Fed Ex. 10-15-07

COPY

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: SUPREME COURT RULE 13

Docket No M2007-02331-SC-RL1-RL

By: Billable Hours, Inc.;
and Robert L. Foster, Esq.,

Petitioners.

PETITION TO AMEND SUPREME COURT RULE 13
AND FOR OTHER RELIEF RELATED TO SUPREME COURT RULE 13,
INCLUDING INTERIM RELIEF FROM CURRENT APPLICATION OF
SUPREME COURT RULE 13 BY THE ADMINISTRATIVE OFFICE OF THE COURTS

F. Braxton Terry (#018248)
Terry Terry & Stapleton
918 W. First North St.
P.O. Box 724
Morristown, TN 37815
Tel. (423)586-5800
Fax (423)587-4714

W. Lewis Jenkins, Jr. (#017423)
Wilkerson Gauldin Hayes & Jenkins
112 W. Court St.
P. O. Box 220
Dyersburg, Tennessee 38024
Tel. (731)286-2401
Fax (731)286-2294

Attorneys for Petitioners

TERRY, TERRY
AND STAPLETON
ATTORNEYS AT LAW
918 WEST FIRST NORTH STREET
POST OFFICE BOX 724
MORRISTOWN, TENNESSEE
37815-0724

TABLE OF CONTENTS

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
ORRISTOWN, TENNESSEE
37815-0724

EXHIBITS TO PETITION

A – AOC Letters and Memorandum, 18 September 2007 and Copy of AOC Letter and Memorandum, 14 September 2007 (Drafted, but Petitioners understand not disseminated generally)

B – Proposed Amendments to Supreme Court Rule 13

C – Attorney Letters regarding for Billable Hours, Inc.

D – San Diego County Bar Association, *Ethics Opinion 2007-1*

E – *In re PNC Bank, Delaware v. Berg*, 45 U.C.C. Rep.Serv.2d 27, 1997 WL 527978 (Del. Super., January 31, 1997)

F – New York City Bar, *Ethics Opinion 2006-3*

NOTE REGARDING WEB-AVAILABLE CITED AUTHORITIES

In an effort to facilitate access to the web-available authorities cited in this Petition, Petitioners and counsel have prepared a web-link and universal resource locator (url) listing to web-available cited authorities. The listing may be found at:

http://www.billablehoursinc.com/petition.html

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
ORRISTOWN, TENNESSEE
37815-0724

PETITION AND ARGUMENT IN SUPPORT OF PETITION

I. JURISDICTION AND STANDING.

For a period of more than two years, Billable Hours, Inc. ("BH") and its primary shareholder, chief executive, and president, Robert Foster, Esq. ("Foster") have provided a valuable and helpful service to attorneys fulfilling the responsibility of representing indigent persons in the courts of Tennessee. The service, which will be described more fully below, involves the preparation of fee claims (using information provided by individual attorneys appointed to represent individual defendants) and a payment system to advance to appointed counsel funds when an appointed counsel fee claim is completed for filing. On 18 September 2007, the Director of the Administrative Office of the Courts ("AOC") announced that the services the BH had provided would no longer be allowed to continue.[1] (Exhibit A – Letters and Memoranda from AOC)

BH and Foster appear in this Court to seek the following relief:

(A) A continuing implementation of Tenn. Code Ann. § 40-14-201 *et seq.* and Supreme Court Rule 13 (hereinafter "Rule 13") that accords with the statute's language and the substantive law of Tennessee;

(B) Restoration of the status quo (of prior to 18 September 2007) pending full consideration and a decision on this matter by this Court, in order to avoid immediate and irreparable harm to BH and Foster by way of a forced cessation of the company's services; and,

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
8 WEST FIRST NORTH STREET
POST OFFICE BOX 724
ORRISTOWN, TENNESSEE
37815-0724

[1] It is believed that the AOC first contemplated the action on 14 September 2007, but that the actual, official notice of action was dated 18 September 2007. Petitioners believe the contemplated notice of 14 September 2007 was not sent and did not represent the action of the AOC. A copy of the letters and memoranda of 18 September 2007 and 14 September 2007 are attached as Exhibit A.

(C) Amendment of Supreme Court Rule 13 (hereinafter "Rule 13") to more fully reflect the statutory provisions of Tenn. Code Ann. § 40-14-201 *et seq.* and the law of Tennessee. Although Petitioners argue in this Petition that the amendment is not required to allow agent preparation of claims, the amendment, as proposed by the Petitioners and attached as Exhibit B to this Petition, would formalize the procedures for agent preparation of claims and establish certain standards for agent processing of claims.[2]

Petitioners do not fully understand the procedural and substantive basis for the action taken by the AOC: the action is broad, but does not contain any specific indication of its basis; for example, the action does not appear to be a denial of any specific claim under S. Ct. R. 13, § 6(b)(5). The AOC issued, as Exhibit A shows, a generally applicable ruling, somewhat akin to a Formal Ethics Opinion of the Board of Professional Responsibility and that ruling essentially terminated the business of Petitioners. The broad ruling appears to indicate that Rule 13 contains no express provision to allow the services performed by BH, and that therefore those services cannot be allowed. (*See* Exhibit A, Letter and Memorandum of 18 September 2007.) In any event, an interpretation of Rule 13 now exists, upon which the AOC will conduct the review of claims under Tenn. Code Ann. § 40-14-201 and Rule 13, and that interpretation disallows the business in which BH engaged prior to 18 September 2007.

Given that Rule 13 is a rule of this Court, it appears that this Court is the only court with jurisdiction to determine the implementation and interpretation of the rule; certainly,

[2] The request to amend Rule 13 does not imply or concede that the present Rule 13 disallows in any way the process by which BH has prepared and managed the claims submissions of its clients. The request to amend Rule 13 is only included to ensure that the interstices of Rule 13 are filled in a way that makes explicit what Petitioners believe is already allowed by Tenn. Code Ann. § 40-14-201 *et seq.*, Rule 13, and the general law of Tennessee. Moreover, Rule 13 should be amended to ensure the valuable service provided by BH within the system of providing representation to indigent persons suffers no further disruption.

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
MORRISTOWN, TENNESSEE
37815-0724

only this Court may amend the rule. *See In re Youngblood*, 895 S.W.2d 322, 326 (Tenn. 1995); *Allen v. McWilliams*, 715 S.W.2d 28, 29-30 (Tenn. 1986) ("To a significant degree it involves the interpretation of an existing rule of this Court, of which the Court itself is the primary arbiter.") *Cf. In Matter of Petition of Tennessee Bar Ass'n*, 539 S.W.2d 805, 807 (Tenn. 1976).[3]

Moreover, the actions of the AOC directly affected BH and Foster and have threatened to deprive BH and Foster of a property interest in certain assignments properly made according to the law of Tennessee, thus resulting in a direct injury to BH and Foster under the new implementation and interpretation of Rule 13. Such an injury under a Rule of this Court affords standing to BH for this Petition. *In re Youngblood*, 895 S.W.2d at 326. In *Youngblood*, certain attorneys filed a petition for review by this Court of a formal ethics opinion issued by the Board of Professional Responsibility. *Id.* at 324. The formal ethics opinion construed a portion of the formerly applicable Code of Professional Responsibility, found in Rule 8 of this Court's Rules. *Id.* In finding standing for the petitioners, this Court stated: "No other authority may revise the rules of the Court; consequently, under these circumstances, the petitioners have standing to file an original petition in this Court seeking review of the opinion." *Id.* at 326. Moreover, Foster is a member of the bar of this Court and has such has independent standing to petition for amendment of the rule of this Court. *See Allen*, 715 S.W.2d at 29-30.

Given the factors set out in this Section I, this Court should entertain this Petition.

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
ORRISTOWN, TENNESSEE
37815-0724

[3] *In Matter of Petition of Tennessee Bar Ass'n* relies upon authority that the Supreme Court has inherent and original jurisdiction over rules governing the practice of law. *Allen v. McWilliams* appears to have extended this concept to all rules of the Tennessee Supreme Court.

II. REQUEST FOR INTERIM / IMMEDIATE RELIEF.

Petitioners pray that this Court grant interim relief pending a final decision regarding the amendment of Rule 13. Petitioners respectfully assert that the argument in this Petition demonstrates that the current interpretation of Rule 13 disallowing preparation of fee and expense claims by the agents of appointed counsel and the assignment of funds in return for an advance payment of a portion of a fee and expense claim is not correct, based on generally applicable principles of law.

As set forth below in Section IV, the general law of Tennessee allows generally for any person to appoint an agent to complete any task that the principal could complete. Exceptions to the general rule regarding personal services have no application to the preparation of fee and expense claims, because these actions consist merely of compiling time and expense information maintained by appointed counsel. Rule 13 specifically requires appointed counsel to maintain "contemporaneous" time records and documentation related to expenses. S. Ct. R. 13, § 6(a)(6). The transformation of such records into a claim form does not involve the professional judgment or skill of an attorney. Furthermore, the signature of appointed counsel upon the claim form ensures verification and responsibility for the accuracy of the form.

As set forth in Section V below, the business of BH implicates no ethical provisions applicable to appointed counsel. The service provided by BH assists appointed counsel in acting more zealously and expending more time on actual representation of appointed clients, because the service relieves appointed counsel of the administrative task of transforming contemporaneous time records and expense documentation into a fee claim.

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
8 WEST FIRST NORTH STREET
POST OFFICE BOX 724
JERRISTOWN, TENNESSEE
37815-0724

(The letters of support from attorneys, attached as Exhibit C to this Petition, buttress this assertion.)

As set forth in Section VI below, BH relied upon the pre-18 September 2007 status quo in making certain commitments and expending certain funds. The general law of Tennessee supports the validity of such commitments and weighs in favor of interim relief preserving the ability of BH to conduct its business during the pendency of this Petition.

Based upon the immediate and devastating harm to BH, and the principles of law set forth in this Petition, Petitioners pray that this Court issue an interim order allowing BH to continue conduct its business, pending a final decision by this Court, under the provisions of the Proposed Amendment set forth in Exhibit B to this Petition, or under such other provisions, rules, and/or restrictions as this Court may deem appropriate.

In order to advance their request for immediate interim relief, Petitioners have attempted to address, in this Petition, all of the issues that they believe, at this time, may have a bearing upon this request.

III. FACTUAL NARRATIVE AND GENERAL REASONS SUPPORTING PETITION.

The constitutional mandate of providing counsel to indigent persons represents a cornerstone of the rule of law. *See Gideon v. Wainwright*, 372 U.S. 335 (1963). The need to facilitate the provision of legal services to indigent or other needy individuals resonates throughout American law and finds expression in this Court's Rules of Professional Conduct. *See, e.g.,* S. Ct. R. 8, RPC 6.1, 6.2 (hereinafter "RPC"). The *Gideon* court surveyed history and precedent and summarized the longstanding recognition of the essentiality of providing counsel for indigent criminal defendants as follows:

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
118 WEST FIRST NORTH STREET
POST OFFICE BOX 724
MORRISTOWN, TENNESSEE
37815-0724

> Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

372 U.S. at 344.

The notoriety of *Gideon*, which technically only decided whether to extend Sixth Amendment concepts into the Fourteenth Amendment, sometimes obscures the fact that the U.S. Supreme Court had long held that the Sixth Amendment right to counsel entailed provision of counsel to those criminal defendants unable to afford such representation in federal court. Some twenty-five years before *Gideon*, for example, the U.S. Supreme Court said:

> [The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer-to the untrained layman-may appear intricate, complex, and mysterious.

Johnson v. Zerbst, 304 U.S. 458, 462-463 (1938). *See also Patton v. U.S.*, 281 U.S. 276, 307-308 (1930) *partially overruled on other grounds by Williams v. Florida*, 399 U.S. 78 (1970). *See also Hack v. State*, 124 N.W. 492, 494 (Wis. 1910). The reasoning of *Johnson*

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
ORRISTOWN, TENNESSEE
37815-0724

and *Gideon* applies with equal force to criminal proceedings as well as dependency and neglect, parental termination, and delinquency proceedings in juvenile court: all the listed types of cases implicate important constitutional rights that cannot be protected without the involvement of skilled legal counsel acting on behalf of the indigent party.

Despite the unquestionable centrality to the protection of the rule of law of providing appointed counsel to indigent criminal defendants and indigent persons in the juvenile court system, ensuring the effectiveness of the right represents an ongoing challenge for legislators and judicial officials nearly everywhere. The burden upon the public treasury, the unpopularity of providing publicly funded representation for a generally disfavored segment of the populace, and perhaps a general societal perception that representation of such individuals merely results in the raising of technical points at the expense of substance, all combine to create constant challenges. *See* Am. Bar Association Standing Comm. on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (Dec. 2004), pp. 7-10, 11 (available at http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/ [last accessed 8 October 2007]) (hereinafter "*Gideon's Broken Promise*").

After practicing law for a little over a year, Petitioner Foster perceived a problem in the administration of justice in Tennessee: attorneys who fulfilled their responsibility to accept appointed clients and diligently represent those clients faced myriad hurdles in preparing and submitting fee and expense claims under Tenn. Code Ann. § 40-14-201 *et seq.* and Rule 13 and in obtaining payment of those claims. Foster observed, rightly, that the administrative hurdles frustrated many attorneys in the overall representation experience, and also sometimes caused a financial burden on attorneys who depended, for a portion of

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
8 WEST FIRST NORTH STREET
POST OFFICE BOX 724
MORRISTOWN, TENNESSEE
37815-0724

their own livelihood, on the limited compensation afforded by Tenn. Code Ann. § 40-14-201 *et seq.* and Rule 13. Appointed counsel, Foster observed, often faced a triple hardship: significant uncompensated time to prepare and submit fee and expense claims; reduced compensation, both in terms of the hourly rate and the total available compensation; and, a delayed payment process.[4] Foster further reasoned that the administrative hurdles would have an effect, perhaps a subtle but important one, upon the quality of representation delivered to indigent clients. At an extreme, the administrative hurdles discouraged or prevented attorneys from accepting appointed clients. *Cf.* RPC 6.2(b).

Foster set about to develop a solution that would streamline and professionalize the fee and expense claim preparation and submission process under Tenn. Code Ann. § 40-14-201 *et seq.* and Rule 13, and, hopefully, would render the process so efficient and straightforward that attorneys would be encouraged to participate fully in representing indigent clients and, once involved, would be able to focus their energy and efforts upon zealous representation of the appointed client.

Foster's concept, developed in conjunction with others, envisioned that streamlining and professionalizing the claims submission process, conjoined with assistance to attorneys in receiving prompt payment for claims submitted, would contribute to improved delivery of legal services to, and would facilitate broader participation in representing, indigent clients

[4] Petitioners do not wish to criticize the efforts to update Tennessee's compensation structure for appointed counsel and recognize that fairly recently this Court has recently addressed the compensation structure and improved it. *See In re: Amendments to Supreme Court Rule 13*, No. M2003-02181-SC-RL2-RL, pp. 4-5 (Tenn., 1 June 2004). Even with improvements, however, the rates and maximum compensation are still low, and reduced compensation is one recognized problem for improving representation for indigent persons. *See Gideon's Broken Promise*, pp. 9-10, 41; The Spangenberg Group, *Resources of the Prosecution and Indigent Defense Functions in Tennessee*, pp. 2, 17-19 (June 2007) (available at http://www.thejusticeproject.org/ state/tn/reports/spangenberg-study.pdf [last accessed 12 October 2007]); Bill Redick and Bradley MacLean, *Uneven Playing Field Creates Injustice for Indigent in Tennessee*, Nashville TENNESSEAN, 1 July 2007 (available at http://www.nacdl.org/public.nsf/defenseupdates/tennessee009 [last accessed 12 October 2007]).

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
ORRISTOWN, TENNESSEE
37815-0724

in the State of Tennessee. Foster molded his concept into a company, BH. BH and Foster sought to develop, and seek constantly to improve, a professional system to help appointed attorneys:

- Collect accurate time and expense data, in keeping with the specific directive of Rule 13, § 6(b)(6) that "counsel will be held to a high degree of care in the keeping of contemporaneous time records supporting all claims and in the application for payment";
- Prepare consistent and accurate claim submissions upon the forms and in the manner prescribed by the AOC under Rule 13; and,
- Receive as payment as promptly as possible for representation of appointed clients.

The services developed by BH and Foster, and provided by BH to attorneys, very quickly resulted in attorneys taking court appointed cases without frustration or fear of non-payment, rendering less likely the presence of an "unreasonable financial burden" under RPC 6.2(b). Moreover, attorneys were more willing and capable to deliver zealous representation to indigent clients. Indeed, BH's services help narrow the practical and monetary gap between representation of appointed clients and representation of private clients by substantially reducing the administrative complexity of the Rule 13 claims submission process and by facilitating prompt payment of fees. (*See, e.g.,* Attorney Support Letters collected in Exhibit C to this Petition.)

The services offered by BH ease the administrative, record keeping, mailing, and tracking burden involved in the fee and expense claims process; the services can be summarized as follows:

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
MORRISTOWN, TENNESSEE
37815-0724

1. A trial court appoints an attorney to represent an indigent client.

2. Appointed counsel (AC) agrees with BH for BH to perform administrative tasks related to fee and expense claims for AC's representation of the indigent client.[5]

3. BH provides AC with forms on which contemporaneous time records can be made, and provides instructions and guidance regarding time and record keeping.

4. BH provides guidance and instructional materials regarding correct record keeping for the submission of claims under Tenn. Code Ann. § 40-14-201 *et seq.* and Rule 13, and regarding acceptable billing practices in appointed cases.

5. BH receives an assignment of the proceeds of the Rule 13 claim from the attorney. This assignment allows BH to advance to the attorney the claim and provide immediate payment to AC once a claim is reviewed and approved by AC and ready for submission to the trial court.

6. When either the representation (or a billable segment of the representation) has been completed, as provided in Rule 13, § 6(a)(4)-(5), BH transfers the records maintained by appointed counsel onto the proper forms for claims submission, obtains the signature of the appointed attorney verifying the content of the claim form, and obtains the signature of the trial court judge, as required by Tenn. Code Ann. § 40-14-208 and Rule 13, § 6(a)(1).

7. When the claim has been approved by the trial judge and is otherwise in order and complete, BH submits the claim to the AOC for payment, unless local practice mandates that the trial court clerk submit the claim. One benefit of this submission process

[5] Because of the confidential nature of this agreement, and because BH views its business model and practices as confidential as far as potential competitors are concerned, BH intends to seek permission to present a specimen copy of its agreement with appointed counsel to the Court under seal. BH understands that the Court may need to review that document, but will request that its business documents be protected from general disclosure.

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
8 WEST FIRST NORTH STREET
POST OFFICE BOX 724
)RRISTOWN, TENNESSEE
37815-0724

is that all claims submitted to AOC from BH are clean and uniform: formatting is clear and correct; tabulations are correct; and claims are complete. Another benefit is that BH bears the overhead of claim processing, from postage to copying, part or most of which would otherwise be born by the State of Tennessee.

8. Questions regarding the claim may be directed to BH, however, BH does not intend to interfere with any direct contact with AC on questions relating to the substance of the claim. BH does facilitate providing additional information to the AOC, if necessary, on behalf of the AC who contracts with it to provide administrative services.

9. After processing, audit, and approval by AOC, payment is then issued, in the name of AC and under the taxpayer identification number of AC, but is mailed to a post office box controlled by BH. [6]

10. Throughout the process, BH exerts no influence upon, and has no contact with, the substance of the representation – no confidential information or duties of loyalty are compromised, and BH handles and processes only information that is in the process of becoming a public record.[7]

In developing and implementing the system described in this Petition, BH and Foster invested substantial sums in software and documentation development, entered into contracts with vendors and suppliers, prepared instructional and marketing materials to make known the administrative service provided by BH, and expended significant money

[6] BH has no objection to payment being made directly to it, but that has not been its practice. Payments have been made, under its system, to the attorney, but have been requested to be mailed to a post office box controlled by BH.

[7] Petitioners understand that outright assignments of claims have been honored by the AOC for some undetermined period of time, i.e., that "factoring companies" have been allowed to "purchase" claims from appointed counsel and that AOC has, again Petitioners do not know the exact length of time, honored those purchases and sent payments directly to the "factor" rather than to appointed counsel. The system implemented by BH, however, represents more than a mere monetary arrangement: the system implemented by BH actually contributes to the quality and availability of appointed representation in Tennessee.

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
MORRISTOWN, TENNESSEE
37815-0724

and time analyzing and adjusting the system to ensure compliance with Rule 13 and all operating procedures within the AOC. Over the course of two and one-half years, BH filed over one thousand three hundred claims for appointed counsel. In two and one-half months after BH made its services widely available to attorneys across the state of Tennessee, the number of individual attorneys using the company's services grew quickly from eight to forty-three attorneys.

The attorney testimonial letters collected and attached as Exhibit C to this Petition attest to the facts described above regarding the services developed by Foster and offered by BH. Those letters demonstrate that the services offered by BH have been a resounding success for the attorneys involved and, more importantly, for the clients of the attorneys involved. Foster thus perceived the concept and the company helped to remedy, in a professional and lawful manner, problem areas in the system of appointed representation, i.e., the administrative overhead of claims submission and the delay in claim payment. The solution resulted in increased willingness by attorneys to accept court appointments and increased time by appointed attorneys to devote to legal service to indigent clients. (*See, e.g.,* Exhibit C.)

The recent interpretation of Rule 13 described in this Petition put an immediate halt to the improvement in appointed representation accomplished by BH. For the reasons set forth in this Petition, BH and Foster respectfully assert the business of BH should be allowed to continue.

TERRY, TERRY
AND STAPLETON
ATTORNEYS AT LAW
118 WEST FIRST NORTH STREET
POST OFFICE BOX 724
MORRISTOWN, TENNESSEE
37815-0724

IV. THE STATUTORY AND REGULATORY SYSTEM FOR COMPENSATION OF COUNSEL (AND FOR REIMBURSEMENT OF EXPENSES TO COUNSEL) APPOINTED TO REPRESENT INDIGENT DEFENDANTS DOES NOT CONTAIN ANY EXPRESS PROHIBITION ON DELEGATION OF THE PREPARATION OF CLAIMS NOR UPON THE ASSIGNMENT OF CLAIMS, NOR SHOULD ANY PROHIBITIONS BE IMPLIED UNDER TENNESSEE LAW.

In the wake of *Gideon v. Wainright,* the Tennessee General Assembly enacted 1965 Tenn. Pub. Acts, ch. 217, now codified as amended at Tenn. Code Ann. § 40-14-201 *et seq. See Allen v. McWilliams*, 715 S.W.2d 28, 30 (Tenn. 1986). The statute contains all of the substance of the law pertaining to compensation, with certain claim processing procedures to be prescribed by this Court by rule. *Id.*; Tenn. Code Ann. §§ 40-14-206, -208. No specific language in the statute prohibits the preparation of claims by or the assignment of claims to, a processing agent. *See* Tenn. Code Ann. §§ 40-14-201 to 40-14-210.

A. Applicable Statutory Provisions Contain No Prohibition on Either Preparation of Claim Forms by an Agent, nor on Assignment of Claim to a Third Party

The analysis of any question related to the processing of claims must begin with the language of the statute passed by the General Assembly, *see Lanier v. Rains,* 229 S.W.3d 656, 661 (Tenn. 2007), because Tenn. Code Ann. § 40-14-206 represents the cornerstone of this Court's regulatory provisions in Rule 13. *Cf. In re: Amendments to Supreme Court Rule 13 - Order,* No. M2003-02181-SC-RL2-RL, p. 2 (Tenn. S. Ct., 1 June 2004) (recognizing that certain portions of appointed counsel regime are within the purview of the legislature). This Court has recognized that: "[Rule 13] . . . merely contains the procedural mechanism for implementing Tenn. Code Ann. § 40-14-207(b)." *Owens v. State*, 908 S.W.2d 923, 928 n.10 (Tenn. 1995).[8]

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
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37815-0724

[8] *Owens* involved a post-conviction proceeding in a capital case, and so referred to a portion of the statutory scheme concerning capital cases. Nonetheless, *Owens* appears to support the broader proposition that Rule 13 is a procedural device to implement Tenn. Code Ann. § 40-14-201 *et seq.* (especially Tenn. Code Ann. §§ 40-14-206, -207, and -208).

Recognizing the role of the legislature, and the impact of the substantive law of Tennessee, represents a crucial component of the Petitioners' argument: if the otherwise generally applicable substantive law empowers individuals to authorize others to act on their behalf, and the legislature has not removed that empowerment for appointed counsel in the statutory enactment for their compensation, then any rule enacted by this Court should not affect or lessen that substantive right. *Cf. Owens*, 908 S.W.2d at 928 n.10 ("Rule 13 does not create rights.") *and also, In re: Amendments to Supreme Court Rule 13 – Order/Dissent,* No. M2003-02181-SC-RL2-RL, p. 2 (Tenn., 1 June 2004, Drowota, J., dissenting in part). *Cf. also* Tenn. Code Ann. 16-3-403 (rulemaking in another context expressly not to affect substantive rights); *Corum v. Holston Health & Rehabilitation Center*, 104 S.W.3d 451, 454-455 (Tenn. 2003).[9] If the substantive law of Tennessee enables an individual attorney to have another individual act on his or her behalf, then neither the interpretation of Tenn. Code Ann. § 40-14-201 *et seq.* nor the implementation of rules under the aegis of that statutory enactment should negate the effect of the existing law, unless the language of the statute supports such an effect: "When called upon to construe a statute, the courts must take care not to unduly restrict a statute's application or conversely to expand its coverage beyond its intended scope." *Lanier*, 229 S.W.3d at 661. An important part of construing a statute thus resides in a reading of the statute that accounts for the background of Tennessee law against which the legislature passed any particular statute. (*See* argument below, Section IV.B.)

[9] Petitioner does not assert that Tenn. Code Ann. § 16-3-403 applies directly in the present case. Rather, since Rule 13 is likely not within the "inherent" power of this Court to prescribe rules of practice, *see Corum*, 104 S.W.3d at 454 (right to establish rules of practice is "inherent power [that] 'exists by virtue of the establishment of a Court'"), the scope of Rule 13 should conform to the scope of rulemaking authority granted by Tenn. Code Ann. § 40-14-206 and the general substantive law of Tennessee.

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
MORRISTOWN, TENNESSEE
37815-0724

Tenn. Code Ann. § 40-14-206, the statute authorizing the promulgation of regulations, contains four sentences:

(Sentence 1) This Court is empowered to prescribe rules regarding the "nature of the expenses for which reimbursement may be allowed under this part" and the "limitations and conditions for expense reimbursement." Thus, the Court may control the types of expenditures for which cost reimbursement may be granted, such as postage and copying, as indeed this Court has done in Rule 13, § 4(a).

(Sentence 2) Next, the statute indicates that this Court should "specify the form and content of applications for reimbursement and compensation[.]" Thus, this Court appears to have a duty to specify the format of fee and expense applications, as indeed this Court has done in Rule 13, § 6(a)(1).

(Sentence 3) Next, the statute states: "The court may adopt other rules with regard to the accomplishment of the purposes set forth in this part as it deems appropriate in the public interest." This Court, then, may prescribe a range of rules, as long as those rules advance the accomplishment of the purposes of Tenn. Code Ann. § 40-14-201 *et seq.* (This provision allows this Court to modify Rule 13 to expressly allow use of an agent in Rule 13 claim preparation, since such a provision contributes to accomplishing the purposes set forth in Tenn. Code Ann. § 40-14-201 *et seq.* of meeting the constitutional mandate to provide counsel to indigent defendants.)

(Sentence 4) Finally, the statute reiterates its primary purpose by catching all potential loose ends with a broad statement: "The rules shall provide for compensation for appointed counsel, not otherwise compensated, in all cases where appointment of counsel is required by law." (Again, this broad provision supports the assertion that this Court can

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
MORRISTOWN, TENNESSEE
37815-0724

amend Rule 13 to expressly provide for delegation of claim preparation, since the legislative intent clearly was to meet the constitutional mandate of *Gideon v. Wainright*, and third-party claim preparation facilitates achieving that mandate.)

Section 206 reveals no prohibition on the use of a claim preparation agent by appointed counsel and no bars to an assignment of the claim.

The statute then contains certain language regarding submission of claims; Tenn. Code Ann. § 40-14-208(a) provides: "Each attorney seeking reimbursement or compensation under this part shall file an application with the trial court stating in detail the nature and amount of the expenses claimed[.]" This provision places the requirement of filing an application for compensation/reimbursement upon "each attorney." This language, however, cannot naturally be read to make the responsibility of filing an application wholly and absolutely incumbent upon the actual appointed attorney personally, i.e., in a strict sense, non-delegable.

To read § 40-14-208(a) as prohibiting any action except the personal completion and filing of the claim form by the individual appointed attorney would exclude even the attorney's office personnel from assisting or participating in any way in claim preparation. Such a reading of the statute would violate the normal usage of the statute's words: "each attorney" simply denotes the person entitled to file the fee and expense application with the trial court, and contains no hint of any absolute restriction on the preparation of a claim to the attorney, or even the attorney's office staff. Moreover, a normal reading of any language regarding the investing of some task in an individual person, (absent some express prohibition), does not preclude the individual having assistance with the task or appointing some agent to perform part of the task. (*See* argument below, Section IV.B.)

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MORRISTOWN, TENNESSEE
37815-0724

Even in the context of a law practice, delegation of duties to others occurs routinely, even with tasks that would otherwise constitute the practice of law, but the lawyer must retain authority over the task, responsibility for the task, and confidentiality of the client's information. For example, the Tennessee Board of Professional Responsibility has stated:

> There is no impropriety in a law firm leasing non-lawyer staff personnel from a third party lessor/employer provided the law firm exercises reasonable care to prevent the leased personnel from disclosing or using the confidences or secrets of a client.

Tennessee Board of Professional Responsibility, *Formal Ethics Opinion 85-F-99*, p. 2 (available at http://www.tbpr.org/Attorneys/EthicsOpinions/ Pdfs/85-F-99.pdf [last accessed 13 October 2007]).[10] *See also, e.g.,* San Diego County Bar Association, *Ethics Opinion 2007-1* (use of overseas company to prepare litigation documents not unauthorized practice of law, so long as lawyer retains responsibility and authority over representation) (available at http://www.sdcba.org/ethics/ethicsopinion07-1.htm [last accessed 15 October 2007] and copy provided as Exhibit D) *Cf. also* RPC 5.3 (reciting responsibility for actions of non-lawyers whose services are used by lawyers). Even Rule 13 appears to recognize that attorneys will use the services of others in appointed representation, for Section 4(a)(2) expressly prohibits the reimbursement of "the services or time of a paralegal, law clerk, secretary, legal assistant, or other administrative assistants." S. Ct. R. 13, § 4(a)(2).

Authority and responsibility constitute the foundation of any analysis of delegation: an attorney may not delegate the authority vested in him or her by virtue of the professional relationship with the client, but may have the assistance of others, whether employees, "leased" office staff, or even non-employee agents, in fulfilling tasks incumbent upon the

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ORRISTOWN, TENNESSEE
37815-0724

[10] This opinion relied heavily upon Ethical Considerations 4-1, 4-2, 4-3, and 4-5 under this Court's prior Rule 8, Code of Professional Responsibility. The factors in 4-1, 4-2, 4-3, and 4-5 appear to be embodied in RPC 1.6 and 5.3 under current Rule 8, Rules of Professional Conduct.

lawyer. So, as long as appointed counsel retains complete responsibility for the ultimate veracity of any fee or expense claim filed with the AOC and protects any confidential information of the appointed client, engaging an agent for the administrative task of preparing the claim form (based wholly upon information recorded and provided by appointed counsel) accords seamlessly with the ultimate responsibility of "each attorney" to file the form.

In implementing Tenn. Code Ann. §§ 40-14-206, -207, -208, Rule 13 provides: "Payment may be made directly to the person, agency, or entity providing the services." Rule 13, § 6(b)(3). Payments on claims prepared by BH have always been made payable to appointed counsel (and thus "directly to the person . . . providing the services"). Since "made directly" in Rule 13, § 6(b)(3) may more naturally be read to mean "made directly payable to" than "mailed directly to," full compliance with Rule 13 obtains under the system used by BH.[11]

Moreover, "may" should be read as permissive in Rule 13, particularly because may is used in a permissive sense throughout the rule. In the remainder of Rule 13, "may" appears to denote a permissive situation: § 1(b) ("may appoint"); § 2(e)(1) ("may be sought"); § 2(e)(1) ("The following, while neither controlling nor exclusive, indicate the character of reasons that may support"); § 2(e)(3)(D) ("director may waive"); § 3(b)(2) ("trial court may grant"); § 3(b)(3) ("the trial court may either"); § 3(e) ("Attorneys who represent the defendant in the trial court in a capital case may be designated to represent the defendant on direct appeal"); § 3(h) ("Counsel also must have a working knowledge of

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MORRISTOWN, TENNESSEE
37815-0724

[11] To the extent "made directly" means "made payable to and mailed only to the normal office address of appointed counsel," the language may exceed the scope of rulemaking authority granted under Tenn. Code Ann. § 40-14-206 and, as long as no other provision of law prohibits assignments, may also conflict with the non-impairment of assignment mandate of Tenn. Code Ann. § 47-9-406(f).

federal *habeas corpus* practice, which may be satisfied by six hours of specialized training in the representation in federal courts of defendants under the sentence of death imposed in state courts"); § 6(a)(6) ("Failure to provide sufficient specificity in the claim or supporting documentation may constitute grounds for denial of the claim for compensation or reimbursement.") Section 4 of Rule 13, dealing with reimbursed expenses, perhaps bears the closest resemblance to § 6(b)(3), where § 4(a)(1) states: "Appointed counsel, experts, and investigators may be reimbursed[.]" The entire regime related to expense reimbursement appears to be permissive: the reimbursement may be made or it may not be made. The Court made the permissive nature clear in the Explanatory Comment: "Section 4(a)(3)[[12]] *permits* reimbursement without prior approval of certain expenses and is intended to eliminate time previously spent by attorneys and judges considering such expenses." [Italics added.] Comparing the language of § 4(a)(1) with § 4(a)(2) may also help, ("Normal overhead expenses also shall not be reimbursed") for clearly mandatory language is used when necessary. For another, final example, in another rule of this Court, S. Ct. R. 8, RPC *Scope* [1], specifically denotes "may" as a permissive term. Using these comparisons and related usages of "may" would render § 6(b)(3) naturally as a permissive section that acts in default of other instructions from appointed counsel, i.e., the language gives guidance to the director regarding payment, provided no other, more specific instructions are received from appointed counsel.

The existing, substantive law of Tennessee supports the suggested reading of Rule 13, § 6(b)(3), because longstanding law provides that payment to an agent constitutes

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18 WEST FIRST NORTH STREET
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ORRISTOWN, TENNESSEE
37815-0724

[12] Section 4(a)(3) lists categories of expenses that "will" be reimbursed without prior approval of the Court. In this context, and given the explanatory comment quoted above, even "will" appears to be a permissive term here. Whether such discretion is permitted with Tenn. Code Ann. § 40-14-201 *et seq.* may be questioned, but the usage appears here to be purely permissive.

payment to the principal. *Loveday v. Barnes*, 909 S.W.2d 448, 450-451 (Tenn. App. 1995) (citing, as in accord, *Conaway v. New York Life Ins. Co.*, 102 S.W.2d 66 (Tenn. 1937) [the relevant language seems to appear on pp. 70-71, 74]). Read against the background of existing law and the lack of any express statutory authority to restrict payments in a manner contrary to the common law, and even if the "may" is mandatory and even if payable to appointed counsel mailed to a post office box controlled by BH is not "directly," the "made directly" in Rule 13, § 6(b)(3) should be read to include mailing to agents.

B. General Law Supports the Permissibility of Appointed Counsel Using an Agent to Prepare Claim Forms.

Given the absence of any specific language on the use of an agent and on assignment, the generally applicable substantive law should fill the interstice in the regime. Nearly a century ago, this court declared:

> It is well settled that "if the statute does not include and cover such a case, it leaves the law as it was before its enactment. * * * A statute will not be construed to alter the common law further than the act expressly declares, or than is necessarily implied from the fact that it covers the whole subject-matter.

State v. Watkins, 130 S.W. 839, 840 (Tenn. 1910) (quoting *State v. Cooper*, 113 S.W.1049, 1049 (Tenn. 1908) (ellipsis in original)). In the past half-decade, this Court has, on at least two notable occasions, followed the rule of *State v. Cooper* in refusing to disturb common law principles even in the face of statutory enactments regarding the subject matter. In *Houghton v. Aramark Education Resources, Inc.*, 90 S.W.3d 676 (Tenn. 2002), this Court determined that, despite the existence of a regulation providing that "central operators [of child care facilities] shall have ultimate responsibility for the administration/operation of any or all child care homes and child care centers in the system" that vicarious liability could not attach to the criminal acts of a day care center employee. 90 S.W.3d at 679-680. This Court

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ORRISTOWN, TENNESSEE
37815-0724

determined that the regulations did not displace the common law prohibition on vicarious liability for criminal acts of employees exceeding the scope of the employee's employment. *Id.* at 681. Similarly, in *Guy v. Mutual of Omaha Ins. Co.*, 79 S.W.3d 528 (Tenn. 2002), this Court determined that a legislative enactment establishing a cause of action for retaliatory discharge in violation of public policy did not repeal the common law cause of action for retaliatory discharge. 79 S.W.2d at 536-537. Although *Houghton* and *Guy* deal with differing factual situations, they reflect a general rule in Tennessee: that a statutory enactment leaves the existing law on a subject untouched, unless, by its plain meaning, the statutory enactment repeals or changes the existing law.

In the present case, the common law of agency (as well as the general law related to assignments and payments, *see* above Section IV.A) demonstrates that appointed counsel may use agents for claim preparation and facilitation under Rule 13 and Tenn. Code Ann. § 40-14-201 *et seq.* and that an assignment of a claim in return for an advance payment is permissible.

The general law of Tennessee supports the notion that any act for which no express public policy precludes delegation may be done through an agent:

> It is axiomatic that an agency may be created for any lawful act and that whatever a person may lawfully do, if acting in his own right and in his own behalf, he may delegate that authority to an agent. It is also axiomatic that authority cannot be lawfully delegated which is illegal, immoral or opposed to public policy, nor can one delegate an act which is personal in its nature, such as designating an agency to perform a personal duty or a personal trust.

Rich Printing Co. v. McKellar's Estate, 330 S.W.2d 361, 379-380 (Tenn. App. 1959). *See also Henson v. Henson*, 268 S.W.378, 381 (Tenn. 1925) ("What a party can lawfully do himself he can do through an agent.") *See generally* RESTATEMENT (SECOND), AGENCY §

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ATTORNEYS AT LAW
18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
ORRISTOWN, TENNESSEE
37815-0724

17.[13] While the performance of legal representation likely amounts to "a personal duty or a personal trust," the administrative task of completing a fee and expense claim form cannot be "personal" in any sense, because one person can prepare the form just as well as another, once appointed counsel gathers the necessary information.

The Restatement of Agency (Second) states:

> Duties or privileges created by statute may be imposed or conferred upon a person to be performed or exercised personally only. Whether a statute is to be so interpreted depends upon whether or not in view of the purposes of the statute, the knowledge, consent, or judgment of the particular individual is required.

RESTATEMENT (SECOND), AGENCY § 17, *comment b.* This statement shows clearly that the preparation of a claim form under Tenn. Code Ann. § 40-14-201 *et seq.* and Rule 13 cannot be a task that requires the strictly personal action of the appointed attorney: if the appointed attorney has maintained contemporaneous time records as required by Rule 13, then the preparation of the claim form will not require any "knowledge, consent, or judgment of the particular individual," but rather will be the act of a scrivener filling in the spaces of the form with the information maintained and provided by the attorney.

Petitioners respectfully assert that nothing in Tenn. Code Ann. § 40-14-201 *et seq.* prohibits third party processing of claim forms, nor does anything in the statute prohibit assignment of claims. Nothing in Rule 13 expressly prohibits third party preparation of claims, and the "directly" language of Rule 13 should not be read to place substantive limitations upon payment, since such a restriction would run counter to the existing substantive law of Tennessee. Precisely stated, Rule 13 and Tenn. Code Ann. § 40-14-201 *et seq.* neither expressly prohibit nor expressly allow third party processing of claims, nothing in the statute expressly prohibits assignment of claims, and the one sentence of Rule

[13] RESTATEMENT (SECOND), AGENCY has been superceded by RESTATEMENT (THIRD), AGENCY.

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18 WEST FIRST NORTH STREET
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ORRISTOWN, TENNESSEE
37815-0724

13 that might lend some support to the assertion that payments should be mailed to appointed counsel should not be read in that manner and, in any event, would not support the complete prohibition of on the business of BH mandated by the AOC on 18 September 2007.

V. NO ETHICAL OR OTHER CONSIDERATION WEIGHS IN FAVOR OF PROHIBITING PREPARATION OF APPOINTED COUNSEL FEE AND EXPENSE CLAIMS BY AGENTS OR IN FAVOR OF PROHIBITING THE ASSIGNMENT OF SUCH CLAIMS ONCE EARNED.

The 14 September 2007 letter from the AOC, which Petitioners believe was not disseminated or made effective, indicate that unspecified "ethical considerations" rendered the claim preparation and assignment services of BH impermissible. The reference to "ethical considerations" was removed altogether from the 18 September 2007 letter from the AOC, however, to be thorough and in order to address as many issues as possible to allow consideration of the request for immediate, interim relief, Petitioners will attempt to address preliminarily in this document two issues that may present some questions: confidentiality and division of fees. Petitioners are prepared to address other issues, if the Court desires.

A. No Breach of Confidentiality or Privilege Occurs By Way of the Services Performed by BH.

Initially, it appears unlikely that claim preparation involves confidential information: the types of information required for claim submission do not necessarily include confidential information under RPC 1.6 or privileged information under the law of Tennessee. *See* RPC 1.6. *See also* Nat'l Assn. of Criminal Defense Lawyers Ethics Advisory Opinion, *Formal Opinion* 03-01 (January 2003) (reciting "identities of potential witnesses, places visited and things done in an investigation, information derived from

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37815-0724

investigation, and legal research topics" as confidential and privileged items in criminal defense practice). The "contemporaneous time records" mandated in Rule 13, § 6(a)(6) describe a certain mode of record-keeping, and do not refer to the detail in which matters are described on the fee claim form. Nothing in Tenn. Code Ann. § 40-14-201 *et seq.* nor Rule 13 mandate that appointed counsel include confidential or privileged information in a fee claim form. (One benefit of the system developed by BH resides in the method recording and segregating data to protect confidential information: BH provides a form for recording time and expenses for each matter, which keeps such time separate from other matters and also allows the attorney to maintain contemporaneous time records separately from interview notes, court notes, or strategy notes that may be confidential or privileged.)

The burden of preserving confidentiality will rest, as it does in any event, upon the individual appointed counsel, who will need to refrain from including confidential or privileged information in the records provided to BH (just as such information need not be included in claim forms submitted to AOC).[14] Moreover, to the extent appointed counsel deems necessary a disclosure of potentially confidential information, counsel should either obtain consent for such a release of information, or would be unable to use the services of BH. *See* RPC 1.6(a). It might be that counsel using an agent to process claims would need to take extra care before passing time records to the agent, but that does not represent an argument against the permissibility of using an agent. Rather, concerns about confidentiality in agent processing of fee and expense claims require attention to disclosure in just the manner lawyers constantly attend to those concerns in their daily lives.

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37815-0724

[14] Following conclusion of the matter, such information likely will be neither confidential nor privileged, since whatever exists in the detailed billing becomes a public record. Tenn. Code Ann. § 40-14-202(j).

Furthermore, Rule 13 specifically states that no interim billing is allowed in noncapital cases. S. Ct. R. 13, § 6(a)(5). The statute enacting the right to payment for representation of indigent defendants renders the detailed time records and billing records public record following conclusion of the matter. Tenn. Code Ann. § 40-14-202(j). In addition, appointed counsel's rate of pay, the maximum compensation that may be claimed, and the identity of the party paying the claim, all of which have been analyzed by some sources as potentially confidential, arise, in appointed representation, from public enactments, either by this Court or by the legislature of Tennessee, and are thus common knowledge or are available from public sources. Accordingly, all of the information provided to BH in the course of its claim processing is (or is becoming) a public record by the time that BH obtains the information in noncapital cases.

One Massachusetts ethics opinion on a similar subject voiced a concern over potential disclosure of the "amount of time the lawyer spent on the client's business, what the business was and how the time was spent[.]" Massachusetts Bar Association, *Ethics Opinion* 82-3 (available at http://www.massbar.org/for-attorneys/publications/ethics-opinions/1980-1989/1982/opinion-no-82-3 [last accessed 10 October 2007]). These concerns should not present a problem in the present situation, where the fact of the representation, the total amount of time spent on a matter, and the total of expenses paid are "a public record" even during the pendency of the proceedings. Tenn. Code Ann. § 40-14-202(j).

Ethics opinions related to "outsourcing," discussed below, make clear that law office tasks can be done in a manner that preserves confidentiality, in the same way that lawyers must ensure that all non-lawyers "employed, retained by, or associated with a lawyer"

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POST OFFICE BOX 724
ORRISTOWN, TENNESSEE
37815-0724

maintain confidentiality of the information to which they have access. RPC 5.3. The comments to RPC 5.3, in fact, seem to specifically envision the use of agents for law office tasks, so long as the lawyer takes "instruction and supervision" to ensure the protection of confidentiality:

> Lawyers generally employ non-lawyers in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such employees act for the lawyer in rendition of the lawyers professional services.

RPC 5.3 *comment [1].*

Appointed counsel, therefore, can preserve confidentiality by (a) reviewing the time information provided to an agent, which will not necessarily include any confidential information and (b) ensuring that any agreement with a claims processing agent contain appropriate confidentiality provisions.

B. No Improper Division of Fees Occurs as a Result of the Assignment of the Claim by Appointed Counsel to BH.

As many authorities recognize, concerns over the splitting of fees mainly exist to prevent impairment of the lawyer's independent judgment and control over the litigation. For example, as Restatement of Law Governing Lawyers (Third) § 10 and its comments make clear, the prohibition on division of a fee with a non-lawyer arises directly from concerns about control and judgment. *See* RESTATEMENT (THIRD), THE LAW GOVERNING LAWYERS § 10; *id., comment b;* RPC 5.4 *comment [1]* ("These limitations are to protect the independence of the lawyer's professional judgment.")

In the present case, no question of control or judgment can be raised. First, the regime for compensation of appointed counsel contains one feature not found in any case in which impairment of independent judgment is a concern: compensation of appointed

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POST OFFICE BOX 724
MORRISTOWN, TENNESSEE
37815-0724

counsel always occurs by the responsibility and action of a third party, and never at the action of the client. Therefore, concerns related to potential impairment of the attorney-client relationship because of third party involvement in the billing and payment process do not exist in appointed representation. As the fees and reimbursement paid to appointed counsel never involve the client, the involvement of BH (or any other agent) in the process presents no meaningful risk of impairing appointed counsel's independence or loyalty to any greater extent than already exists structurally, by virtue of a relationship in which the client never pays and in which the state government controls the payment process.

Moreover, BH has no connection with or contact with the substance of the lawsuit and exercises no control over appointed counsel at any point in the representation. BH simply processes the contemporaneous records maintained by appointed counsel and transforms appointed counsel's records into a claim, obtains the required administrative approval of the claim, and shepherds the claim through the administrative system for payment. If anything, as has been repeatedly argued in this Petition, and as is shown in the letters attached as Exhibit C, a salubrious, rather than deleterious, effect results from the involvement of BH: relieved of the administrative burden of billing and awaiting payment in an endeavor whose profitability is marginal at best, appointed counsel actually dedicate more time and attention to their clients when claim preparation is accomplished by BH. (*See* Attorney Letters, Exhibit C.)

Generally, rights to the payment of money are assignable. Tenn. Code Ann. § 40-14-207(a) creates an entitlement to "reasonable compensation" for serving as appointed counsel to indigent clients, and once such compensation is earned, it is property just as any other compensation is property. The representation, the exercise of professional judgment and

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118 WEST FIRST NORTH STREET
POST OFFICE BOX 724
MORRISTOWN, TENNESSEE
37815-0724

skill, and the exercise of professional knowledge on behalf of the client have all occurred by the time BH undertakes its administrative services to appointed counsel; only enforcing property rights against a party other than the client remains.

Moreover, once a fee is earned, concerns regarding division of fees decrease or fade entirely: legal fees are similar to any other property in that once the lawyer has earned the fees, fees are simply property that may be divided with non-lawyers or transferred just as any other property may be. *Cf. Hennigan v. Hennigan,* 666 S.W.2d 322, 325 (Tex. App. 1984) ("Appellant [an attorney] can assign his accounts receivable, consisting of current or future, earned or unearned, attorney fees as property securing a transaction."); *Levine v. Bayne, Snell & Krause, Ltd.*, 92 S.W.3d 1, 5 (Tex. App. 1999) *rev'd on other grounds* 40 S.W.3d 92 (Tex. 2001) ("Attorneys, however, can assign their accounts receivable which includes current, future earned or unearned attorney's fees."); Massachusetts Bar Association, *Ethics Opinion* 82-3 (lawyer may sell accounts receivable, but must "be cautious in doing so" because of potential for disclosure of underlying confidential information during collection process) (available at http://www.massbar.org/for-attorneys/publications/ethics-opinions/1980-1989/1982/opinion-no-82-3 [last accessed 10 October 2007]); Iowa State Bar, *Ethics Opinion 81-37* (24 November 1981) (available at http://www.iowabar.org/ethics.nsf/e61beed77a215f6686256497004ce492/3648a26d05fce577862564c20065f3d3!OpenDocument [last accessed 10 October 2007]). *See generally* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 41:2010 (collecting opinions from state authorities).[15]

[15] Petitioners recognize that the conclusion set forth in the opinions cited in the ABA/BNA Manual does not represent a unanimous position and that myriad factual circumstances have resulted in differing decisions. For example, the Ohio Board of Commissioners on Grievances and Discipline reached the conclusion that a lawyer may not "factor" a contingent fee after settlement but before receipt of the proceeds,

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ATTORNEYS AT LAW
18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
MORRISTOWN, TENNESSEE
37815-0724

In *In re PNC Bank, Delaware v. Berg*, 45 U.C.C.Rep.Serv.2d 27, 1997 WL 527978 (Del. Super., January 31, 1997) (a copy of this case is attached as Exhibit E to this Petition), the Superior Court of Delaware stated unequivocally:

> The Tighe defendants suggest that it is "inappropriate" for a lender to have a security interest in an attorney's contract rights. Yet it is routine practice for lenders to take security interests in the contract rights of other business enterprises. *A law firm is a business, albeit one infused with some measure of the public trust, and there is no valid reason why a law firm should be treated differently than an accounting firm or a construction firm.* The Rules of Professional Conduct ensure that attorneys will zealously represent the interests of their clients, regardless of whether the fees the attorney generates from the contract through representation remain with the firm or must be used to satisfy a security interest. *Parenthetically, the Court will note that there is no suggestion that it is inappropriate for a lender to have a security interest in* an attorney*'s accounts receivable. It is, in fact, a common practice.* Yet there is no real "ethical" difference whether the security interest is in contract rights (fees not yet earned) or accounts receivable (fees earned) in so far as Rule of Professional Conduct 5.4, the rule prohibiting the sharing of legal fees with a nonlawyer, is concerned. It does not seem to this Court that we can claim for our profession, under the guise of ethics, an insulation from creditors to which others are not entitled.

1997 WL 527978, at *10 n.5 (emphasis added).

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at least in part because if the settlement then failed to materialize, the lawyer's loyalty and duty to the client might be compromised. Ohio Board of Commissioners on Grievances and Discipline, *Opinion 2004-2* (3 June 2004) (available at http://www.sconet.state.oh.us/boc/ advisory_opinions/2004/op%2004-002.doc [last accessed 12 October 2007]). One Ohio appellate court, however, allowed an assignment of fees to stand in the face of the advisory opinion and followed instead the rationale of the *PNC Bank* court quoted below. *See Core Funding Group, LLC v. Diana McDonald, et al.*, 2007-Ohio-1953, ¶¶ 60-62, 2006 WL 832833, at *10-11 (Ohio App., 6th Dist., 31 March 2006) *review accepted* 852 N.E.2d 187 (Oh. 2006) *and appeal dismissed as improvidently granted and Court of Appeals opinion designated as not for citation as authority* 865 N.E.2d 52 (Oh. 2007). *See also* Tex. Comm. on Professional Ethics, *Opinion 464*, 52 Tex. B. J. 1200 (1989) (lawyer may only sell accounts receivable with consent of clients, which must be obtained in advance and must protect confidentiality) (also available at http://www.txethics.org/reference_opinions.asp?opinionnum=464 [last accessed 12 October 2007]). State Bar of Arizona, *Opinion 98-05* (March 1998) (factor arrangement not permissible primarily because of potential to disclose confidential information when agreement would have allowed factoring company to have direct contact with client and use information from attorney to collect accounts) (available at http://www.myazbar.org/Ethics/opinionview.cfm?id=490 [last accessed 12 October 2007]). Petitioners believe these opinions are distinguishable based upon the public nature of the information provided to BH, the nature of the representation, the distance from the substance of the actual representation of BH, the fact that BH is merely processing a claim with a governmental agency (versus attempting to act as a collection agent against a client), and, perhaps most importantly, that a payment never comes from or involves the client in any way in appointed representation. At the outset of appointed representation, an irreducible fact exists: the client cannot pay, otherwise appointed counsel would not have been appointed. Collection efforts that do not involve the client do not threaten to impair the attorney-client relationship in the same manner that collection efforts involving clients do.

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
8 WEST FIRST NORTH STREET
POST OFFICE BOX 724
MORRISTOWN, TENNESSEE
37815-0724

Some authorities may not have gone as far as the Delaware Superior Court in treating unearned contingent fees as contract rights, however, this Court need not decide that question for the purpose of interpreting, applying, and clarifying Rule 13: under that Rule, and under the practices of BH, advances are made only after fees have been earned; and, the transfer of earned fees is unproblematic from the standpoint of professional ethics and responsibility.

C. The Practice of "Outsourcing" Law Office Tasks, Discussed in New York City Bar Formal Ethics Opinion 2006-3 and Other Sources, Provides a Persuasive Analogy that Agent Claim Processing for Appointed Counsel is Permissible.

As many sources and authorities have come to acknowledge, outsourcing in order to obtain cost savings and efficiencies of scale has become a significant component of business in the United States, including within the legal profession. *See* The Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, *Formal Ethics Opinion 2006-3*, pp. 1-2 (August 2006)(copy attached to this petition as Exhibit F) (hereinafter "NYCBA FEO 2006-3").[16] As NYCBA FEO 2006-3 and other more recent authorities recognize (*see* Footnote 16 above), outsourcing even of the drafting of pleadings, discovery, affidavits, and other documents, had become common within the legal profession and, provided certain safeguards are met, may be accomplished within the boundaries of the

[16] As further background, please see Marcia L. Proctor, *Considerations in Outsourcing Legal Work*, MICH. BAR J. (Sept. 2005), pp. 20-24 (available at http://www.michbar.org/journal/pdf/pdf4article904.pdf [last accessed 13 October 2007]); Keith Woffinden, Comment, *Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries under New York City Opinion 2006-3*, 2007 B.Y.U. L. REV. 483 (2007) (available at http://lawreview.byu.edu/archives/2007/2/5WOFFINDEN.FIN.pdf [last accessed 13 October 2007]). For other ethics opinions regarding the same subject, all of which reach similar conclusions regarding the acceptability of "outsourcing" (with varying safeguards), *see* San Diego County Bar Association, Ethics Opinion 2007-1 (available at http://www.sdcba.org/ethics/ethicsopinion07-1.htm [last accessed 9 October 2007]), North Carolina State Bar, *Proposed 2007 Formal Ethics Opinion 12 – Outsourcing Legal Support Services* (12 July 2007) (available at http://www.ncbar.com/ethics/propeth.asp [last accessed 9 October 2007]), Florida Bar, *Professional Ethics Opinion of the Florida Bar – Proposed Advisory Opinion 07-2* (7 September 2007) (available at http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/DB3E4EDA068D917385257353007OB8D0/$FILE/07-2%20pao.pdf?OpenElement [last accessed 9 October 2007]).

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
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various rules of professional conduct. NYCBA FEO 2006-3, pp. 1-2. For example, NYCBA FEO 2006-3 requires certain steps be taken to supervise the work of outsourcing contractors, to protect confidentiality, and to guard against conflicts of interests when overseas outsourcing is used for the preparation of memoranda, briefs, affidavits, and other documents. *Id.*, pp. 4-8. NYCBA FEO 2006-3 requires and allows the divulging of client confidences to the outsourcing business when informed consent has been obtained from the client. *Id.*, pp. 5-6.

The services provided by Billable Hours are not the outsourcing of legal services such as was permitted in New York and in San Diego. In the case before this Court, no legal work of any type is being done by BH, but rather only an administrative task that needs to be completed at the end of the representation or at the end of a particular billing phase in the case. The administrative task is of a sort normally delegated by lawyers to others, whether employees or contractors, and is less problematic than the outsourcing of actual legal work such as drafting.

D. The Practice of Accepting Credit Card Payments for Legal Services Provides a Persuasive Analogy that Assignment of Claims for Fees and Expense Reimbursement by Appointed Counsel is Permissible.

The situation with BH and the appointed attorneys who use the services of BH finds an analogue in credit card payments to law firms for legal services, which the Board of Professional Responsibility of this court has specifically approved. Tennessee Board of Professional Responsibility, *Formal Ethics Opinion 82-F-28* (18 June 1982) (available at http://www.tbpr.org/Attorneys/EthicsOpinions/Pdfs/82-F-28.pdf [last accessed 13 October 2007]); Tennessee Board of Professional Responsibility, *Formal Ethics Opinion 82-F-28(a)* (18 October 1982) (available at http://www.tbpr.org/Attorneys/EthicsOpinions/Pdfs/82-F-

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18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
ORRISTOWN, TENNESSEE
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28(a).pdf [last accessed 13 October 2007]). When a law firm takes a credit card payment it is the card issuer who actually makes the payment for legal services to the lawyer and the actual client does not make the payment. In return for the fee paid to accept credit card payments, the law firm gets an immediate amount of money instead of having to wait on the client to pay. The immediate sum received generally represents less than the full fee due, because, normally, fees and/or processing costs are subtracted from the sums actually paid to the vendor/attorney by the credit card company. Formal Ethics Opinion 82-F-28 prohibits attorneys from passing on to clients the expense of accepting the credit card payment (or belonging to the credit card program), thus, the attorney is using a portion of the attorney fee to pay the fee for utilizing that particular payment system, just as occurs with BH. The client makes payments to the credit card company, but those payments are not forwarded to the law firm; instead, the payments are retained by the credit card company in satisfaction of the amount it advanced to the law firm.

By way of comparison, in the present situation, the appointed attorney stands in the place of the lawyer, the AOC stands in the position of the client, and BH stands in the position of the credit card company. Regarding money, BH makes an immediate payment to the lawyer, just as the credit card company does, and then facilitates collection of funds from the payer of the fees, in this case the AOC.

VI. THE PRE-18 SEPTEMBER 2007 STATUS QUO SHOULD BE RESTORED PENDING FURTHER ACTION BY THIS COURT.

The 18 September 2007 directive by the AOC director demonstrates that prior to that directive, claims prepared by processing agents on behalf of appointed counsel were accepted and paid without problem. (*See* Exhibit A to this Petition – directive notes a

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
8 WEST FIRST NORTH STREET
POST OFFICE BOX 724
)RRISTOWN, TENNESSEE
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"change" from the manner business had been conducted prior to that time.) According to its records, BH submitted over one thousand three hundred claims that it prepared on behalf of appointed counsel prior to 18 September 2007. Moreover, BH possessed assignment of those claims and other claims when the AOC issued its directive.

BH has important property rights that have been affected by the current interpretation of Rule 13. For example, BH has paid appointed counsel and received assignments for a substantial number of claims that have yet to be submitted to AOC. In addition, BH has contracted to provide processing, and has begun processing, on a substantial number of claims (and has received an assignment on those claims, though no payment has yet been made). Finally, BH has completed processing of a number of claims on which it is not certain of the status (e.g., claims prepared and submitted to a trial judge, but not yet returned or perhaps not yet approved by the trial judge.) In other words, BH has expended a great deal of time, work hours, and funds in direct reliance on the pre-18 September 2007 regime of claim processing. Given that no express prohibition exists against such processing, BH believes relief should be given for all claims it has agreed to process and should be granted preserving the operation of BH under the pre-18 September 2007 status quo.

Moreover, the assignments BH obtained from appointed counsel are valid under the law of Tennessee, including Tenn. Code Ann. § 47-9-406, which provides, in part:

> LEGAL RESTRICTIONS ON ASSIGNMENT GENERALLY INEFFECTIVE. Except as otherwise provided in §§ 47-2A-303 and 47-9-407 and subject to subsections (h) and (i), a rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper is ineffective to the extent that the rule of law, statute, or regulation:

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
8 WEST FIRST NORTH STREET
POST OFFICE BOX 724
ORRISTOWN, TENNESSEE
37815-0724

> (1) prohibits, restricts, or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in the account or chattel paper; or
>
> (2) provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account or chattel paper.

Tenn. Code Ann. § 47-9-406(f).[17]

The 18 September 2007 directive from the AOC both state "we currently have no choice but to *mandate this change.*" (*See* Exhibit A [italics added].)[18] Thus, AOC acknowledges that it had previously allowed the practices undertaken by BH (and perhaps other agents), and that a "change" occurred with the issuance of the directive.

Given the acceptability of the submission of claims prepared by BH prior to 18 September 2007, the impairment of BH's property rights by the arbitrary action of the AOC, and lack of any express prohibition on the preparation of claims by agents for appointed counsel and upon assignment of such claims after fees are earned, this Court should return the interpretation and application of Rule 13 to that as existed prior to 18 September 2007, on an interim (and ultimately permanent) basis in order to preserve the status quo. BH and Foster had relied directly upon what they perceived to be the acceptability of BH's practices

[17] The claim of appointed counsel for fees and expense reimbursement meets the definition of an account under Tenn. Code Ann. § 47-9-102(a)(2), because that statute includes, within the definition of "account" any right to payment "for services rendered." *In re PNC Bank, Delaware v. Berg*, 45 U.C.C.Rep.Serv.2d 27, 1997 WL 527978 (Del. Super., January 31, 1997), dealing with a challenge to a security interest in a law firm's accounts receivable, stated:

> In the Court's opinion, both the hourly billing and the contingency fee contracts meet the definition of "contract rights," and therefore "accounts," within the meaning of the Uniform Commercial Code. The hourly billing contract is an "existing contract" creating a "right to payment," the hourly fee, that is "to be earned by future performance," future work by an attorney on that case.

1997 WL 527978, at *10.

[18] The unsent directive of 14 September 2007 contains similar language. (*See* Exhibit A to this Petition.)

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
ORRISTOWN, TENNESSEE
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and the lack of any problem with BH's ongoing processing of a substantial number of claims, as well as the law of Tennessee as discussed in this Petition.

Finally, considering the drastic nature of the change effected on 18 September 2007, Petitioners request that this Court waive any provision within Rule 13 that would prohibit the processing of claims by an agent for appointed counsel and/or the assignment of claims. This Court has the inherent authority to waive any of its rules when justice so requires, *see Oliphant v. Oliphant*, 401 S.W.2d 778, 780 (Tenn. 1966), and Petitioners assert that, should Rule 13 be read to preclude the type of claims processing and/or assignment in which BH has been engaged, the Rule should be waived pending further orders of this Court.

VII. MANY ADVANTAGES WILL RESULT FROM THE PROPOSED AMENDMENTS TO RULE 13 SUBMITTED BY THE PETITIONERS.

As a closing matter, Petitioners desire to enumerate the potential advantages they perceive from the proposed amendments to Rule 13 submitted with this Petition. Part of these advantages have been addressed in this Petition previously, but Petitioners reiterate them here in the hope that this summary will add additional weight in favor of the Petition as a whole. The Petitioners believe that the proposed rule will:

1. Clarify the permissibility of agent processing of fee and expense claims on behalf of appointed counsel, which will encourage appointed counsel to use the services of a processing agent, which in turn will magnify the other advantages set out below;

2. Contribute to the overall sound functioning of the indigent defense system in Tennessee and contribute to the goal of providing competent and zealous representation to individuals in need of such representation;

3. Assist appointed counsel with meeting this Court's high standard for keeping contemporaneous time records in appointed representation;

4. Ensure standard, verified fee and expense claims are submitted to trial courts from processing agents, and will thus assist trial courts and save time for trial court judges in the review and processing of appointed counsel fee and expense claims;

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
8 WEST FIRST NORTH STREET
POST OFFICE BOX 724
ORRISTOWN, TENNESSEE
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5. Ensure standard, verified fee and expense claims are submitted to the AOC from processing agents, and will thus assist the AOC and save time for AOC personnel in the review and processing of appointed counsel fee and expense claims;

6. Provide a central point for facilitating contact between AOC and appointed counsel (who use an agent) for any questions that arise regarding appointed counsel fee and expense claims. The presence of a competent processing agent will not inhibit such communication, but rather will make AOC's task easier by having a point of contact who can answer initial questions and can then facilitate direct contact with appointed counsel should questions that need the attention of appointed counsel arrive. (In turn, this should reduce the workload of AOC in attempting to contact appointed counsel to answer questions.);

7. Transfer some administrative costs (for example, certain mailing costs and copying costs) to the processing agent, thus relieving trial court clerks, the AOC, and, ultimately, the State of Tennessee of these expenses;

8. Streamline and render more efficient the overall process for submission and processing of appointed counsel fee and expense claims; and,

9. Contribute to the overall accuracy and propriety of claims submitted for appointed counsel fees and expenses.

Petitioners assert that the proposed rule will contribute to "the accomplishment of the purposes of" Tenn. Code Ann. § 40-14-201 *et seq.*, and should be adopted by this Court.

WHEREFORE, PREMISES CONSIDERED, Petitioners pray for the following relief:

A. That the "mandate" of the AOC of 18 September 2007 be rescinded pending further orders of this Court and that the pre-18 September 2007 status quo be restored to allow processing and submission of fee and expense claims by appointed counsel through a claims processing agent or service and the dispatch of payments of such claims, made payable to appointed counsel, to the address of the claims processing agent;

B. That Rule 13 of this Court be amended to expressly confirm the acceptability of submission of fee and expense claims by appointed counsel through a claims processing agent or service and the dispatch of payments of such claims, made payable to appointed counsel, to the address of the claims processing agent, as described in the proposal Subsection (c) to Rule 13, Section 6 submitted with this Petition, or in such manner as the Court deems appropriate;

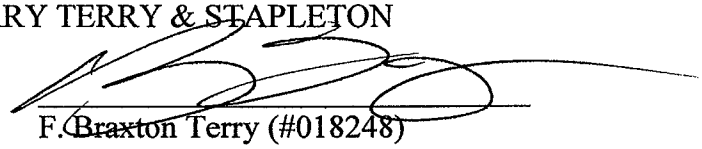
C. That for any claim processed by BH that has passed the submission deadline established by Rule 13 since 18 September 2007, the submission deadline should be waived and extended to forty-five (45) days following a decision by this Court on this Petition;

D. That Petitioners have such other relief to which they may be entitled.

TERRY, TERRY AND STAPLETON
ATTORNEYS AT LAW
18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
MORRISTOWN, TENNESSEE
37815-0724

Respectfully Submitted,

TERRY TERRY & STAPLETON

By: 

F. Braxton Terry (#018248)
918 W. First North St.
P.O. Box 724
Morristown, Tennessee 37815
Tel. (423)586-5800
Fax (423)587-4714

WILKERSON GAULDIN HAYES & JENKINS

By: 

W. Lewis Jenkins, Jr. (#017023)
112 W. Court St.
P. O. Box 220
Dyersburg, Tennessee 38024
Tel. (731)286-2401
Fax (731)286-2294

Attorneys for Billable Hours, Inc. and Robert Foster, Esq.

TERRY, TERRY
AND STAPLETON
ATTORNEYS AT LAW
918 WEST FIRST NORTH STREET
POST OFFICE BOX 724
MORRISTOWN, TENNESSEE
37815-0724

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition to Amend Supreme Court Rule 13 and for Other Relief Related to Supreme Court Rule 13, Including Interim Relief from Application of Supreme Court Rule 13 by the Administrative Office of the Courts was served upon the following person(s) on the 15th day of October, 2007, at the address below and by the method noted below each entry:

David Haines, Esq., General Counsel
Administrative Office of the Courts
Nashville City Center Ste 600
511 Union Street
Nashville, TN 37219
(3 copies via overnight courier)

Suzanne Keith, Executive Director
Tennessee Association For Justice
1903 Division St
Nashville, TN 37203
(1 copy via U.S. Mail)

Allen F. Ramsaur, Esq.
Executive Director
Tennessee Bar Association
221 Fourth Ave North Ste 400
Nashville, TN 37219
(1 copy via U.S. Mail)

Barbara L. Short
Executive Director
Tenn. Assn. of Criminal Defense Lawyers
810 Broadway Ste 501
Nashville, TN 37203-3810
(1 copy via U.S. Mail)

W. Lewis Jenkins, Jr.

TERRY, TERRY
AND STAPLETON
ATTORNEYS AT LAW
18 WEST FIRST NORTH STREET
POST OFFICE BOX 724
ORRISTOWN, TENNESSEE
37815-0724