

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENTS TO SUPREME COURT RULE 13

No. M2003-02181-SC-RL2-RL - Filed June 1, 2004

ORDER

Introduction

With the exception of one issue, this Court unanimously adopts amended Rule 13, set forth as Appendix A to this order. With regard to ex parte hearings, the decision of this Court is not unanimous. The majority decision appears in subsection III of this order.¹ A separate dissent is attached and made a part of this order.² With respect to all other issues, this order represents the unanimous decision of the Court.

On September 8, 2003, this Court entered an order publishing proposed amendments to Supreme Court Rule 13 and inviting the bench, the bar and the public to submit written comments on the proposed amendments. On November 3, 2003, the Tennessee Bar Association, the Tennessee Public Defenders' Conference, the Tennessee Post Conviction Defender's Office, and the Tennessee Association of Criminal Defense Lawyers ("Joint Commentors")³ filed a joint motion requesting an extension of the comment period. This Court granted the motion, extended the deadline for written comments through January 23, 2004, directed the Joint Commentors to address three specific issues,⁴ and set this matter for hearing.

¹The majority consists of Justice E. Riley Anderson, Justice Adolpho A. Birch, Jr., and Justice Janice M. Holder.

²Chief Justice Frank F. Drowota, III and Justice William M. Barker are the dissenting justices.

³Under the direction of Allan F. Ramsaur, Executive Director of the Tennessee Bar Association, a study group was formed consisting of the above named organizations. This group met several times with the goal of submitting a joint consensus comment on the proposed amendments to Rule 13. The Tennessee District Attorneys General Conference originally participated in the Rule 13 work group assembled by the Tennessee Bar Association but withdrew on January 15, 2004.

⁴The order directed the Joint Commentors to address the following issues:

1) The compensation of guardians ad litem and attorneys in dependency and neglect cases,

Thereafter, this Court received comprehensive comments that included suggestions from the Joint Commentors consisting of the Tennessee Bar Association, the Tennessee Post Conviction Defender's Office, the Tennessee Association of Criminal Defense Lawyers, and the Tennessee Public Defenders' Conference. The suggestions from the Tennessee District Attorneys General Conference were received separately. Moreover, representatives of these groups, along with William P. Redick, Jr., formerly of the Capital Case Resource Center, presented oral argument on February 11, 2004. This Court also received insightful comments from many mental health professionals, investigators, mitigation specialists, interpreters, and attorneys. Finally, this Court received recommendations from the Rule 13 Committee of the Tennessee Judicial Conference ("TJC Committee"). This Court genuinely appreciates the comments, presentations, and recommendations and commends all those who participated in this process for their time and effort to help create a better indigent defense system in this state.

As this Court recognized ten years ago, "[t]he Judicial Department, the Legislative Department, and the Executive Department, . . . bear administrative responsibility for providing effective assistance of counsel for indigent persons charged by the state with criminal offenses . . . and neither of the three departments can provide such services without the assistance and cooperation of the other departments. . . ."⁵ This statement is even more timely today. After carefully considering the proposed amendments, the written comments, and the oral presentations, this Court concludes that several comments and recommendations raise issues that are best addressed through the legislative process.

I.

Creation of an Independent Commission

The Joint Commentors, consisting of the Tennessee Bar Association, the Tennessee Post Conviction Defender's Office, the Tennessee Association of Criminal Defense Lawyers, and the Tennessee Public Defenders' Conference, urge this Court to exercise its rule making authority and create an independent commission within the Judicial Department to administer indigent defense monies and oversee indigent defense services.

The Joint Commentors' proposal involves the creation of an Office of Tennessee Indigent Representation Services ("TIRS") that would operate independently of the Administrative Office

including the method of filing and receiving compensation in such cases as well as the amount of compensation allowed.

2) The feasibility and desirability of restructuring the indigent defense system so that requests for funding of experts and investigators are addressed, considered, and decided by a central administrative entity rather than the various trial courts of this State.

3) The proposed fee schedule and monetary caps for investigators, experts, and interpreters.

⁵See Tennessee Supreme Court Order filed August 18, 1994, creating an Indigent Defense Commission.

of the Courts and have the responsibility for “establishing, supervising, and maintaining a system for providing legal representation by appointed counsel and related services” in cases involving indigent litigants. Under the proposal, TIRS would “allocate and disburse funds appropriated for legal representation by appointed counsel and related services for all indigent parties.” The Joint Commentors’ proposal would also create a Tennessee Commission on Indigent Representation Services for the purpose of developing and improving programs by which TIRS would operate with regard to prescribing minimum experience and training for counsel, establishing standards for caseloads and performance of counsel, providing and compensating experts and others who provide services, and similar matters. The Joint Commentors assert that a centralized agency can both promulgate meaningful standards and efficiently and economically manage indigent defense monies. The Joint Commentors’ proposal closely tracks the North Carolina Indigent Defense Services Act of 2000,⁶ which created the North Carolina Office of Indigent Defense Services and its thirteen-member governing body, the North Carolina Commission on Indigent Defense Services.

The Tennessee District Attorneys General Conference (“TDAGC”) opposes the Joint Commentors’ proposal to create an independent commission, arguing that the North Carolina Commission is untested and that its viability and legality is still in question. The TJC Committee also recommended against “creation of a Commission to determine indigent fees.”

After much consideration, this Court declines to exercise its rule-making authority at this time to create an independent commission to administer indigent defense funds. This Court recognizes that North Carolina, Georgia⁷ and Florida⁸ recently have enacted legislation establishing commissions to manage indigent defense services. We are also aware that other states, including Arkansas, Oklahoma, and Wisconsin, have adopted the commission approach to providing indigent services.⁹ However, we are not aware of any state that has *judicially* created an independent commission for managing indigent defense services. Nor do we believe judicially creating such a commission in Tennessee is appropriate at this time.

Although such commissions appear to be a creative and flexible solution to the difficult and complex issues raised by the need to administer indigent funding, there is little or no information available about the effectiveness or ineffectiveness of these commissions. The commissions in North Carolina, Georgia, and Florida are newly created and untested.

⁶See N.C. Gen. Stat. §§ 7A-498 et seq.

⁷See Ga. Code Ann. § 17-12-1 through § 17-12-128.

⁸See 2003 Fla. Laws ch. 2003-402 (House Bill No. 113-A) (effective July 1, 2004).

⁹See, e.g., Ark. Code Ann. §§ 16-87-201 et seq.; Okla. Stat. Ann. tit. 22, §§ 1355 et seq.; Wis. Stat. Ann. §§ 977.01 et seq. North Carolina, Georgia, and Florida are the focus of this order because the Joint Commentors’ proposal closely tracks the legislation passed in North Carolina, as does the legislation more recently passed in Florida and Georgia.

Furthermore, these commissions were created only after the idea had been studied and debated during the legislative process. Although we are not convinced that judicially establishing an independent commission is appropriate at this time, the experience of the commissions established in North Carolina, Georgia, and Florida will no doubt be valuable for future consideration of this issue. Since the effectiveness of these commissions is currently unknown, we prefer to maintain the current system of administering indigent defense funds, at least until such time as information is provided indicating that the commission approach is more efficient and more effective. In the meantime, we are confident that trial judges, and all those involved in managing indigent defense monies, will continue to ensure that indigent parties receive the legal services to which they are entitled, while at the same time conscientiously managing state money.

In sum, because there has been no study of the operations of North Carolina, Georgia, Florida, Arkansas, Oklahoma, and Wisconsin, this Court favors further study of the commission approach in managing indigent defense services. This approach previously has been proposed by the Indigent Defense Commission established by this Court. Although this Court declines to exercise its rule-making power to create such a commission at this time, the Judicial Department remains committed to fulfilling its responsibility and role in the management and provision of indigent defense services in Tennessee. Therefore, we will begin a study of the commission approach, and we will invite the assistance of the Executive and Legislative Branches where appropriate.¹⁰

II.

Attorney Compensation

The Joint Commentors, consisting of the Tennessee Bar Association, the Tennessee Post Conviction Defender's Office, the Tennessee Association of Criminal Defense Lawyers, and the Tennessee Public Defenders' Conference, urge this Court to establish a single hourly rate for all attorney compensation and dispense with the distinction currently drawn between in-court and out-of-court time. The Joint Commentors proposed the following hourly compensation rates for both in-court and out-of-court time: \$50 per hour for non-capital cases; \$100 per hour for lead counsel in capital cases; \$80 per hour for co-counsel and post-conviction counsel in capital cases. In addition, the Joint Commentors proposed that attorneys be paid a \$20 per hour reimbursement fee to cover overhead expenses and that this hourly reimbursement fee be paid "without limitation."

This Court unanimously agrees that hourly rates paid attorneys should be increased and that a single hourly rate applicable to in-court and out-of-court time should be established. Indeed, almost ten years have passed since hourly rates for attorneys were increased from \$20 to \$40 per hour for out-of-court time and from \$30 to \$50 for in-court time. Almost seven years

¹⁰We note that the Executive and Legislative Branches may be able to provide assistance by consulting with officials in other states that have established indigent defense commissions and by providing a forum for all interested parties to freely and openly debate the efficiency, effectiveness, and desirability of such a commission.

have passed since hourly rates for attorneys in capital cases were increased to the current levels of \$75 out-of-court and \$100 in-court for lead counsel and \$60 out-of-court and \$80 in-court for co-counsel and post-conviction counsel. Creating a single hourly rate at current in-court compensation levels certainly is a reasonable recommendation. This proposal would ensure that attorneys who have the professional training and education required to undertake the representation of an indigent person are compensated at a rate at least equal to investigators and interpreters.

Nonetheless, this Court has determined that implementation of hourly rate increases should be postponed until funding for these improvements is obtained through the legislative budget process. The Judicial Department is committed to cooperating with the Legislative and Executive Departments to ensure that the State of Tennessee is satisfying its constitutional and statutory obligations of providing indigent parties legal services. Accordingly, this Court strongly supports hourly rate increases for attorney compensation and will seek such funding from the legislative and the executive branches of government.

III.¹¹

Ex Parte Hearings

The Joint Commentors, consisting of the Tennessee Bar Association, the Tennessee Post Conviction Defender's Office, the Tennessee Association of Criminal Defense Lawyers, and the Tennessee Public Defenders' Conference urge the Court to retain the present wording of Section 5 relating to ex parte hearings. The Joint Commentors oppose the abolition or restriction of ex parte hearings and the institution of adversarial hearings on defense requests. They point out that the District Attorneys and the State Attorney General's Office need not seek judicial permission to fund investigative or expert services and that the prosecution is able to rely upon unlimited state and local resources, such as state, local, and federal law enforcement agencies, medical examiners, the Tennessee Bureau of Investigation and its laboratory, and state mental health facilities, and may retain private experts for consultation and proof without any restriction upon the expert's location or the hourly rate. Defense attorneys are not allowed to contest in adversarial proceedings the use and compensation of state experts and other services used by the prosecution in a given case. The Joint Commentors contend that Section 5 (a)(2) and (3) of the Court's proposed section 5 impinges upon defense counsel's ability to effectively represent the client, interferes with the right to present a defense, unfairly discriminates by requiring indigent defendants to reveal their theory of defense and the identity of experts who may or may not testify, while non-indigent defendants are not required to do so. The Joint Commentors also assert that Sections 5(a)(2) and (3) improperly create constitutional jurisprudence via a rule rather than through case law. (The Joint Commentors point out that this Court in State v. Barnett, 909

¹¹Subsection III reflects the decision of the majority on this issue. The majority consists of Justice E. Riley Anderson, Justice Adolpho A. Birch, Jr., and Justice Janice M. Holder. The separate dissent of Chief Justice Frank F. Drowota, III and Justice William M. Barker is attached hereto.

S.W.2d 423 (Tenn. 1995), did not express an opinion on whether an indigent party seeking a non-psychiatric expert is constitutionally entitled to an ex parte hearing on the request).

On the other hand, the Tennessee District Attorneys General Conference proposes a new Section 5 which entirely eliminates ex parte hearings, arguing that such hearings are not constitutionally or statutorily required and that the plain language of Tennessee Code Annotated section 40-14-207 does not mandate ex parte hearings in either capital or non-capital cases. They also argue that such hearings are used to obtain for indigent defendants the same resources as are available to better-off defendants and more resources than a wealthy defendant could afford, and that the State's only constitutional obligation is to afford necessary resources for an adequate defense. The TJC committee opposes ex parte hearings unless such hearings are constitutionally mandated.

After reviewing the arguments, a majority of this Court has decided to retain the current language of Rule 13, section 5 regarding ex parte hearings. The present rule set forth in Rule 13, section 5 was adopted in 1994 by a unanimous Court. The present rule is consistent with the Joint Commentors' recommendation that the rule "should require procedures that permit defense counsel, without consultation, notice and participation of the prosecutor, to request and obtain necessary expert, investigative and related services and to be reimbursed for those services." As the Joint Commentors explained:

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

The present rule is consistent with this Court's holding that ex parte proceedings are constitutionally required for defense-requested funding for psychiatric/psychological assistance. State v. Barnett, 909 S.W.2d 423 (Tenn. 1995). The Court explained:

The logic of requiring an ex parte hearing under such circumstances is apparent. Indigent defendants who must seek state-funding to hire a psychiatric expert should not be required to reveal their theory of defense when their more affluent counterparts, with funds to hire experts, are not required to reveal their theory of defense, or the identity of experts who are consulted, but who may not, or do not, testify at trial.

Id. at 428. Although the holding in Barnett was limited to defense-requested funding for expert psychiatric or psychological assistance, we made it clear that was the sole issue before the Court. Id. at 428 n. 4 (“We express no opinion on that issue, which is not presented in this case.”).

In addition, the present rule should be retained for several other reasons as well. First, there has been no showing that the unprecedented steps proposed in the amendments to Rule 13, section 5 are accompanied by sufficient guidelines for their principled application to the myriad complex questions that may arise. Indeed, the adoption of a rule that leaves decisions to the trial courts without specific guidance creates a risk for lack of uniformity and numerous contested hearings.

Second, although the rationale for the proposed rule is to reduce costs, there has been no convincing showing that the proposed Rule 13, section 5, is necessary to achieve that purpose. Although the Tennessee District Attorneys General Conference has asserted that ex parte procedures are a waste of money, it has offered no basis upon which to find that savings will be achieved by requiring all motions for requested funding to be heard in open court.¹² To the contrary, any savings may very well be offset by the cost of more contested hearings, increased delays, numerous interlocutory appeals, and related expense.

Third, the present rule retains the substantial thresholds that must be met before any defense-requested funding is to be granted. Counsel for an indigent defendant must seek authorization for requested services by filing a motion that specifically shows the nature of the services; the name and location of the person proposed to provided the services; an explanation for not obtaining the services in Tennessee, if applicable; the date, time, and location the services are to be provided; and an itemized list of the costs. The trial court must then determine “that the requested services are necessary to ensure the protection of the defendant’s constitutional rights”

Accordingly, the Court concludes that Rule 13, section 5, governing ex parte proceedings for expert, investigative, or other services requested by indigent defendants, shall be retained in its present version.

IV.

Public Defender Qualifications

The District Attorneys and the TJC Committee recommended that Public Defenders be qualified to serve as counsel in capital cases. There presently are some Judicial Districts where the elected Public Defender is not death penalty qualified. In addition, there currently is no

¹²The dissent’s assertion that the proposed amendment would reduce costs by eliminating indigent funding in cases in which guilty pleas are entered is conjectural and erroneous. Indeed, in many cases it is often the expert assistance or investigative assistance received by an indigent defendant that advances the plea negotiation process by prompting the State to extend a plea offer or the defendant to accept a plea offer.

statutory provision requiring Public Defenders to satisfy the Rule 13 qualifications for counsel in death penalty cases. While this Court encourages attorneys to satisfy the qualifications of Rule 13, this Court has no authority to order Public Defenders to satisfy these requirements. This is an issue that should be addressed by the General Assembly for study and consideration.

V.

Conclusion

The Court hereby amends Supreme Court Rule 13 by deleting the current rule in its entirety and by substituting in its place amended Rule 13 set out in Appendix A to this order. We note that the amendment includes (1) a schedule, including maximum fees, for the compensation of foreign language interpreters;¹³ (2) a schedule, including maximum fees, for the compensation of experts and investigators;¹⁴ and (3) a section detailing the expenses for which reimbursement may be sought and the method for seeking reimbursement.¹⁵

IT IS HEREBY ORDERED that amended Rule 13 shall become effective and apply to work performed after midnight on June 30, 2004.

Frank F. Drowota, III, Chief Justice

E. Riley Anderson, Justice

Adolpho A. Birch, Jr., Justice

¹³Rule 13, Section 4(d).

¹⁴Rule 13, Section 5.

¹⁵Rule 13, Section 4(a)-(c).

Janice M. Holder, Justice

William M. Barker, Justice