. Prior to the entry of the plea, counsel should:

1. make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;
2. make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions and other consequences the accused will be exposed to by entering a plea;
3. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions from the judge and providing a statement concerning the offense.

B. During entry of the plea, counsel should make sure that the full content and conditions of the plea agreement are placed on the record before the court.

GUIDELINE 11.7.1 GENERAL TRIAL PREPARATION

A. As the investigations mandated by Guideline 11.4.1 produce information, counsel should formulate a defense theory. In doing so, counsel should consider both the guilt/innocence phase and the penalty phase, and seek a theory that will be effective through both phases.

B. If inconsistencies between guilt/innocence and penalty phase defenses arise, counsel should seek to minimize them by procedural or substantive tactics.

GUIDELINE 11.7.2 VOIR DIRE AND JURY SELECTION

A. Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case, whether any procedures have been instituted for selection of juries in capital cases that present potential legal bases for challenge.

B. Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualifications" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

GUIDELINE 11.7.3 OBJECTION TO ERROR AND PRESERVATION OF ISSUES FOR POST JUDGMENT REVIEW

Counsel should consider, when deciding whether to object to legal error and whether to assert on the record a position regarding any procedure or ruling, that post judgment review in the event of conviction and sentence is likely, and counsel should take steps where appropriate to preserve, on all applicable state and Federal grounds, any given question for review .

GUIDELINE 11.8.1 OBLIGATION OF COUNSEL AT THE SENTENCING PHASE OF DEATH PENALTY CASES

Counsel should be aware that the sentencing phase of a death penalty trial is constitutionally different from sentencing proceedings in other criminal cases.

GUIDELINE 11.8.2 DUTIES OF COUNSEL REGARDING SENTENCING OPTIONS, CONSEQUENCES AND PROCEDURES

- A.** Counsel should be familiar with the procedures for capital sentencing in the given jurisdiction, with the prosecutor's practice in preparing for and presenting the prosecution's case at the sentencing phase, and with the caselaw and rules regarding what information may be presented to the sentencing entity or entities, and how that information may be presented. Counsel should insist that the prosecutor adhere to the applicable evidentiary rules unless a valid strategic reason exists for counsel not to insist.
- B.** If the client has chosen not to proceed to trial and a plea of guilty or its equivalent has been negotiated and entered by counsel in accordance with Guidelines 11.6.1 through 11.6.4, counsel should seek to ensure compliance with all portions of the plea agreement beneficial to the client.
- C.** Counsel should seek to ensure that the client is not harmed by improper, inaccurate or misleading information being considered by the sentencing entity or entities in determining the sentence to be imposed.
- D.** Counsel should ensure that all reasonably available mitigating and favorable information consistent with the defense sentencing theory is

GUIDELINE 11.8.3 PREPARATION FOR THE SENTENCING PHASE

- A.** As set out in Guideline 11.4.1, preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case. Counsel should seek information to present to the sentencing entity or entities in mitigation or explanation of the offense and to rebut the prosecution's sentencing case.
- B.** Counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between strategy for the sentencing phase and for the guilt/innocence phase.
- C.** Prior to the sentencing phase, counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing. Counsel should discuss with the client the accuracy of any information known to counsel that will be presented to the sentencing entity or entities, and the strategy for meeting the prosecution's case.
- D.** If the client will be interviewed by anyone other than people working with defense counsel, counsel should prepare the client for such interview(s). Counsel should discuss with the client the possible impact on the sentence and later potential proceedings

(such as appeal, subsequent retrial or resentencing) of statements the client may give in the interviews.

E. Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing entity or entities.

F. In deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following:

1. Witnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evidence presented by the prosecutor;
2. Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor;
3. Witnesses with knowledge and opinions about the lack of effectiveness of the death penalty itself;
4. Witnesses drawn from the victim's family or intimates who are willing to speak against killing the client.

GUIDELINE 11.8.4 THE OFFICIAL PRESENTENCE REPORT

A. If an official presentence report or similar document may or will be presented to the court at any time, counsel should consider:

1. The strategic implications of requesting that an optional report be prepared;
2. The value of providing to the report preparer information favorable to the client.

B. Counsel should review any completed report and take appropriate steps to ensure that improper, incorrect or misleading information that may harm the client is deleted from the report.

C. Counsel should take steps to preserve and protect the client's interest regarding material that has been challenged by the defense as improper, inaccurate or misleading.

D. Counsel should consider whether the client should speak with the person preparing the report and, if so, whether counsel should be present.

GUIDELINE 11.8.5 THE PROSECUTOR'S CASE AT THE SENTENCING PHASE

A. Counsel should attempt to determine at the earliest possible time what aggravating factors the prosecution will rely on in seeking the death penalty and what evidence will be offered in support thereof (Guideline 11.3). If the jurisdiction has rules regarding notification of these factors, counsel should object to any non-compliance, and if such rules are inadequate, should consider challenging the adequacy of the rules.

B. If counsel determines that the prosecutor plans to rely on or offer arguably improper, inaccurate or misleading evidence in support of the request for the death penalty, counsel should consider appropriate pretrial or trial strategies in response.

GUIDELINE 11.8.6 THE DEFENSE CASE AT THE SENTENCING PHASE

A. Counsel should present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence.

B. Among the topics counsel should consider presenting are:

1. Medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays);
2. Educational history (including achievement, performance and behavior, special educational needs including cognitive limitations and learning disabilities) and opportunity or lack thereof;
3. Military service, (including length and type of service, conduct, and special training);
4. Employment and training history (including skills and performance, and barriers to employability);
5. Family, and social history (including physical, sexual or emotional abuse, neighborhood surroundings and peer influence); and other cultural or religion influence, professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof; prior correctional experience (including conduct on supervision and in institutions, education or training and clinical services);

6. Rehabilitative potential of the client.
7. Record of prior offenses (adult and juvenile), especially where there is no record, a short record, or a record of non-violent offenses.
8. Expert testimony concerning any of the above and the resulting impact on the client, relating to the offense and to the client's potential at the time of sentencing.

C. Counsel should consider all potential methods for offering mitigating evidence to the sentencing entity or entities, including witnesses, affidavits, reports (including, if appropriate, a defense presentence report which could include challenges to inaccurate, misleading or incomplete information contained in the official presentence report and/or offered by the prosecution, as well as information favorable to the client), letters and public records.

D. Counsel may consider having the client testify or speak during the closing argument of the sentencing phase.

GUIDELINE 11.9.1 DUTIES OF TRIAL COUNSEL IN POST JUDGMENT PROCEEDINGS

A. Counsel should be familiar with all state and federal post judgment options available to the client. Counsel should consider and discuss with the client the post judgment procedures that will or may follow imposition of the death sentence.

B. Counsel should take whatever action, such as filing a claim or notice of appeal, is necessary to preserve the client's right to post judgment review of the conviction and sentence. Counsel should consider what other post judgment action, if any, counsel could take to maximize the client's opportunity to seek appellate and post-conviction relief.

C. Trial counsel should not cease acting on the client's behalf until subsequent counsel has entered the case or trial counsel's representation has been formally terminated.

D. Trial counsel should cooperate with subsequent counsel concerning information regarding trial-level proceedings and strategies.

GUIDELINE 11.9.2 DUTIES OF APPELLATE COUNSEL

- A. Appellate counsel should be familiar with all state and federal appellate and post-conviction options available to the client, and should consider how any tactical decision might affect later options.
- B. Appellate counsel should interview the client, and trial counsel if possible, about the case, including any relevant matters that do not appear in the record. Counsel should consider whether any potential off-record matters should have an impact on how the appeal is pursued, and whether an investigation of any matter is warranted.
- C. Appellate counsel should communicate with the client concerning both the substance and procedural status of the appeal.
- D. Appellate counsel should seek, when perfecting the appeal, to present all arguably meritorious issues, including challenges to any overly restrictive appellate rules.
- E. Appellate counsel should cooperate with any subsequent counsel concerning information about the appellate proceedings and strategies, and about information obtained by appellate counsel concerning earlier stages of the case.

GUIDELINE 11.9.3 DUTIES OF POSTCONVICTION COUNSEL

- A. Post-conviction counsel should be familiar with all state and federal post-conviction remedies available to the client.
- B. Post-conviction counsel should interview the client, and previous counsel if possible, about the case. Counsel should consider conducting a full investigation of the case, relating to both the guilt/innocence and sentencing phases. Post-conviction counsel should obtain and review a complete record of all court proceedings relevant to the case. With the consent of the client, post-conviction counsel should obtain and review all prior counsel's file(s).
- C. Post-conviction counsel should seek to present to the appropriate court or courts all arguably meritorious issues, including challenges to overly restrictive rules governing post-conviction proceedings.

GUIDELINE 11.9.4 DUTIES OF CLEMENCY COUNSEL

- A. Clemency counsel should be familiar with the procedures for and permissible substantive content of a request for clemency.

B. Clemency counsel should interview the client, and any prior attorneys if possible, and conduct an investigation to discover information relevant to the clemency procedure applicable in the jurisdiction.

C. Clemency counsel should take appropriate steps to ensure that clemency is sought in as timely and persuasive a manner as possible.

GUIDELINE 11.9.5 DUTIES COMMON TO ALL POST JUDGMENT COUNSEL

A. Counsel representing a capital client at any point after imposition of the death sentence should be familiar with the procedures by which execution dates are set and how notification of that date is made. Counsel should also be familiar with the procedures for seeking a stay of execution from all courts in which the case may be lodged when an execution date is set.

B. Counsel should take immediate steps to seek a stay of execution, and to appeal from any denial of a stay, in any and all available courts when an execution date is set.

C. Counsel should continually monitor the client's mental, physical and emotional condition to determine whether any deterioration in the client's condition warrants legal action.

PEACE

LIBERTY

JUSTICE

EXHIBITS G

TENNESSEE SUPREME COURT RULE _____

I. Qualification for Eligibility to be Court-Appointed Counsel for Indigent Defendants Charged with a Capital Offense in the Courts of Tennessee

A. Trial Counsel.

(1) At least two attorneys must be court-appointed to represent an indigent defendant charged with a capital offense. At least one of the appointed counsel must maintain a law office in the state of Tennessee and have experience in Tennessee criminal trial practice. The counsel appointed shall be designated "lead counsel" and "co-counsel."

(2) Court-Appointed "Lead Counsel" must:

- a) be admitted to the Tennessee Bar or admitted to practice pro hac vice;
- b) have at least three years of substantially criminal competent trial experience;
- c) have had a minimum of twelve (12) hours of specialized training in the defense of persons accused of capital crimes; and
- d) have at least one of the following qualifications [(i) to (iv)]:
 - I. competent experience as "lead counsel" in the jury trial of at least one capital case;
 - II. competent experience as "co-counsel" in the trial of at least two capital cases;
 - III. competent experience as "co-counsel" in the trial of a capital case; and competent experience as "lead counsel" in the jury trial of at least one murder case; or
 - IV. competent experience as "lead counsel" in at least:
 - Three murder jury trials; or
 - One murder jury trial and three felony jury trials.

(3) Court--appointed "Co-Counsel" must:

- a) be admitted to the Tennessee Bar or admitted to practice pro hac vice;
- b) have at least a minimum of twelve (12) hours of specialized training in the defense of persons accused of capital crimes;
- c) have at least one of the following qualifications:
 - I. qualify as "lead counsel" under A.(2) above;

II. competent experience as "lead" or "co-counsel" in a capital case;

III. competent experience as "co-counsel" in a murder trial.

(4) Exceptional Circumstances. -- If an attorney does not meet the qualification requirements of paragraphs A.(2) or A.(3) above, the attorney may still be court-appointed "lead" or "co-counsel" at trial if it can be demonstrated to the satisfaction of the majority of the committee (see, section III.) that competent representation will be provided to the defendant. In determining whether an attorney may be qualified under this paragraph, the committee may consider the following:

- a) competent experience in the trial of criminal jury trials;
- b) specialized post-graduate training as defense counsel in criminal jury trials;
- c) specialized training in the defense of persons accused of capital crimes;
- d) any other relevant considerations.

B. Appellate Counsel.

(1) Trial counsel may be appellate counsel, if one or both of the trial counsel qualify under this rule as appellate counsel. Even if trial counsel qualifies as appellate counsel, new counsel may be substituted, if, as determined by the trial court, it is in the best interests of the defendant or if prior counsel is otherwise unavailable. Appellate counsel should expect to represent the defendant through every stage of appellate litigation, including to the United States Supreme Court.

(2) At least two attorneys must be court-appointed to appeal cases where the death penalty has been imposed and where trial counsel has been granted leave to withdraw or supplemental counsel is being appointed. Both counsel must possess competent criminal appellate, post-conviction, or habeas corpus experience commensurate with the appellate responsibilities of a capital case. At least one of the appointed counsel must maintain a law office in Tennessee.

(3) Both Appellate Counsel must:

- a) be admitted to the Tennessee Bar or admitted to practice pro hac vice;
- b) have three (3) years of litigation experience; and
- c) have competent experience as counsel of record in the appeal of a case where the death penalty was the sentence; or
 - i. have competent experience as the attorney of record in the appeal of at least three felony convictions within the past three (3) years and have a minimum of twelve (12) hours of specialized training in the trial or appeal of cases in which the death penalty was being sought.

II. have submitted to the committee (see, section III.) a copy of the briefs prepared by counsel in the cases to be considered for eligibility under this rule.

(d) expect to represent the defendant through every stage of appellate litigation, including the United States Supreme Court.

(4) Exceptional Circumstances. -- If any attorney does not meet the qualification requirements of paragraph B.(2) above, the attorney may still be court-appointed appellate counsel if it can be demonstrated to the satisfaction of a majority of the committee (see, section III) that competent representation will be provided to the defendant. In so determining, the committee may consider the following:

- a) specialized training for defense counsel in the trial or appeal of cases in which the death penalty may be imposed;
- b) experience in the trial or appeal as defense counsel in criminal cases;
- c) any other relevant considerations.

C. Post-Conviction Counsel.

Counsel eligible to be appointed as post-conviction counsel must:

- a) have the same qualifications as appellate counsel, see, I.(B);
- b) have competent experience as counsel of record on state post-conviction (at trial and appellate level) in:
 - (i) three felony cases; or
 - (ii) two homicide cases; or
 - (iii) one capital case; and
- (c) have a competent working knowledge of federal habeas corpus practice which may be satisfied by six (6) hours of specialized training in the representation of persons with state death sentences in federal court on habeas corpus petitions.

Commission Comments

The proposed minimum standards for eligibility to be court-appointed counsel for indigent capital defendants are recommended for adoption in recognition of and in response to the risk of having inexperienced, ill-prepared counsel appointed to represent persons charged with capital crimes, thereby increasing the chance that an innocent person may be convicted or that one convicted of a capital crime may be inappropriately sentenced to death. Further, the proposed rule advances the right to qualified appellate and post conviction counsel of the defendant convicted and sentenced to death.

II. Retained or Appointed Counsel; Qualifications and Standards of Performance the Trial Court's Obligation.

(1) The Court shall appoint only counsel who are eligible pursuant to this rule as recognized by the committee (see section, III.). The fact that attorneys meet the minimum qualifications to be counsel under this rule is not criteria for assessing the effectiveness of counsel in a particular case.

(2) The minimum obligations in section I. apply automatically as a matter of rule to court-appointed counsel. In a capital case, the trial judge shall have the obligation to assess the performance of counsel for the defendant on a continuing basis and if the trial court at any time during the course of the proceedings is not satisfied with the performance of court-appointed counsel, using the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (hereinafter referred to as, ABA Guidelines), specifically, see: Guidelines 11.1 through 11-9.5, as a standard, it may appoint substitute or additional counsel.

(3) In the event that counsel was retained and not eligible for appointment in a capital case, pursuant to this rule, the burden shall be on the court to inquire on the record into the qualifications of counsel (referring to section I. of this rule as a standard) and observe the performance of counsel (using the ABA Guidelines as a standard). If the court is not satisfied with either counsel's qualifications or performance at any time in the course of the proceedings, it shall advise the defendant of its right to effective assistance of counsel, referring to applicable portions of this rule and to the ABA Guidelines; and the court shall give the defendant sufficient time and opportunity to retain substitute or additional eligible counsel or to accept an appointment of substitute or additional eligible counsel, if financially unable to retain same. If necessary, the court shall inquire into the competency of the defendant's choice of counsel.

Commission Comments

The court shall not appoint anyone to a capital case who has not been declared eligible by the committee (see, section III.). The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases are a reference for the court in determining the level, extent, and quality of representation to expect in a capital case; see: sections 11.1 through 11.9.5, relating to the performance of counsel.

If the performance of court-appointed counsel does not rise to the minimum level of competence required of counsel pursuant to these guidelines, the court shall take corrective steps to ensure that both the qualification requirements and the performance standards are met.

If counsel is retained, the defendant's choice of counsel must be given due respect. If counsel is not eligible for appointment under this rule or if counsel does not meet the performance standards expected of counsel in capital cases, using the ABA Guidelines as the standard, however, the court has an affirmative obligation to advise the defendant concerning his right to effective assistance of counsel and the application of this rule.

III. Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases.

A. The Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases is Hereby Created.

(1) **Selection of Committee Members.** -- The commission will be composed of five (5) attorneys. Two (2) members of the committee shall be selected by a majority vote of all members of the Supreme Court of Tennessee; one (1) shall be selected by the Tennessee Bar association; one (1) shall be selected by the Tennessee Association of Criminal Defense Lawyers; and one (1) shall be selected by the Tennessee District Public Defender Conference.

(2) Eligibility for Appointment to the Committee:

- a) Member of the Tennessee Bar;
- b) Represented criminal defendants for not less than five (5) years;
- c) Demonstrates knowledge of the law and practice of capital cases;
- d) Currently not a prosecuting attorney, city or county attorney, or similar officer or their assistant or their employee, nor an employee of any court or affiliated with law enforcement.

(3) Overall Composition:

- a) No more than one judge shall be appointed on the committee; and, should a judge be appointed on the committee, it should be someone who has a particular awareness and sensitivity to the problems and responsibilities of counsel representing defendants in capital cases.
- b) At least one member of the committee shall be from each of three grand divisions of the state of Tennessee.

(4) Initial Appointments; Terms, Vacancies:

- a) Initial appointments to the committee shall be made by the respective appointing authorities within forty-five (45) days of the effective date of this rule.
- b) Of the three initial appointments to be made by a majority vote of all members of the Supreme Court of Tennessee, one shall be a term of two (2) years and one for a term of one (1) year.
- c) The Tennessee Bar Association's initial appointment shall be for a term of three (3) years.
- d) The Tennessee Association of Criminal Defense Lawyers' initial appointment shall be for a term of two (2) years.

- e) **The Tennessee District Public Defender Conference's initial appointment shall be for a term of one (1) year.**
- f) **Committee members shall be eligible to repeat themselves as members of the committee. Committee members can be removed from the committee for cause by the appointing authority.**
- g) **The term of office for each member shall be five (5) years, each term ending on the same day of the same month as did the term in which it succeeds. When a vacancy occurs (at the expiration of a term, or by a member's voluntary resignation), the authority that appointed the departing member of the committee shall appoint the successor to office. Any member appointed to fill a vacancy occurring prior to the expiration of a term shall hold office for the remainder of the term. Any member shall continue in office subsequent to the expiration date of the term until a successor takes office or until a period of sixty (60) days has elapsed, whichever occurs first.**

(5) Powers and Duties of the Committee. -- The committee shall:

- a) **Draft, and at least once per year, notify the members of the state bar as to the procedures for applying for inclusion on the list of those eligible to be court-appointed counsel for indigent capital defendants;**
- b) **Provide all state general sessions, trial, and appellate court judges and the Tennessee District Public Defender Conference with the list of all attorneys who meet the qualifications for eligibility to be court-appointed counsel for indigent defendants charged with a capital offense in the courts of Tennessee, and who may therefore receive court appointments to defend capital cases**
- c) **Periodically review the list, at least twice a year, with the power and obligation to remove from the list the names of attorneys, who, by their failure to adequately perform in a particular capital case or cases, or for any other just cause, should be removed from the list of attorneys eligible for appointment in capital cases;**
- d) **Develop criteria and procedures for retention on or deletion from lists of eligible counsel including, but not limited to, some form of mandatory continuing legal education on the defense of capital cases;**
- e) **Expand, reduce, or otherwise modify the list of qualified attorneys as it deems appropriate and necessary in accord with paragraphs (c) and (d) above;**
- f) **Sponsor or co-sponsor specialized training on the defense of capital cases with appropriate organizations, including the Capital Case Resource Center of Tennessee;**

g) If and when deemed appropriate, recommend to the Tennessee Supreme Court amendments to this rule.

(6) Meetings. -- Meetings shall be called by written notice of at least one month given to all members either by the chairman, three (3) members of the committee, or at the request of the Tennessee Supreme Court. The committee shall meet at least once every three (3) months. A quorum shall consist of three (3) members.

(7) The committee shall elect a chairman. A majority of the entire committee is necessary for the committee to select a chairman and take any other action.

(8) Compensation. -- All members of the committee shall receive compensation in an amount to be established by the Tennessee Supreme Court.

Commission Comments

This committee, known as the Committee for the Appointment of Counsel for Indigent Defendants in Capital Cases, or the Rule ____ Committee, is established to improve the quality of legal representation provided to capital defendants. This state-wide committee will compile a list of attorneys eligible for such court appointments. All state general sessions, trial, and appellate judges shall receive the list of all attorneys eligible for appointments in Tennessee state courts. Each list will be categorized according to eligibility as: (a) "lead counsel;" (b) "co-counsel;" (c) "appellate counsel;" and, (d) "post-conviction counsel."

The committee may also perform related administrative duties.

The members of the committee shall be members of the bar, as this tends to assure an understanding of a lawyers' professional duties and responsibilities and an awareness of needs and problems inherent in these matters. Similarly, because of the unique aspects of defending defendants charged with capital offenses, it is appropriate for all of the committee members to have not only a general background in criminal defense, but also a working knowledge of the issues involved in litigating a death penalty case.

An effective means of securing professional independence for assigned counsel is to place the responsibility for the decisions concerning the qualification of assigned counsel with a committee whose members are themselves free to act as dictated by their best professional judgment. Consequently, it is recommended that the membership of the committee not include persons affiliated with law enforcement, prosecutors or more than one judge, and, if a judge is included in the committee, it should be someone who is particularly sensitive to the problems and responsibilities of criminal defense counsel. These restrictions are necessary to "remove any implication that defense attorneys under the system are subject to the control of those who appear as their adversaries or before whom they must appear in the representation of defendants, except judges as charged with disciplinary supervision of all members of the bar." ABA Standards for Criminal Justice (2d ed. 1980), 5-1.3, Commentary at 5.17-5.18, (hereinafter "ABA Standards"). see, also, California Standing Committee on Delivery of Legal Services to Criminal Defendants, Report on the Independence of the Criminal Defense Bar and Standards Relating to Professional Competence of Appointed Counsel (1980), at 3-4. Qualifications and procedures for eligibility shall be written and publicized with the goal in mind of encouraging participation from a large number of attorneys throughout Tennessee and attracting public interest. Public awareness and trust in appointed counsel programs is essential if they are to be financed adequately and operated effectively. ABA Standards, 5A1.5 and Commentary.

Applications for eligibility should include the attorney's experience, training, and demonstrable qualifications. The committee's review for continued eligibility for appointment in capital cases shall include a review of performance in particular cases, willingness to maintain the required continuing legal education concerning the representation of capital defendants and any other relevant considerations. Information may be provided by a judge before whom the applicant has appeared, and by others familiar with the applicant's professional abilities. The committee will monitor the performance of assigned counsel and consider whether counsel has met the basic responsibilities of a trial; appellate or post-conviction lawyer. If counsel has not met those standards, his or her name shall be removed from the list.

The attorney-client relationship should be respected. The committee has no authority to remove, substitute, or add counsel in a particular case where the conduct of existing counsel is suspect. To the extent that this can be done, it is within the province of the judge or judges with authority over the particular case (see, section II.).

It is critical that the committee insure that comprehensive training programs, which focus on criminal defense advocacy, with particular emphasis on capital cases, be regularly offered throughout the state. Planning by the committee for appropriate training should be made with and through the Capital Case Resource Center of Tennessee. Required continuing legal education should enhance trial, appellate and post-conviction practice skills and should provide instruction on the current law and strategy relating to the defense of capital cases.

IV. Procedures for Court Appointments of Counsel.

A. Appointing Counsel.

(1) **Appoint Qualified Counsel.** -- All general sessions, trial, and appellate courts with criminal jurisdiction within the state shall appoint counsel to represent indigent defendants charged with a capital offense in accordance with section I. of this rule. Each court shall be free to adopt local rules requiring qualifications in addition to the mandatory minimum requirements established by this rule.

(2) **Counsel's Workload.** -- The appointing court shall not assign, and counsel shall not accept, an appointment which creates a total work load so excessive that it interferes with or effectively prevents rendering of quality representation in accordance with constitutional and professional standards.

(3) **Geographic Location of Counsel.** -- Appointments of counsel for these cases should be distributed as widely as possible among eligible members of the bar in an appointing court's jurisdiction. An appointing court shall, whenever practical, appoint at least one eligible attorney who routinely practices in that court's jurisdiction. The primary consideration, however, is the qualifications of counsel and not the geographic location of counsel.

(4) **Best Qualified Counsel Available.** -- The court shall appoint the best qualified counsel available.

(5) **Counsel with Federal Habeas Corpus Experience.** -- The court shall, whenever possible, seek to appoint counsel on capital cases who have had competent experience with federal habeas corpus practice.

(6) **Capital Case Resource Center.** -- The court is encouraged to confer with and advise the Capital Case Resource Center concerning the appointment of counsel in all capital cases. The court shall confer with the Capital Case Resource Center concerning appointments on post-conviction relief and shall appoint counsel recommended by the resource center or state on the record reasons for not following the recommendation made by the resource center.

B. Notice to the Committee.

(1) Within two (2) weeks of appointment, the appointing court shall notify the committee chairman of the appointment. The written notice shall include:

- a) the court and the judge assigned to the case;
- b) the full case name and number,
- c) a copy of the indictment;
- d) the names, business addresses, phone number, and status ("lead" or "co-counsel") of all attorneys appointed.

(2) The court shall notify the committee chairman, in writing, of the ultimate disposition of the case within one week of final disposition. The notice shall include:

- a) the section of the Tennessee Code of all crimes to which the defendant pled and/or was found guilty;
- b) the date sentence was rendered;
- c) the court's sentence;
- d) a copy of the court's entry reflecting the above; and
- e) a statement concerning the appointment of counsel for the appeal, if the death penalty was imposed or if the defendant requested appointment of counsel for an appeal.

C. Support Services. -- The appointing court shall provide appointed counsel, as required by the state and federal constitutions and by statute, as well as professional standards, with the investigators, social workers, and mental health professionals or other forensic experts and other support services reasonably necessary for counsel to prepare and present an adequate defense at every stage of the proceedings--before, during, and after the trial, including appeal and state post-conviction. The court should entertain requests for the appointment of appropriate experts to assist defense counsel in the determinations relevant to: competency to stand trial, a not guilty by reason of insanity plea, jury selection, the cross-examination of expert witnesses called by the prosecution, the presentation of mitigating evidence and the rebuttal of aggravating evidence at the sentencing phase of the trial, and any other relevant forensic expertise that an adequate defense may require, particularly if

necessary to rebut forensic evidence offered by the state. The court should expect these requests to be made *ex parte* and should preserve them, along with any responsive orders, under seal.

Commission Comments

The goal in providing defense services in capital cases is to assure high quality legal representation to persons unable to afford counsel. The caseload of an attorney receiving assignments pursuant to this rule, should, therefore, permit the attorney to provide each client with the time and effort necessary to ensure effective representation. As the American Bar Association has noted:

One of the single most significant impediments to the furnishing of quality defense services for the poor is the presence of excessive workloads. All too often in defender organizations attorneys are asked to provide representation in too many cases. Unfortunately, not even the most able and industrious lawyers can provide quality representation when their workloads are unmanageable. Excessive workloads, moreover, lead to attorney frustration, disillusionment by clients, and weakening of the adversary system. ABA Standards, 54.3, Commentary at 5.48.

Judges making appointments should distribute assignments in light of each attorney's duties under the Code of Professional Responsibility not to accept "employment . . . when he is unable to render competent service" Code of Professional Responsibility EC 229, or to handle cases "without preparation adequate in the circumstances." *Id.* at DR 6-101(A)(2). Similarly, attorneys should be admonished not to accept more assignments than they can reasonably discharge, ABA Standards, 4-1.2(d), or accept a client where the representation will be materially limited by the attorney's responsibilities to another client or to a third person, Model Rules of Professional Conduct 1.1 (1983).

In accordance with these principles, judges are urged to assess the workload, in general, and specifically the death penalty case workload of eligible attorneys to determine whether the workload is excessive. To assist in assessing workloads, some defender offices have established caseload guidelines which are useful in determining whether the workload of a particular attorney is excessive. Judges should limit the number of assignments per attorney to an appropriate level consistent with the lawyer's ability to provide each client with quality representation in accordance with constitutional and professional standards. The primary reference standard for the court in determining whether or not performance standards are being met are the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases which were approved by the American Bar Association on February 7, 1989. The performance standards in these guidelines can be found in Guidelines 11.1 through 11.9.5.

In order to properly litigate on behalf of the defendant, counsel must be knowledgeable concerning the substantive and procedural law in state and federal court. The appointing court should be aware of this need and attempt to accommodate it when possible. Typically, when the transition of counsel takes place prior to state post-conviction litigation, the Capital Case Resource Center will be in a position to recommend competent counsel who are prepared to represent the defendant in state court and afterward, in federal court. In the interest of providing continuity of representation from state to federal court, it is presumed that the recommendation made by the Resource Center to the appointing court concerning the appointment of counsel in

state post-conviction will be honored. If the court has objections to counsel recommended by the Resource Center, it should confer and advise the Resource Center concerning its objections. If the court decides not to follow the Resource Center's recommendation in this regard, it shall state its reasons on the record.

Fundamental fairness entitles indigent defendants to the "basic tools of an adequate defense." In Ake v. Oklahoma, 470 U.S. 68, 77, 105 S.Ct. 1087, 1094, 84 L.Ed.2d 53, 62 (1985), the United States Supreme Court stated that:

We recognized that long ago that mere access to the courthouse does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the state proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

We reiterate the proposition adopted by other national standards for defense services that quality representation cannot be rendered by appointed counsel unless the lawyers have available for their use adequate supporting services. These services may include:

expert witnesses capable of testifying at trial and at other proceedings, personnel skilled in social work and related disciplines to provide assistance at pre-trial release hearings and at sentencing, and trained investigators to interview witnesses and to assemble demonstrative evidence. ABA Standards, 5A1.4, Commentary at 5.19
5.20.

Also see, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 8.1 and Commentary.

It is critical, therefore, for courts to authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for the trial and sentencing phases, and to procure necessary expert witnesses and documentary evidence. Experts appointed should have a demonstrable expertise in the special characteristics of capital litigation, if possible. Typically, counsel will need specialized investigative and psychological assistance in every case in which a capital sentencing hearing is possible.

Support services should be made available to counsel, as needed, on state post-conviction as in trial and on direct appeal.

Resources available to appointed capital defense counsel should be equivalent to, yet independent of, those available to the prosecution.

The burden of defense counsel to establish the need for the appointment of support services should not be onerous. A defendant has a right to present an adequate defense; this right should particularly be preserved in a capital case. When in doubt, the court should grant the services requested. Counsel, as an officer of the court, has an obligation not to be frivolous or excessive in his or her requests.