M2011-1411

PARKER & PUGH

RECEIVED
JUL 21 2011
Clerk of the Courts
Rec'd By

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Douglas B. Parker (Retired)
Elizabeth Parker Pugh
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Michael T. Pugh
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July 18, 2011

Michael Catalano, Clerk
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219

Re: Court appointed counsel

Dear Sir,

I have read with much dismay the proposal regarding an all new way to shaft attorneys. The solution to this problem is painfully clear yet nobody will address it. The solution is to stop appointing everyone a free lawyer. Recently my firm was doing court appointed work for a couple whose teenage son had gotten into trouble and their yearly income was $100,000.00. This is the root of the problem. Why can no one see this? As I was writing this letter a man came in looking for an attorney to sign his form for a free lawyer and he had made a $10,000.00 bond. This is where the changes should be made. If he can make a bond like that he can certainly pay a lawyer.

This new proposal asks attorneys yet again to take a hit in their wallets. You want us to be a public defender but we wouldn't get the pay, the insurance, the vacations, the staff, the building, and we are still responsible for the huge amount of overhead it takes to run an office.

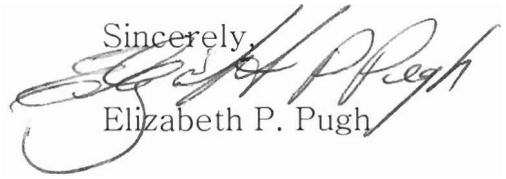
You are probably wondering why any attorney would bother with this mess at all but once again it comes down to everyone getting a free attorney. No one has to hire one so if you want work, you will do appointed work and you won't get paid for months. The Administrative Office of the Courts promised us

we would get paid within ten days with their new ICE system. Well, I have claims still unpaid from April 6 but that is another battle.

I know everyone thinks it is fun to stick it to lawyers but at every turn we are asked to work for free or told that our services are no longer needed (see worker's comp and uncontested divorces) but yet we are expected to maintain an enormously expensive office and devote all of our time for "indigents" that live better than we do while we are supposed to keep our mouths shut a be good little rented mules.

Please consider the dismal affect this proposition would have on lawyers all over the state in firms big and small and don't allow this to go through.

Sincerely,



Elizabeth P. Pugh

#M2011-1411-SC-RL2-RL

SANTORE & SANTORE
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RECEIVED
AUG - 1 2011
Clerk of the Courts
Rec'd By

July 25, 2011

Mr. Michael W. Catalano, Clerk
TENNESSEE SUPREME COURT
100 Supreme Court Building
401 Seventh Avenue South
Nashville, TN 37219

IN RE: Proposed Amendment to Supreme Court Rule 13

Dear Mr. Catalano:

I write this letter to respectfully object to the Proposed Amendment to Supreme Court Rule 13, which would allow the AOC to enter into contracts with firms/individuals for legal services.

In so doing, this writer wants to make clear that he appreciates the efforts of both the AOC and the Supreme Court in attempting to raise the parsimonious rates by which indigent counsel are now paid, rates which, frankly, are lower than those by which my plumber is paid. However, taking the decision of court appointments away from local judges—who know who practice before them and who know whom will do an efficient, fair and decent job representing the indigent—and placing it in the hands of the AOC in Nashville is not the solution. The idea of such services going to the lowest bidder is, in my respectful opinion, abhorrent.

Besides, our AOC, with which I deal on a regular basis and which is always there to help, is swamped with work already. This new task would push the overworked and underpaid staff of the AOC to exhaustion.

I respectfully suggest that the issue of raising the rates for legal services provided, rates which have not been raised in a quarter-century, be addressed instead of the manner by which these services are allocated. Again, please note my respectful objection to the Proposed Amendment.

Sincerely,

Francis X. Santore, Jr.

OLDHAM & DUNNING, LLC

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Bruce N. Oldham
Sue H. Dunning

July 29, 2011

RECEIVED
AUG - 2 2011
Clerk of the Courts
Rec'd By

Mr. Michael W. Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: No. M2011-01411-SC-RL2-RL

Dear Mr. Catalano:

I am writing in opposition to the aforementioned rule change wherein the Administrative Office of the Courts would have the power and authority to select representation for indigent persons under TCSR Rule 13, Section 7.

As the system is now operated, the judge has the ability to select an attorney to appoint for specific cases. This gives the judge the option to appoint one attorney in several cases if the same litigants are involved (one parent with multiple children with various last names, but different case numbers). The judge can also consider litigants with criminal charges pending regarding the same fact situations so that attorneys with knowledge in both litigation arenas are providing advice to the litigant. There are also extreme or unusual fact patterns which warrant special attorneys being appointed.

I do not often take cases by appointment in Juvenile court, but I was formerly a registered nurse, so when my local Juvenile Judge calls and requests that I accept an appointment, I know that it is because someone involved in the case has unusual medical issues and it will be critical that the litigant be appointed an attorney who can understand complex medical problems. For instance, I was asked to be a guardian ad litem for a one-year old child who had a profound seizure problem and someone needed to elect between two horrible choices: whether the child should receive a trial of experimental potentially lethal medication or undergo surgery which would remove half the child's brain. In another case, I was appointed to represent a mother whose child had been profoundly brain damaged by its father and decisions had to be made whether to maintain the child on life support indefinitely or allow the child to die. That same mother had been charged with endangerment for leaving the child in its father's care and constant coordination with the court appointed criminal attorney was necessary.

I have also requested to be appointed in a number of cases where I had previously represented a parent in a former domestic matter and that parent is now involved in Juvenile Court proceedings. Having former knowledge of the client and the situation

greatly enhanced my ability to bring the matters to conclusion expeditiously (and with a cost savings to the State), while giving the client confidence in her counsel's ability to assist them through the process.

We also all know that a number of new attorneys accept appointments with the expectation that they would learn how to practice law as they work. These are likely to be attorneys who would accept lower compensation from the AOC bidding structure. Some attorneys have a knack or flair for certain practice areas where others do not, yet may lack insight into their own shortcomings. A judge exercising his discretion in making appointments is likely to know these things, while these are not considerations that are likely to be ascertainable to the AOC in the contracting process.

The residents of the State of Tennessee who are most at risk by the passage of this amendment are the persons who are the most vulnerable: children and their indigent parents. They are also the persons who are least able to voice their concerns (and have their voices heard) when the system fails them. I recently read a case where the State of Tennessee was sued because a child was "safety placed" with a non-relative and the child died while in the non-relative's care. I think the passage of this amendment will place the State of Tennessee at significant risk if the system by which a judge, exercising his discretion based upon knowledge of the facts and persons involved, is replaced by a system in which the local judge is deprived of the ability to make appropriate appointments on a case by case basis.

Sincerely,

SUE HYNDS DUNNING

SHD/ms

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RECEIVED
AUG 08 2011
Clerk of the Courts
Rec'd By

August 4, 2011

Michael W. Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear Mr. Catalano:

With regard to the new proposed Amendment to Supreme Court Rule 13, the consequences would be detrimental to our indigent defendants. In our experience, we often need to appoint separate counsel due to conflicts of interest. For example, several persons may be charged in a car burglary ring. Each of them meet the criteria for court appointed counsel. Although the public defenders' office will represent of them, we must find attorneys for the remaining from the private bar.

When defendants are in custody and are unable to make bond we are required to comply with the ten-day rule. We find that new attorneys are willing to accept appointed cases until they build sufficient practice to avoid appointments due to other court conflicts. I feel that the new Proposal would create a great disservice to our judicial system.

Sincerely,

Joyce Ward

Joyce M. Ward
General Sessions Court Judge for Hamblen County

Kathy Robertson

Kathy Robertson
Judicial Commissioner for Hamblen County General Sessions Court

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AUG 11 2011

August 9, 2011

Supreme Court of Tennessee
Michael W. Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

RE: Amendment to Supreme Court Rule 13
No. M2011-01411-SC-RL2-RL

Honored Justices,

Pursuant to the solicitation for written comments by lawyers and judges, please accept this as my comments to the published proposed amendment to Rule 13, Section 7. As a practicing attorney, as well as Magistrate of the Juvenile Court for Sumner County, this is an amendment that affects my law practice, as well as my judicial authority. I am in opposition to the proposed amendment

As a lawyer who routinely takes appointed cases at both the General Sessions and trial level, I have engaged in several conversations with other local attorneys regarding this proposed amendment and, in every conversation, lawyers have expressed their displeasure. The basis of appointment should not be made upon who made the lowest bid and, sadly, I believe that pure economic conditions spearhead this proposal. It is my fear that the lowest bid will create a lowest-common-denominator style of lawyer; no one with any great skill or experience will want these "public conflictor" contracts and, ultimately, clients will suffer. This has to be against the public interest.

As a Magistrate who routinely is called upon to appoint attorneys, I find this proposed amendment acts against my authority pursuant to Tenn. Code Ann. § 40-14-202 and my discretion to appoint the best lawyer possible to handle cases. At times, Juvenile Court tends to be a world unto itself; not every lawyer practices juvenile law or understands its intricacies. To have "conflict defenders" representing children simply because they are the "first priority of appointment" does not necessarily comfort me. Children deserve the best possible representation and I try to provide this. When I appoint attorneys, I prefer to appoint attorneys because they understand juvenile court and its procedures. I prefer to appoint attorneys with the experience commensurate to the issues I anticipate will occur.

While the AOC has indicated that it will evaluate proposals to determine the quality of representation, I am unsure as to how they plan to do this. How does an administrative agency that does not personally and consistently observe an individual lawyer or law firm practice law plan to evaluate their practice of law? Every licensed attorney is supposed to maintain the necessary skills to represent any client; this is the basis of their professional qualification as a lawyer. A perhaps less than scrupulous attorney, interested more in making money off the State rather than effectively representing their clients, can say or do anything in their proposal to say that they will exercise independent judgment and maintain a workload to devote adequate time to contractual practice. How does an administrative agency instruct a duly-elected or duly-appointed judicial official that they have to appoint lawyers under some tier-based system? This issue is decidedly-problematic when some of these "conflict defenders" may originate in jurisdictions other than the one with which the local court has personal knowledge. The judges are then forced to accept these first-priority attorneys over local attorneys more familiar with the courts, the clients, and the manner in which the courts conduct their business.

I certainly understand the State's desire to save money and I am positive that this proposed amendment was not simply an idea that arose from the ether. In the process of trying to save money, though, we cannot ignore the fact that judicial discretion will be eroded; skilled lawyers may be bypassed in favor of less-experienced, but cheaper alternatives; and the public interest—the interest of the client—will be ignored.

I respectfully request that the Court refuse to ratify this proposed amendment. I fear that it will cause more harm than good.

Respectfully,

David R. Howard

Ben H. Houston II,
Attorney at Law

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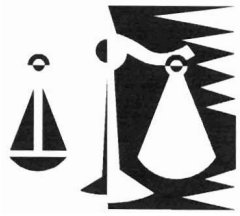
AUG 12 2011



August 10, 2011

Michael W. Catalano, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Docket No. M2011-01411-SC-RL2-RL

Dear Mr. Catalano:

I am writing you today to implore the Justices of the Tennessee Supreme Court to reject the proposed Amendment to Tennessee Supreme Court Rule 13 because the proposed Amendment would result in a race to the bottom that would necessarily threaten the Constitutional rights of indigent persons entitled to legal representation under our state and federal Constitutions. This proposed rule change will not only deprive indigent criminal defendants and indigent parents in Title 37 cases of their Constitutional right to effective legal representation, but it will also deprive innocent children who have been the victims of child abuse or neglect of their right to effective representation by a court appointed Guardian ad Litem.

During the 2009-2010 legislative session, the Tennessee General Assembly commissioned a study to be headed by the Administrative Office of the Courts (hereinafter referred to as AOC) concerning the indigent defense fund. This commission included members of the legislature, the private bar, the Supreme Court, the AOC, members of the judiciary and many other interested participants. Said commission filed a report to the legislature in January of this year. The general themes and recommendations of the report were that contracting for legal services is not what should be done, that the current system of indigent representation delivery is likely the best system for its purpose, and that attorneys are not being compensated adequately within the current system.

With regard to setting up a contract system, the AOC report states that "[o]ther states contract with private attorneys to handle all conflicts in a certain jurisdiction. This method has been criticized as giving an attorney earning a flat rate for a number of cases an incentive to resolve cases in the least amount of time possible even if doing so is not in

the best interests of the attorney's clients. Ultimately, the group agreed that the current system being employed is likely the best system of its kind for the purposes for which it is being used." Yet in direct contravention of its own report's recommendations, the AOC is now proposing an Amendment to Rule 13 that would set up a contracting system in this state. Under such a system, private court appointed attorneys, who are already undercompensated under the current system, would be placed in a bidding war with each other, which will inevitably result in attorneys being compensated even less than they are now. Such a contracting system would result in a race to the bottom with justice – or dare I say injustice - being sold to the lowest bidder.

By the AOC's own admission, such a contracting system would create a built in incentive for overworked and underpaid attorneys to do whatever is necessary to close files as quickly as possible even if doing so is contrary to their clients' best interests. In short, overworked and underpaid criminal defense attorneys would have an incentive to convince innocent clients to accept plea deals that are not in their clients' best interests. Overworked and underpaid parents attorneys in Title 37 cases would have an incentive to convince their clients not to contest allegations of abuse or neglect even when the allegations are either false or overstated. And overworked and underpaid Guardian ad Litems, who are appointed to advocate for the best interests of children in Title 37 cases, would have an incentive to spend less time investigating the circumstances of their clients, many of whom are in foster care. In short the proposed Amendment to Rule 13 is antithetical to the firmly enshrined Constitutional guarantee to equal protection under the law. U.S. Cont. Amend. XIV.

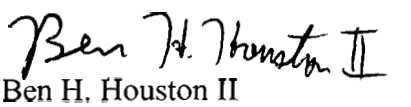
The Amendment's proposal to essentially strip the duly elected Judges of this State of their authority to appoint members of the bar who they are familiar with is also troubling. Local judges, who have been duly elected by the citizens of this State, are situated to have personal knowledge of the experience, dedication, and quality of attorneys that practice in their local courts. AOC employees, most of whom work in Nashville, are not situated to have personal knowledge concerning the experience, dedication, and quality of attorneys practicing in locales throughout this state. As such, it is clear that our duly elected Judges are much better situated than unelected bureaucrats working in Nashville to make critical decisions about who to appoint when an indigent defendant, an indigent parent, or a dependant and neglected child is in need of legal representation.

The abbreviated time period for commenting on this proposed Amendment, which would radically alter the method by which our State compensates attorneys appointed to represent indigent defendants, indigent parents, and children who are the victims of abuse or neglect, is yet another very troubling aspect of this proposed Amendment. Most proposed Amendments are afforded comment periods that last for at least six (6) months, but this proposed Amendment has a comment period of less than two months. Given the magnitude of the changes to judicial system that would result if this Amendment were adopted, this incredibly abbreviated comment period is simply an insufficient amount of time for the legal community to adequately discuss these proposed radical changes.

For all of the foregoing reasons, I implore the Justices of the Tennessee Supreme Court to reject the proposed Amendment to Tennessee Supreme Court Rule 13.

As always I remain,

Very truly yours,



Ben H. Houston II

Law Office of James A. Rose
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Nashville, Tennessee 37203
(615) 719-5034
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Also admitted to practice in the District of Columbia

AUG 12 2011

August 10, 2011

Michael W. Catalano
Clerk
401 7th Avenue North, Suite 100
Nashville, Tennessee 37219-1400

Re: *In Re: Rule 13, Section 7,*
Rules of the Tennessee Supreme Court
Supreme Court of Tennessee
No. M2011-01411-SC-RL2-RL

Dear Mr. Catalano:

This office has represented indigent persons, primarily in juvenile court in Cheatham and Davidson counties (Guardian *Ad Litem* and Parent's Attorney), since 2006. I respectfully take issue with the proposed rule change referenced above and urge the Honorable Justices of our Supreme Court to deny the proposal and leave the rule "as is". In the alternative, please consider this a request to consider a rule change that would spell out certain types of cases, i.e. mental health commitments and perhaps child support contempt cases, where contract representation would perhaps be effective according to recent studies considered by the General Assembly.

While I accept private-hire cases in family law and also am building an entertainment law practice, a significant portion (presently about half) of my practice consists of indigent representation in two juvenile courts. An attorney can be very busy doing such work, as the need is great. Day in and day out, I report to juvenile court for case rotation, confer with clients and other counsel, assist and inform, and solve problems as an attorney, either via trial, settlement, or rehabilitation of a parent. I'm expected to pay fees to maintain my practice, i.e. the Board of Professional Responsibility annual payment and the Professional Privilege Tax, not to mention CLE, federal income taxes, and state sales taxes. In the economy we now live in, many attorneys have turned to work as a solo practitioner out of necessity, but I enjoy what I do and believe that my colleagues and I are making a difference every day in our offices and in court.

Upon reliable information and belief, many Nashville attorneys have given substantial portions of their lives to juvenile court work, as a Guardian *Ad Litem*, parent's counsel, or in defense of youths facing delinquent petitions. I have done all three consistently for over five years. We are essentially state employees who do not receive benefits. The human element of this proposal merits the consideration of the Court. In recent years, there has been an emphasis on giving and access to justice for all people, regardless of income or social standing. Lawyers have responded very well, and it was rewarding to attend the *Pro Bono* Summit in January of this year and to learn of many worthy initiatives that have been put into place to ensure that those who are in need receive assistance. While indigent defense is not *pro bono* work, it does require a heart. Preference contracting is a threat to this and an affront to many lawyers across the state who go "above and beyond" the payment caps and ethical obligations associated with their work.

If adopted, this proposal would offer justice "auctioned off to the lowest bidder". While paragraph (b) specifies that contracts shall not be awarded solely on the basis of cost, it certainly contemplates a system by which the attorneys who make decisions based on a low number of hours spent for a fixed fee, as opposed to the most effective representation for their respective clients, would be given priority in court appointments. The proposed change does not specify how the quality of representation and the independent level of judgment of attorneys would be determined. In the competitive bidding process utilized by the state, cost is a major component. The proposal is too indefinite regarding these issues.

A legislative report compiled from research provided by the Administrative Office of the Courts and presented to the General Assembly in January of this year had a strong finding: **Contracting for indigent representation services is not a good idea**. It creates an incentive for attorneys to provide a substandard level of representation in order to earn the most for their time. The report even mentioned that the contract system was criticized in many other jurisdictions as providing such an improper incentive to attorneys that they acted against the interests of their clients.

Finally, there are 95 counties in this great state, all united as one, but all with different people, different judges, and different needs. If the proposal is adopted, the authority of local judges to match attorneys to cases according to work experience and skill would be breached. Decision-making as to what attorney works on what case and whether attorneys are even qualified for an appointment panel should be left to judges and magistrates who have knowledge of their cases and the local bar and who are in the best position to make decisions that are tailored to the needs of their respective courts and communities.

I sincerely appreciate your consideration of my comment and thank all Justices, Clerks, and court officers for the work they do on behalf of our great state. Please do not amend Supreme Court Rule 13 as proposed.

Respectfully,

James A. Rose

James A. Rose

Michael W. Catalano, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

AUG 12 2011

RE: Docket No. M2011-01411-SC-RL2-RL

Dear Mr. Catalano,

Pursuant to the Court's request for comments on the proposed Amendment to Supreme Court Rule 13, I am writing you today to respectfully request the Justices of the Supreme Court not to adopt the proposed Amendment. As a licensed attorney who is actively engaged in the representation of indigent individuals who are entitled to counsel under the Constitutions of the United States of America and/or the State of Tennessee, I hope my comments will be helpful to the Honorable Justices of the Court.

First, I would like to commend the Justices of the Supreme Court and the Director of the Administrative Office of the Courts (AOC) for attempting to implement cost savings measures for the taxpayers of Tennessee. Although I commend the Court and the AOC, I disagree with the proposed Amendment as a viable cost savings measure. It is apparent that all who are involved have the common goals of ensuring the delivery of adequately compensated indigent representation to those individuals who are entitled to it in a manner that is consistent with good stewardship of taxpayers' dollars. Admittedly, this is a difficult and daunting task, especially in today's economic climate. However, it is a task that must be accomplished as it is a task that is constitutionally mandated, but a task that will not be accomplished by the passage of the pending Amendment.

The proposed Amendment presents multiple problems and the ability to issue a well reasoned comment that lacks over speculation on a Rule change that is so vague and ambiguous is the first. Other problems I can identify with the proposed Amendment are as follows:

1. Attorneys do not know what "might" be.
2. Contracting, via the AOC's own findings, is not a viable alternative.
3. Bidding for contracts will necessarily result in decreased pay to attorneys who, as the AOC has found, are already undercompensated.
4. Bidding for contracts will cause acrimony within the bar.
5. Failures to provide adequate indigent representation systems result in additional liabilities to the State and additional costs to the State.
6. Removal of the authority of the local judge to match attorneys with cases will hamper the local judge's ability to ensure that justice is administered efficiently and that competent counsel is appointed and will eliminate the important training ground for so many new attorneys.
7. The proposed Amendment lacks clear and concise standards.
8. The proposed Amendment and its operation presents a threat of serious ethical problems.

I. Attorneys do not know what "might" be.

The AOC's official comment in the Chattanooga Free Times Press was that there has been a "misunderstanding"; that the system would be used first in judicial hospitalizations and then "might" move into child support cases. With all due respect, there appears to be no misunderstanding. The proposed Amendment has no limiting language, and if child support contempt cases "might" be next, what is after that? If this Amendment is adopted, the public, the legislature, the judiciary, and the bar would have no further ability to comment or have any true input into what areas and types of cases the preference contracting "might" apply to. Those decisions, without any oversight or further public involvement, would be placed squarely in the hands of **the Director of the Administrative Office of the Courts. In order to properly analyze this Rule, coupled with** the comments of the spokeswoman from the AOC, one can only issue comment with the mindset that all case types "might" be next because that is the black and white language of the proposed Amendment.

If the Honorable Justices of the Supreme Court of Tennessee and/or the AOC believe creating a preference contracting system applicable only to particular case types serves the public interest, then I would respectfully request the Court to spell those case types out in a proposed Amendment and be much clearer in the administrate type language that sets forth standards, bidding procedures, workload requirements, etc. A free flowing debate can only occur when the true intent and operation of any proposal on the table is capable of being determined from the black and white language of the proposal. One is not capable of gleaning from the proposed Amendment what its true intent is or what its true operation will be. Let's be fair and reasonable and spell out what "is" and not what "might" be.

I, like so many others, rely on court appointed indigent representation work to put food on my family's table and to meet my financial obligations, such as the privilege tax I must pay each year to maintain my license, and the CLE fees I must pay to keep my license current. Furthermore, in order to be in a position to provide a valuable service to the State of Tennessee and the indigent individuals I represent, I have substantial student loans that must be repaid as well. Yet, I am asked to comment on a proposed Amendment that affects my livelihood to such a degree that I might be completely out of work if the Amendment's operation is what it could be or rather "might" be. **Let's be fair and reasonable and spell out what "is" and not what "might" be.** Then let's debate any proposed Amendment based upon what "is" instead of what "might" be.

The AOC has condemned the alarmist reactions, probably specifically aimed at one particular attorney who has been very vocal about the opposition to this proposed Amendment. Just as a fire alarm would sound if there was a small brush fire near a highly populated area that "might" spread to the neighborhood, the alarm sounded here because the proposed Amendment is so vague that one must alarmingly over speculate what "might" be.

II. Contracting, via the AOC's own findings, is not a viable alternative.

The AOC's own research was culminated into the Legislative Report it provided to the 107th General Assembly in January of this year. **The resounding finding in said report was that contracting for indigent representation services is not a good idea**; it creates an incentive for attorneys to provide a substandard level of service in order to earn the most for their time. The report even mentioned that the contract type system was criticized in many other jurisdictions as providing such an improper incentive to attorneys that they acted against the interests of their clients. The report was in line with so many other studies, reports, profiles and the like conducted by organizations such as the U.S. Department of Justice, the American Civil Liberties Union, the Southern Center for Human Rights, and bar associations nationwide. The report pointed out that heaping dozens of cases on a few attorneys results in crowded dockets, unnecessary continuances, additional jail time, and a significant waste of the court's time. All this translates into additional costs for the taxpayers of Tennessee, not a cost savings, and results in attorneys being paid even less than they are now for the important, necessary services they provide to the State of Tennessee and the indigent individuals they represent.

In all fairness, the report did say that contracting in the area of mental health might be a viable option. If that is what the AOC and/or the Honorable Justice of the Supreme Court believes is in the public interest, again, I would respectfully request that they spell it out in the Rule and not ask members of the bar, the judiciary, the legislature, and the general public to rely on what "might" be but rather ask the same for comments on what is or will be.

III. Bidding for contracts will necessarily result in decreased pay to attorneys who, as the AOC has found, are already undercompensated.

I engage in the practice of indigent representation on a daily basis and am very passionate about the work I do. It is apparent that attorneys who engage in indigent representation practice are not compensated adequately, but we continue to engage in the practice either out of necessity or out of desire to make a difference. Either way, the compensation rates paid to those of us who rely on appointed work to supplement or maintain our practices is very important and is grossly inadequate. The proposed Amendment to Supreme Court Rule 13 threatens to place attorneys in a bidding war with each other which will result in attorneys being compensated even less than we are now. Cost, although not the only element, is a major component of the proposed Amendment. Considering the language of the proposed Amendment that states the fees paid will not be any more than those already set, one can only conclude this measure is not a remedy to the problem of substandard compensation, but rather aimed at further decreasing the substandard compensation already in place. **It certainly appears that the proposed Amendment is completely contrary to the AOC's own findings that a contract system is not a viable alternative, and that attorneys should be compensated more than they are today.**

IV. Bidding for contracts will cause acrimony within the bar.

The last thing the bar needs is any more acrimony or mechanisms in place that create the potential of additional animosity among lawyers. Placing attorneys into a bidding war aimed at receiving bids for less than what is paid now is simply a bad idea. Those of us who rely on indigent representation work to make our living will most certainly be underbid by those who only supplement their income or who are parts of large firms who can underbid us all or even worse, by brand new attorneys who believe they can accomplish the work for less than anyone else. What will we do? We will be out of work! We won't be able to draw unemployment because we are self employed. Losing a private case to a fellow member of the bar does not put an attorney out of work; losing our livelihood to a lower bidder most certainly will. Many of us have dedicated years of our lives to this line of work, and this proposed Amendment threatens to flush those years of dedication down the drain and leave us without work, without the ability to pay our bills, without the ability to maintain our practices, and without the ability to take care of our families. It is implausible for me to believe that this is the intention of the Court or the AOC, but it will necessarily be the result of the proposed Amendment should the Court adopt it. At minimum, it is what "might" be, and for that reason the Court should refuse to adopt the proposed Amendment.

V. Failures to provide adequate indigent representation systems result in additional liabilities to the State and additional costs to the State.

Providing competent counsel to indigent individuals entitled to the same is not an option; it is a constitutionally mandated necessity. Failure to do so adequately may subject the State of Tennessee to substantial liability, be it in the form of judgments, settlements, or simply the costs of litigating the issues associated with actual or perceived failures in the mandated indigent representation delivery system.

Many other states are facing and/or have faced these liabilities in the form of lawsuits filed by organizations such as the American Civil Liberties Union, the Southern Center for Human Rights and other similarly situated organizations. In addition to the class action style lawsuits filed by these organizations, many suits have been filed by indigent defendants in their own rights and by attorneys seeking adequate compensation. The AOC's

report to the legislature in January of this year found Tennessee's system of indigent representation to likely be the best system for its purposes. I truly hope Tennessee can avoid the pitfalls and expanse of taxpayers' dollars other states have experienced due to their perceived or actual failures in the area of the delivery of indigent representation. If the current system is likely the best, why should we change it now?

In addition to the potential liabilities in the form of litigation costs for perceived or actual failures, failure to adequately provide constitutionally mandated indigent representation services will likely increase costs to the Tennessee taxpayers via increased crowding of court dockets, additional filings, appeals, delays, continuances, additional incarceration costs, and other increased costs due to decreased judicial efficiency and economy. A report issued recently by the American Civil Liberties Union profiled 13 indigent defendants from the State of Michigan and the financial impact upon the State due to its actual and/or perceived failures to provide adequate indigent representation services. Said report calculated the failures to have cost the State of Michigan approximately 13 million dollars, enough to have educated 1000 students for one full year or to provide 16,500 impoverished children needed medical attention for one full year. This report profiled only 13 indigent individuals and the additional costs to the State of Michigan for these 13 failures represent approximately 1/3 of the entire annual line item of the Tennessee budget the proposed Amendment would draw on to pay for the services rendered pursuant to the proposed Amendment.

The delivery of legal services to those entitled to representation is not like other services the State of Tennessee provides or contracts for. Legal services are unique, and in most cases cannot be confined into a bidding box with set fees for representation. Setting fees for representation provides an improper incentive to the service provider to provide the least amount of service for the contract price. Considering the liabilities and increased costs associated with actual or perceived failures to provide adequate indigent representation, the State of Tennessee should not set up scenarios where there is an incentive to provide the lowest level of service, but rather seek out alternatives that promote the provision of excellent levels of service delivered in a manner that is consistent with good stewardship of the taxpayers' dollars. Admittedly, this is a difficult task, but is a task that must be handled with great care, discernment, diligence, research, and most importantly, a task that must be accomplished.

The proposed Amendment to Supreme Court Rule 13 attempts to set up a preference contracting system. It appears from the research and recommendations of the AOC from its own report, along with the studies, reports, and profiles, completed by entities previously mentioned, that contracting for indigent representation services without proper constraints, limitations, standards, compensation structures, bidding procedures, training, and other costly requirements result in an overall increase in cost to the taxpayers far in excess of any short term cost savings realized by the implementation of contract systems. Furthermore, it appears that a contracting system results in a dilution of the quality of representation provided to the indigent individuals entitled to such representation and will result in additional costs and liabilities that outweigh any immediate costs savings that the proposed Amendment is aimed at obtaining. Just because a measure appears to provide immediate costs savings today does not mean it should be implemented when the long term effect is an overall increase in costs to the taxpayers. Such is the case with the proposed Amendment, and therefore the Court should vote "not to adopt it".

VI. Removal of the authority of the local judge to match attorneys with cases will hamper the local judge's ability to ensure that justice is administered efficiently and that competent counsel is appointed and will eliminate the important training ground for so many new attorneys.

The indigent representation system currently affords the local judiciary the opportunity to administer justice efficiently and to assist with the provision of constitutionally competent representation to those indigent individuals who are entitled to counsel appearing before their courts. First, having the authority to appoint members of the private bar, as opposed to a few attorneys who take all cases, allows local courts to maintain judicial economy and efficiency. There are times when courts need an attorney for a particular case

immediately. The immediate need is filled by a member of the private bar who is standing in the courtroom at the very moment the need arises. If local judges are forced to appoint only preference contract attorneys, such attorneys may not be in the courtroom at the moment in which the court needs an attorney. The appointment of counsel in times such as these allows local judges to move their dockets and efficiently administer justice. Removing judicial authority to appoint members of the private bar in such times will result in crowded dockets, more delays, unnecessary continuances and additional costs to the taxpayers.

The local judges are situated to have personal knowledge of the experience, dedication, and quality of attorneys that practice in their local courts. The local judge is better suited than anyone to match attorneys to cases. In my opinion, the State of Tennessee does a better job administering justice under the current system than the State could do under a centralized system that provides preference contract attorneys that the appointing court must choose from. Removing the local judges' authority to match attorneys' experience, skill sets, and backgrounds to particular case types will hamper the local judges' ability to ensure the delivery of constitutionally competent counsel.

The Amendment has the impact of hampering the training ground for many new attorneys who get their start in the practice of law by showing up at local courts, introducing themselves to the local judges and asking to be appointed to cases. Currently, local judges have the authority to appoint newly licensed attorneys to cases that can be handled by newly licensed attorneys. This allows judges the opportunity to have firsthand knowledge of the newly licensed attorneys' skills and abilities. This also allows local judges to continue appointing less difficult matters to newly licensed attorneys and assist them with gaining experience and the continued development of their skill sets and abilities. As the attorneys gain more experience and further develop their skills and abilities, the local judges are then able to appoint them to more difficult cases, but only after having had the opportunity to personally watch their development to the extent that the local judges are comfortable the attorneys can handle the more difficult cases.

The system currently provides local judges the requisite authority to work towards ensuring the delivery of competent counsel to those indigent individuals entitled to counsel, to maintain judicial economy and efficiency, to match attorney skill sets and experience to cases, and to help train and develop newly licensed attorneys. In my opinion, the proposed Amendment threatens to remove local judicial authority to accomplish all these critical things.

VII. The proposed Amendment lacks clear and concise standards.

While the proposed Amendment does state that cost will not be the only factor for consideration, it fails to adequately spell out what the standards will be for quantifying the non-cost elements of the solicitation of proposal process or the monitoring of the attorneys who are awarded contracts. For instance, the proposed Amendment requires each proposal to be reviewed based upon the bidder's quality of representation to be provided, including the ability of the attorney(s) who would provide services under the contract to exercise independent judgment. Although the proposed Amendment sets forth quality and independence as an element of the contracting process, the proposed Amendment does not explain what factors would be used to determine a bidder's quality of representation or the attorney(s)' ability to exercise independent judgment. Further the proposed Amendment does not set out the procedures by which such quality would be monitored during the duration of a contract award, or what would occur in the event such standards, whatever they may be, are not honored.

Another non-cost element set forth by the rule relates to workload rates. Again, the proposed Amendment does not address what those workload rates would be, how they would be monitored, or if such workload rate would have an impact on an attorney's ability to accept private cases. Workload rates are addressed in the proposed Amendment with language that appears to tie workload rates to time spent with

clients; but, yet again, the proposed Amendment fails to set forth any standards or any monitoring mechanisms to be used to ensure compliance with such standards, whatever they may be.

In fact, the proposed Amendment sets forth no standards whatsoever; it merely glosses over the high points and leaves the development of those standards to the Director of the AOC to set as the Director deems appropriate. Under the proposed Amendment, standards could change daily, monthly, from contracting period to contracting period, or even worse, in the middle of a contract period. The short of it is that we have absolutely no idea what standards "might" be put into place, what monitoring will be conducted to ensure compliance, and are completely left in the dark to rely on the decisions of the Director of the AOC. Those decisions under the proposed Amendment would be made without a public comment period, without any oversight, and without any public and meaningful involvement of the bench, the legislature, the bar or the public. Therefore, yet again, we are asked to comment on a proposed Amendment that affects gravely our livelihoods without knowing what the effect truly is, but rather left to speculate what "might" be. In response to such request, I must ask that the Court not adopt the Amendment as it places my livelihood in the hands of what "might" be instead of what will necessarily be.

VIII. The proposed Amendment and its operation presents a threat of serious ethical problems.

Several ethical issues come to the forefront when considering contracting of attorneys in the manner prescribed by the proposed Amendment. The most glaring issue is the fact that the proposed Amendment will place attorneys under a direct contract with the Court and further subject them to bidding procedures for additional contracts. Although the proposed Amendment states that contract proposals will be reviewed from the standpoint of the ability to exercise independent judgment, a contract with the Court itself may cause an attorney to act in a manner consistent with what he or she believes the Court desires even if such action is not in the best interest of his or her client. This will occur if the attorney believes doing so is necessary to obtain, maintain, or renew a contract with the Court. At minimum, a contract directly with the Court causes the appearance of an undue influence of the Court upon an attorney's independent judgment.

Additional concerns must be raised considering the AOC's recent requirements that attorneys turn over confidential case files in exchange for clearance for audits and release of payment for work completed. The AOC, under the current system is, in certain instances, requiring attorneys to afford the AOC access to confidential client information and documentation. The AOC's stance has been we pay you so we are entitled to see the work you do, or at least, that has been the stance of the AOC's Rule 13 Compliance Officer. **Said** demands for confidential information in exchange for payment and audit clearance have required attorneys to breach their duties of confidentiality to their indigent clients and provide the AOC with such information as HIPPA protected documentation, case notes, information, work product and other protected documentation, data and information. If the AOC is requiring client files in audits of non-contract attorneys, what requirements will be in place to monitor an attorney's compliance with the quality of representation and adequate time with client contract requirements? Will this not further subject client files to review? The AOC's requests for confidential case files to clear up audits should be analyzed thoroughly not just from a breach of the attorney's ethics when they are turned over, but also from the appearance of impropriety standpoint. When the administrative arm of the very Court that may hear a case on appeal requires the attorney who handled said case in the lower courts to turn over his or her confidential case files, it certainly appears that the Court obtains information, or at minimum has imputed knowledge of the same, that would or could be detrimental to the Court's impartiality, or at least the appearance that such a detriment exists. Contracts that "might" contain audit language that requires attorneys to comply with audit requests by allowing review of confidential case files is not in the interest of the public as it eliminates the indigent parties' right to privileged and confidential communications with his or her attorney, in some instances, results in violation of HIPPA protections afforded the indigent client as well.

In addition to the confidentiality and independent judgment ethical issues, contracting may place an attorney in such a financial position that he or she may not be able to, or simply will not, deliver proper representation and cause a breach of his or her ethical obligations to indigent clients. As stated before, the AOC's own report in January of this year pointed out that contract systems create an incentive for attorneys to act against the interests of their clients due to financial considerations. A heightened potential of this breach will surface when an attorney, due to improper estimation, underbids to the extent it becomes financially impossible for the underbidding attorney to provide competent counsel and continue to meet his or her obligations. Or worse, the delivery of indigent representation will become a profit driven endeavor by large associations attempting to bid properly such that a profit can be made. This will necessarily cause a dilution in the quality of indigent representation as those who control such associations will control the work flow and will necessarily create a mill type situation wherein profit is the main goal, not constitutionally competent representation.

IX. Conclusion

I commend the Court and the AOC on its attempt to identify cost saving measures for the taxpayers of Tennessee and for the recognition that the indigent defense fund has substantially increased over the last decade. However, I respectfully disagree with the proposed Amendment as a cost savings measure and believe, as the studies have shown, its implementation will have the result of an overall increase in the costs associated with the mandated indigent representation delivery system. My comments herein are not directed at any one person, any particular office, or the Court, but rather at the proposed Amendment and its operation. I firmly believe that all who are involved have the common goal of delivering competent and adequately compensated legal representation to those indigent individuals who are entitled to the same. I simply have a respectful disagreement with the proposed Amendment as a mechanism to achieve these common goals. With that said, typically when those having opposing viewpoints but common goals engage in well reasoned and thoughtful debate and discussion, grand solutions are identified. I suggest that the Court vote not to adopt the proposed Amendment and engage in continued debate and discussion on cost savings measures and measures aimed at meeting the adequate compensation goal. Hopefully a solution can be identified that will ensure the delivery of adequately compensated indigent representation to the individuals of Tennessee entitled to the same in a manner consistent with the principals of good stewardship of the taxpayers' dollars. The proposed Amendment is not such a solution.

Thanking the Justices of the Court and the staff of the Administrative Office of the Courts for their service to this great State and for consideration of my comments, I remain,

Very truly yours,

BPR# 010945

Michael W. Catalano, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

RECEIVED
AUG 15 2011

RE: Docket No. M2011-01411-SC-RL2-RL

Dear Mr. Catalano,

Pursuant to the Court's request for comments on the proposed Amendment to Supreme Court Rule 13, I am writing you today to respectfully request the Justices of the Supreme Court not to adopt the proposed Amendment. As a licensed attorney who is actively engaged in the representation of indigent individuals who are entitled to counsel under the Constitutions of the United States of America and/or the State of Tennessee, I hope my comments will be helpful to the Honorable Justices of the Court.

First, I would like to commend the Justices of the Supreme Court and the Director of the Administrative Office of the Courts (AOC) for attempting to implement cost savings measures for the taxpayers of Tennessee. Although I commend the Court and the AOC, I disagree with the proposed Amendment as a viable cost savings measure. It is apparent that all who are involved have the common goals of ensuring the delivery of adequately compensated indigent representation to those individuals who are entitled to it in a manner that is consistent with good stewardship of taxpayers' dollars. Admittedly, this is a difficult and daunting task, especially in today's economic climate. However, it is a task that must be accomplished as it is a task that is constitutionally mandated, but a task that will not be accomplished by the passage of the pending Amendment.

The proposed Amendment presents multiple problems and the ability to issue a well reasoned comment that lacks over speculation on a Rule change that is so vague and ambiguous is the first. Other problems I can identify with the proposed Amendment are as follows:

1. Attorneys do not know what "might" be.
2. Contracting, via the AOC's own findings, is not a viable alternative.
3. Bidding for contracts will necessarily result in decreased pay to attorneys who, as the AOC has found, are already undercompensated.
4. Bidding for contracts will cause acrimony within the bar.
5. Failures to provide adequate indigent representation systems result in additional liabilities to the State and additional costs to the State.
6. Removal of the authority of the local judge to match attorneys with cases will hamper the local judge's ability to ensure that justice is administered efficiently and that competent counsel is appointed and will eliminate the important training ground for so many new attorneys.
7. The proposed Amendment lacks clear and concise standards.
8. The proposed Amendment and its operation presents a threat of serious ethical problems.

I. Attorneys do not know what "might" be.

The AOC's official comment in the Chattanooga Free Times Press was that there has been a "misunderstanding"; that the system would be used first in judicial hospitalizations and then "might" move into child support cases. With all due respect, there appears to be no misunderstanding. The proposed Amendment has no limiting language, and if child support contempt cases "might" be next, what is after that? If this Amendment is adopted, the public, the legislature, the judiciary, and the bar would have no further ability to comment or have any true input into what areas and types of cases the preference contracting "might" apply to. Those decisions, without any oversight or further public involvement, would be placed squarely in the hands of the Director of the Administrative Office of the Courts. In order to properly analyze this Rule, coupled with the comments of the spokeswoman from the AOC, one can only issue comment with the mindset that all case types "might" be next because that is the black and white language of the proposed Amendment.

If the Honorable Justices of the Supreme Court of Tennessee and/or the AOC believe creating a preference contracting system applicable only to particular case types serves the public interest, then I would respectfully request the Court to spell those case types out in a proposed Amendment and be much clearer in the administrate type language that sets forth standards, bidding procedures, workload requirements, etc. A free flowing debate can only occur when the true intent and operation of any proposal on the table is capable of being determined from the black and white language of the proposal. One is not capable of gleaning from the proposed Amendment what its true intent is or what its true operation will be. Let's be fair and reasonable and spell out what "is" and not what "might" be.

I, like so many others, rely on court appointed indigent representation work to put food on my family's table and to meet my financial obligations, such as the privilege tax I must pay each year to maintain my license, and the CLE fees I must pay to keep my license current. Furthermore, in order to be in a position to provide a valuable service to the State of Tennessee and the indigent individuals I represent, I have substantial student loans that must be repaid as well. Yet, I am asked to comment on a proposed Amendment that affects my livelihood to such a degree that I might be completely out of work if the Amendment's operation is what it could be or rather "might" be. Let's be fair and reasonable and spell out what "is" and not what "might" be. Then let's debate any proposed Amendment based upon what "is" instead of what "might" be.

The AOC has condemned the alarmist reactions, probably specifically aimed at one particular attorney who has been very vocal about the opposition to this proposed Amendment. Just as a fire alarm would sound if there was a small brush fire near a highly populated area that "might" spread to the neighborhood, the alarm sounded here because the proposed Amendment is so vague that one must alarmingly over speculate what "might" be.

II. Contracting, via the AOC's own findings, is not a viable alternative.

The AOC's own research was culminated into the Legislative Report it provided to the 107th General Assembly in January of this year. **The resounding finding in said report was that contracting for indigent representation services is not a good idea**; it creates an incentive for attorneys to provide a substandard level of service in order to earn the most for their time. The report even mentioned that the contract type system was criticized in many other jurisdictions as providing such an improper incentive to attorneys that they acted against the interests of their clients. The report was in line with so many other studies, reports, profiles and the like conducted by organizations such as the U.S. Department of Justice, the American Civil Liberties Union, the Southern Center for Human Rights, and bar associations nationwide. The report pointed out that heaping dozens of cases on a few attorneys results in crowded dockets, unnecessary continuances, additional jail time, and a significant waste of the court's time. All this translates into additional costs for the taxpayers of Tennessee, not a cost savings, and results in attorneys being paid even less than they are now for the important, necessary services they provide to the State of Tennessee and the indigent individuals they represent.

In all fairness, the report did say that contracting in the area of mental health might be a viable option. If that is what the AOC and/or the Honorable Justice of the Supreme Court believes is in the public interest, again, I would respectfully request that they spell it out in the Rule and not ask members of the bar, the judiciary, the legislature, and the general public to rely on what "might" be but rather ask the same for comments on what is or will be.

III. Bidding for contracts will necessarily result in decreased pay to attorneys who, as the AOC has found, are already undercompensated.

I engage in the practice of indigent representation on a daily basis and am very passionate about the work I do. It is apparent that attorneys who engage in indigent representation practice are not compensated adequately, but we continue to engage in the practice either out of necessity or out of desire to make a difference. Either way, the compensation rates paid to those of us who rely on appointed work to supplement or maintain our practices is very important and is grossly inadequate. The proposed Amendment to Supreme Court Rule 13 threatens to place attorneys in a bidding war with each other which will result in attorneys being compensated even less than we are now. Cost, although not the only element, is a major component of the proposed Amendment. Considering the language of the proposed Amendment that states the fees paid will not be any more than those already set, one can only conclude this measure is not a remedy to the problem of substandard compensation, but rather aimed at further decreasing the substandard compensation already in place. **It certainly appears that the proposed Amendment is completely contrary to the AOC's own findings that a contract system is not a viable alternative, and that attorneys should be compensated more than they are today.**

IV. Bidding for contracts will cause acrimony within the bar.

The last thing the bar needs is any more acrimony or mechanisms in place that create the potential of additional animosity among lawyers. Placing attorneys into a bidding war aimed at receiving bids for less than what is paid now is simply a bad idea. Those of us who rely on indigent representation work to make our living will most certainly be underbid by those who only supplement their income or who are parts of large firms who can underbid us all or even worse, by brand new attorneys who believe they can accomplish the work for less than anyone else. What will we do? We will be out of work! We won't be able to draw unemployment because we are self employed. Losing a private case to a fellow member of the bar does not put an attorney out of work; losing our livelihood to a lower bidder most certainly will. Many of us have dedicated years of our lives to this line of work, and this proposed Amendment threatens to flush those years of dedication down the drain and leave us without work, without the ability to pay our bills, without the ability to maintain our practices, and without the ability to take care of our families. It is implausible for me to believe that this is the intention of the Court or the AOC, but it will necessarily be the result of the proposed Amendment should the Court adopt it. At minimum, it is what "might" be, and for that reason the Court should refuse to adopt the proposed Amendment.

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In fact, the proposed Amendment sets forth no standards whatsoever; it merely glosses over the high points and leaves the development of those standards to the Director of the AOC to set as the Director deems appropriate. Under the proposed Amendment, standards could change daily, monthly, from contracting period to contracting period, or even worse, in the middle of a contract period. The short of it is that we have absolutely no idea what standards "might" be put into place, what monitoring will be conducted to ensure compliance, and are completely left in the dark to rely on the decisions of the Director of the AOC. Those decisions under the proposed Amendment would be made without a public comment period, without any oversight, and without any public and meaningful involvement of the bench, the legislature, the bar or the public. Therefore, yet again, we are asked to comment on a proposed Amendment that affects gravely our livelihoods without knowing what the effect truly is, but rather left to speculate what "might" be. In response to such request, I must ask that the Court not adopt the Amendment as it places my livelihood in the hands of what "might" be instead of what will necessarily be.

VIII. The proposed Amendment and its operation presents a threat of serious ethical problems.

Several ethical issues come to the forefront when considering contracting of attorneys in the manner prescribed by the proposed Amendment. The most glaring issue is the fact that the proposed Amendment will place attorneys under a direct contract with the Court and further subject them to bidding procedures for additional contracts. Although the proposed Amendment states that contract proposals will be reviewed from the standpoint of the ability to exercise independent judgment, a contract with the Court itself may cause an attorney to act in a manner consistent with what he or she believes the Court desires even if such action is not in the best interest of his or her client. This will occur if the attorney believes doing so is necessary to obtain, maintain, or renew a contract with the Court. At minimum, a contract directly with the Court causes the appearance of an undue influence of the Court upon an attorney's independent judgment.

Additional concerns must be raised considering the AOC's recent requirements that attorneys turn over confidential case files in exchange for clearance for audits and release of payment for work completed. The AOC, under the current system is, in certain instances, requiring attorneys to afford the AOC access to confidential client information and documentation. The AOC's stance has been we pay you so we are entitled to see the work you do, or at least, that has been the stance of the AOC's Rule 13 Compliance Officer. Said demands for confidential information in exchange for payment and audit clearance have required attorneys to breach their duties of confidentiality to their indigent clients and provide the AOC with such information as HIPPA protected documentation, case notes, information, work product and other protected documentation, data and information. If the AOC is requiring client files in audits of non-contract attorneys, what requirements will be in place to monitor an attorney's compliance with the quality of representation and adequate time with client contract requirements? Will this not further subject client files to review? The AOC's requests for confidential case files to clear up audits should be analyzed thoroughly not just from a breach of the attorney's ethics when they are turned over, but also from the appearance of impropriety standpoint. When the administrative arm of the very Court that may hear a case on appeal requires the attorney who handled said case in the lower courts to turn over his or her confidential case files, it certainly appears that the Court obtains information, or at minimum has imputed knowledge of the same, that would or could be detrimental to the Court's impartiality, or at least the appearance that such a detriment exists. Contracts that "might" contain audit language that requires attorneys to comply with audit requests by allowing review of confidential case files is not in the interest of the public as it eliminates the indigent parties' right to privileged and confidential communications with his or her attorney, in some instances, results in violation of HIPPA protections afforded the indigent client as well.

In addition to the confidentiality and independent judgment ethical issues, contracting may place an attorney in such a financial position that he or she may not be able to, or simply will not, deliver proper representation and cause a breach of his or her ethical obligations to indigent clients. As stated before, the AOC's own report in January of this year pointed out that contract systems create an incentive for attorneys to

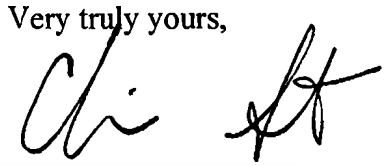
act against the interests of their clients due to financial considerations. A heightened potential of this breach will surface when an attorney, due to improper estimation, underbids to the extent it becomes financially impossible for the underbidding attorney to provide competent counsel and continue to meet his or her obligations. Or worse, the delivery of indigent representation will become a profit driven endeavor by large associations attempting to bid properly such that a profit can be made. This will necessarily cause a dilution in the quality of indigent representation as those who control such associations will control the work flow and will necessarily create a mill type situation wherein profit is the main goal, not constitutionally competent representation.

IX. Conclusion

I commend the Court and the AOC on its attempt to identify cost saving measures for the taxpayers of Tennessee and for the recognition that the indigent defense fund has substantially increased over the last decade. However, I respectfully disagree with the proposed Amendment as a cost savings measure and believe, as the studies have shown, its implementation will have the result of an overall increase in the costs associated with the mandated indigent representation delivery system. My comments herein are not directed at any one person, any particular office, or the Court, but rather at the proposed Amendment and its operation. I firmly believe that all who are involved have the common goal of delivering competent and adequately compensated legal representation to those indigent individuals who are entitled to the same. I simply have a respectful disagreement with the proposed Amendment as a mechanism to achieve these common goals. With that said, typically when those having opposing viewpoints but common goals engage in well reasoned and thoughtful debate and discussion, grand solutions are identified. I suggest that the Court vote not to adopt the proposed Amendment and engage in continued debate and discussion on cost savings measures and measures aimed at meeting the adequate compensation goal. Hopefully a solution can be identified that will ensure the delivery of adequately compensated indigent representation to the individuals of Tennessee entitled to the same in a manner consistent with the principals of good stewardship of the taxpayers' dollars. The proposed Amendment is not such a solution.

Thanking the Justices of the Court and the staff of the Administrative Office of the Courts for their service to this great State and for consideration of my comments, I remain,

Very truly yours,



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August 15, 2011

AUG 16 2011

Michael W. Catalano, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

RE: Docket No. M2011-01411-SC-RL2-RL

Dear Mr. Catalano,

In response to the Court's request for comments on the above referenced pending Amendment to Supreme Court Rule 13, I am writing you today as a member of Tennessee's Legislature to request the Honorable Justices of the Supreme Court to vote not to adopt the Amendment for the following reasons:

1. I do not believe the Amendment is in line with legislative intent.
2. I do not believe the Amendment is in line with the findings and recommendations supplied to the Legislature in the Administrative Office of the Court's Report to the Legislature completed in January, 2011.
3. It appears that adoption of the Amendment will increase the overall costs associated with the delivery of indigent representation and thereby cost the taxpayers of Tennessee more than the current system.
4. I do not believe the proposed Amendment is in the public interest.

The Legislature via T.C.A. 40-14-206 delegated rule making authority concerning the administration of the indigent representation system in this State to the Supreme Court. If adopted, the proposed Amendment would place in the office of the Director of the Administrative Offices of the Court (AOC) the complete and total autonomy to change the indigent defense system of this State at will, overnight, and without the voice of the people or their elected officials ever being heard or their input being requested. Doing so, in my opinion, is contrary to legislative intent and simply not good government. I cannot imagine that the Legislature intended on delegating rule making authority to the Court just to have the rule making authority further delegate to the Director of the AOC,

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a non-elected public official, and to convey upon that office the ability to make changes to the indigent defense system without any public comment, public involvement, legislative involvement, or other oversight.

During the 2009-2010 Legislative Session, the Legislature commissioned a study to be headed by the AOC concerning the indigent defense fund. The commission included members of the Legislature, the private bar, the Supreme Court, the AOC, members of the judiciary and many other interested participants. In January, the commission filed a report to the Legislature proposing recommendation to the indigent defense fund. Of note, the report's resounding theme was that contracting for legal services is not the best method for delivery of representation to indigent clients. The report further indicated that the current system of indigent representation delivery is likely the best system for its purpose, and that attorneys are not compensated adequately within the current system. The Amendment, as proposed, appears to set up a contracting system in the State, makes changes to the indigent representation delivery system, and will cut compensation for attorneys which the report specified is already inadequate.

Some services the State provides are voluntary; others, such as the provision of counsel to indigent persons who are entitled to counsel under the Constitution of the United States or the State of Tennessee, are not. Many of the services the State of Tennessee provides are not mandatory, and the quality of those services will not subject the State of Tennessee to liability or increased costs. The provision of indigent counsel to those entitled to counsel is not one of those services. Failure to provide competent counsel to indigent persons entitled to the same is not an option, but a constitutionally mandated necessity. Failure to do so adequately may subject the State of Tennessee to substantial liability, be it in the form of judgments, settlements, and/or litigation costs, and will result in additional costs to the taxpayers of Tennessee.

The research and recommendations of the AOC report, along with numerous studies, reports, and profiles completed by the U.S. Department of Justice, the American Civil Liberties Union, and various bar associations around the country, indicate that contracting for indigent defense services without proper constraints, limitations, standards, compensation structures, bidding procedures, training, and other costly requirements will result in an overall increase in cost to the taxpayers that is far in excess of any short term cost savings realized by the implementation of contract systems. In an address to the National Association of Criminal Defense Lawyers in February, 2010, Attorney General, Eric Holder, opined, "When the justice system fails to get it right the first time, we all pay, often for years, for new filings, retrials, and appeals. Poor systems of defense do not make economic sense. " Furthermore, many states, such as Georgia, Michigan, Utah, and many others, have and are still facing expensive class action style

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lawsuits driven by actual or perceived failures in those states' indigent representation system. Many of these lawsuits have been filed by organizations such as the ACLU, the Southern Center for Human Rights and others. States (list states) are also facing lawsuits filed by indigent individuals and by attorneys seeking compensation to adequately represent indigent clients.

A report issued recently by the American Civil Liberties Union profiled thirteen indigent defendants from the state of Michigan and calculated the financial impact upon the State resulting from those thirteen cases to be approximately 13 million dollars - enough to have educated 1000 students for one full year or to provide 16,500 impoverished children with medical attention for one full year. 13 million dollars represents approximately one-third of the entire annual line item of the Tennessee budget that the State would draw on to pay for the services rendered pursuant to the proposed Amendment. I do not believe that the proposed Amendment will be a measure of litigation avoidance, but rather act as a catalyst for litigation. I truly hope Tennessee can avoid the pitfalls and expanse of taxpayers' dollars other states have experienced based upon the administration of their indigent defense programs.

For all of the reasons stated above as well as many others, the Amendment is simply not in the public interest. Adoption of the Amendment will have the effect of removing the authority and discretion of local judges, who know their local attorneys better than anyone would in a centralized system, thereby prohibiting them from matching attorney skill sets with case types. As it exists now, the system provides the necessary tools to allow the local judge to ensure proper delivery of representation based upon the complexity of individual cases.

In addition to the removal of authority of the local judges, it appears that a contracting system results is a dilution of the quality of representation provided to the indigent clients. Tennessee takes pride in the services the State provides in all aspects of its operations and has become, in many instances, a model for other states to follow. Tennessee should take pride in its constitutionally mandated indigent defense delivery system as well. It is my opinion that contracting for legal services for indigent people entitled to representation is not a step towards a system that Tennessee can be proud of, but rather a step backwards from the system Tennessee already has in place.

The indigent defense costs have grown substantially over the past decade. I compliment the AOC and the Justices of the Court for their desire to contain costs. However, as stewards of the taxpayers' dollar, we cannot implement systems that will have the long term effect of increasing the overall costs to the taxpayers of Tennessee simply because it appears that there may be some immediate cost savings today while at the same time running the risk of reducing the quality of mandated services provided to

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members of our most vulnerable population. Furthermore, in my opinion, the proposed Amendment is not in line with legislative intent, is contrary to the AOC's own findings and recommendations, and is simply not in the public interest. Therefore, as an interested member of the Tennessee legislature, I would respectfully ask the Justices of the Tennessee Supreme Court to vote not to adopt the pending Amendment to Supreme Court Rule 13.

I thank the Justices of the Court for their service to this State and for consideration of my comments.

Sincerely,

State Representative David Hawk

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AUG 16 2011

August 13, 2011

Mr. Michael Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: No. M2011-01411-SC-RL2-RL

Dear Mr. Catalano,

Please find this letter as my response and opinion to the proposed amendment to Tenn. Sup. Ct. R. 13, §7. My main concern is that if the amendment to the rule is approved and granted, the judiciary will no longer have the authority to appoint counsel as appropriate for the citizenry for which it was elected to serve. Instead, an administrative agency which is not in the practice of law, most likely located far from the judiciary and the people it serves, will enter into an economic contract with some firm, licensed somewhere in the State "for representation in a specified number of cases"... While not clearly stated in the language to the amendment of Rule 13, §7 it is implied that this is being proposed as strictly a cost saving measure.

It is doubtful the State would actually save any money in this endeavor. It should be expected that areas like post conviction relief will increase in the percentage of filings with appointed tangential and distant attorneys. Additionally, the number of appeals, and the

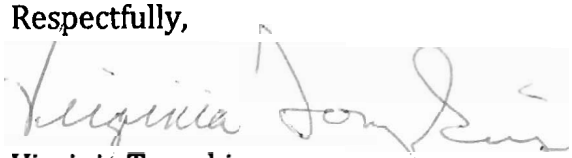
costs thereof, in all areas will likely rise if a random firm, with a random associate is assigned to handle a large volume of cases with nothing other than an economic stake invested in the litigation. It is my personal view that cases assigned en masse and in bulk to a pre-contracted firm or association diminishes the opportunity for the public to receive appropriate justice.

Please note, the majority of the appointed work I handle involves dependent and neglect actions as either a parent's attorney or a guardian ad litem. When I accept an appointment, I make certain that there is adequate room in my caseload to zealously represent every client. If there isn't adequate room, I will notify the Court that I do not think it prudent to accept new appointments due to upcoming trials, depositions, or other matters that do not allow me to provide a concerted effort to handle new appointments. Consider please for example, BIG BOX FIRM, L.L.C. is awarded a contract to handle legal representation for indigent clients as it "shall be given first priority for appointment to any case..." the amendment is silent as to the volume of cases and whether or not Big Box has an option to NOT take a case notwithstanding conflicts of interests. Of concern is that hypothetically, a firm two or more counties away, receive a contract in a multi-county area and isn't appropriately staffed to handle the litigation. How is the client going to access the attorney? Many of these indigent individuals will not have the ability to travel to a multi-county area to meet with their counsel or its agent. Unfortunately, justice, fairness, and other matters involved in legal services will not be available, all in an effort to save money.

The indigent are already disadvantaged and it is my earnest belief that if the amendment is approved as a cost saving measure, the indigents' receipt of caring and competent legal service will be even further diminished or non-existent.

Thank you in advance for considering my opinion in this matter.

Respectfully,



Virginia Tompkins

VKT/mm

CC: COURTS FROM WHOM I ACCEPT APPOINTMENTS
The Honorable Barry R. Brown – Sumner
The Honorable Ken Witcher – Macon
The Honorable David Bass - Smith

Jesse Farr, Attorney
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OFFICE HOURS BY APPOINTMENT ONLY

August 15, 2011

Michael W. Catalano, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

AUG 17 2011

RE: Docket No. M2011-01411-SC-RL2-RL

Dear Mr. Catalano;

I am writing you to respectfully request the Justices of the Supreme Court to not adopt the proposed Amendment to Rule 13 regarding indigent defendant representation. As a licensed attorney who has been, is and hopefully will continue to be actively engaged in the representation of indigent individuals, I can only hope my comments will be helpful.

The proposed Amendment will not be a viable cost savings measure. Removal of the authority of the local judge to match attorneys with cases will hamper the local judge's ability to ensure that justice is administered efficiently and that competent counsel is appointed, as well as eliminating the important training ground for so many new attorneys by local, knowledgeable pairing when/where appropriate.

This will almost certainly translate into additional costs for the taxpayers of Tennessee, not a cost savings; and, while necessarily will have to result in attorneys being paid even less, there will be even much more expense in policing the quality of representation constitutionally required than there is now.

I can only suggest that the Court vote to not adopt this proposed Amendment, as it is not a solution to any of the existent problems, much less those that it will more than likely produce.

Thanking you in advance for your every courtesy, I remain,

Very truly yours,

Jesse Farr, TBPR#. 000989

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AUG 17 2011

August 13, 2011

Michael W. Catalano, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear Mr. Catalano,

I am writing this letter in regard to the proposed change to Rule 13 concerning the appointment of attorneys for indigent criminal defendants. I believe I am uniquely qualified to discuss this issue due to the fact I practiced criminal law in New York City five tears prior to New York City instituting the same change proposed in Tennessee and five years after it was imposed. The change turned out to be a disaster for both the clients and the City of New York

Prior to the election of Mayor Bloomberg the Legal Aid Society handled approximately half of the indigent criminal cases and 18B attorneys (private attorneys that met several requirements and were certified to be assigned cases by the Assigned Counsel Plan). All 18 B attorneys were independent agents being paid by a combination of state and city funds and were responsible for all their expenses. The rate of pay was $25 out of court and $40 in court ($50 after 5 PM for arraignments as court was 24 hours a day) for misdemeanors and $20 higher for felonies. This was raised in 2004 to $60 in and out of court for misdemeanors and $75 for felonies. Most attorneys used the panel to supplement their private practices and made around $40,000 a year. I was the highest paid for four consecutive years making around $140,000 as I closed over 500 cases a year and always worked at least three additional arraignments at night after finishing my cases when court adjourned in the day at 5 PM. At arraignments I would handle over 40 cases while the Legal Aid attorneys would handle 10 at the most. The point is even at the amount I made by working 16-18 hour days, I was a bargain. By this system the courts ran very smoothly and there was never a violation of the constitutional mandate all arrestees had to be arraigned in 72 hours. In fact, almost all were arraigned within 24 hours as the Chief Judge desired.

When Mayor Bloomberg was elected he appointed a new Criminal Justice Administrator who was a former Legal Aid attorney. Legal Aid always hated 18 B lawyers and the system stated above. It arose because The Legal Aid Society struck in 1997 and tried to blackmail the City thinking Mayor Giuliani would have no choice but to grant their many, many demands. Instead the mayor vastly shifted the monies for criminal justice to The Assigned Counsel Panel and had the work shared instead of us only being for conflicts. The efficiency immediately increased

vastly and worked beautifully until 2004. Then the new administrator proposed the exact same system being proposed in Tennessee. A number of entities made proposals to provide conflict representation and The Legal Aid Society was given many millions more to hire more attorneys and pay overtime to try and make this change work. Of course, the new legal entities that were awarded the contracts made the lowest bids by paying the attorneys the lowest amounts. Fresh out of law school attorneys and incompetent attorneys staffed these entities and were thrown in the fire with no training. This was a direct contrast to the many, many highly experienced and qualified attorneys that availed themselves to the Assigned Counsel Plan. In fact, many attorneys were on the Panel because they felt it was their ethical duty despite having very successful private practices.

For approximately a year the system worked as supervisors were working shifts, more experienced Legal Aid attorneys worked double shifts and the work load was low. Very soon after that the accountants started seeing the reality of what they had done. Malpractice causes of action increased many times over with large awards coming from the state and city coiffures, the entities and Legal Aid demanded much more money as they had vastly unstated the monies needed to provide the representations, defendants were arraigned over the constitutionally mandated time and had their cases dismissed despite guilt, the conflict entities disappeared because they couldn't staff at the ridiculous amount they had to pay to get or keep the contract and the costs actually INCREASED. No one had properly ascertained the new additional costs of the salaries of additional Legal Aid attorneys, new office spaces, worker's compensation insurance, benefits, electricity, computer and legal research costs, etc., etc. etc. In other words, a catastrophe.

Yes, the system still exists because it was a totally political decision and remains such as the Administration will not admit it made a mistake. Statistics are manipulated, arrests are labeled incorrectly to show crime had not gone up and all cases are being handled properly, police are told not to arrest in many situations where before they had, clients receive sloppy, incomplete representation and are convicted wrongly or guilty have their cases dismissed to lighten caseloads, etc. What was once the finest court system in the world is now second rate if that.

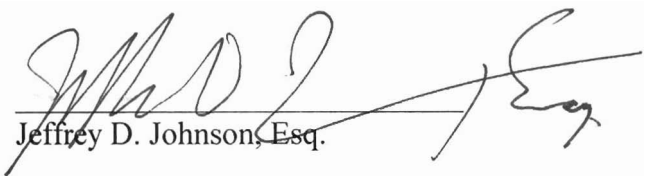
I personally observed the above and continued to work there until last year when my mother became ill and I had to move here to take care of her. I became a member of the Tennessee Bar Association in March of this year. In February I was placed on the federal Criminal Justice Act Panel which only permits the most capable attorneys to be appointed cases which attests to my qualifications as a lawyer. I have practiced over 30 years and give the same zealous representation to appointed cases here as I do federal and retained clients. In the office next to me James Bowen, arguably the finest murder and capital attorney in the State of Tennessee, regularly accepts appointed cases as judges know he will give as good a representation as is available, on the other side of me is Don Spurell who is as fine of a criminal lawyer as there is who regularly accepts appointments as a favor to judges who see a defendant needs his help in a complex case and I am sure this is the case all over the state. I, for one, will have to leave as the situation with my mother has been resolved and I will not be able to keep the lights on without state appointed work. I have been told by other attorneys the same thing not to mention the tragedy that will happen when the Jim Bowens and Don Spurells are not available and replaced

by low paid lawyers-in-training.

It is hoped the above gives whoever is going to decide this egregiously wrong proposal pause. It is a half baked, ill thought out idea by some over reaching middle administrator who thinks cutting costs initially will make them look good at the expense of what I have found to be a very good criminal justice system.

Please contact me if you need any further information on any aspect of the above.

Thank you very much for your kind attention in this matter.



Jeffrey D. Johnson, Esq.

Cc: Robert Foster
Brian Redmon

NLADA 100
National Legal Aid & Defender Association

AUG 18 2011

EQUAL JUSTICE.
OF THE PEOPLE.
FOR THE PEOPLE.

August 17, 2011

Michael W. Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

IN RE: RULE 13, SECTION 7, RULES OF THE TENNESSEE SUPREME COURT
No. M2011-01411-SC-RL2-RL

Dear Mr. Catalano,

Thank you for the opportunity to comment on the Tennessee Supreme Court proposed rule change number M2011-01411-SC-RL2-RL. I applaud the court's attempt to address the growing expense of the Tennessee criminal justice system. Though the National Legal Aid & Defender Association (NLADA)[1] stands ready to assist Tennesseans in achieving accountability for and control over indigent defense costs, I caution that efforts to reduce public defense budgets without taking national standards into account tend to have negative effects on the efficiency of a state's courts and on public safety. I provide the following information to assist you in achieving accountability and control without running afoul of constitutional requirements and community safety.

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[1] The National Legal Aid & Defender Association (NLADA) is a national, non-profit membership association dedicated to quality legal representation for people of insufficient means. Created in 1911, NLADA has been a leader in supporting equal justice for over ninety years. NLADA currently supports a number of initiatives, including the American Council of Chief Defenders (ACCD), a leadership forum that brings together the top defender executives nationwide, and the National Defender Leadership Institute (NDLI), an innovative training project to support current managers and develop future leaders.

Over its long history, NLADA has become a leader in the development of national standards for indigent defense functions and systems. See: *Guidelines for Legal Defense Systems in the United States* (National Study Commission on Defense Services [staffed by NLADA; commissioned by the U.S. Department of Justice], 1976); *The Ten Principles of a Public Defense Delivery System* (written by NLADA officials, adopted by ABA in February 2002, published in U.S. Department of Justice *Compendium of Standards for Indigent Defense Systems, infra n.12*) (http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf); *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* (NLADA, 1988; ABA, 1989), *Defender Training and Development Standards* (NLADA, 1997); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995); *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services (NLADA, 1984; ABA, 1985); Standards for the Administration of Assigned Counsel Systems* (NLADA, 1989); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980); *Evaluation Design for Public Defender Offices* (NLADA, 1977); and *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1994). With proper evaluation procedures, standards help to assure professionals' compliance with national norms of quality in areas where the governmental policy-makers themselves may lack expertise.

1140 Connecticut Avenue NW, Suite 900, Washington, DC 20036 T 202.452.0620 F 202.872.1031 www.nlada.org

I. National Standards of Justice & Prohibition of Fixed Fee Contracts

Policymakers have long recognized that minimum quality standards are necessary to assure public safety in building a hospital, a school, or a bridge. The taking of a person's liberty merits no less consideration.

Foundational standards set the limits below which no public defense system should fall. The use of national standards of justice to guarantee constitutionally adequate representation meets the demands of the United States Supreme Court. In *Wiggins v. Smith*, 539 US 510 (2003), the Court recognized that national standards - specifically those promulgated by the ABA - should serve as guideposts for assessing ineffective assistance of counsel claims. The ABA standards define competency, not only in the sense of the attorney's personal abilities and qualifications, but also in the systemic sense that the attorney practices in an environment that provides her with the time, resources, independence, supervision, and training to effectively carry out her charge to adequately represent her clients. *Rompilla v. Beard*, 545 US 374 (2005) echoes those sentiments, noting that the ABA standards describe the obligations of defense counsel "in terms no one could misunderstand."[2]

The American Bar Association's *Ten Principles of a Public Defense Delivery System (Ten Principles)* present the most widely accepted and used version of national standards for public defense systems. Adopted in February 2002, the ABA *Ten Principles* distill the existing voluminous national standards to their most basic elements, which officials and policymakers can readily review and apply. In the words of the ABA Standing Committee for Legal Aid & Indigent Defendants (ABA/SCLAID), the *Ten Principles* "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."[3] United States Attorney General Eric Holder called the ABA *Ten Principles* the basic "building blocks" of a functioning public defense system.[4]

The ABA *Ten Principles* reflect interdependent standards. That is, the health of an indigent defense system cannot be assessed simply by rating a jurisdiction's compliance with each of the ten criteria

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[2] Citation to national public defense standards in court decisions is not limited to capital cases. See, for example: 1) *United States v. Russell*, 221 F.3d 615 (4th Cir. 2000) (Defendant was convicted of prisoner possession of heroin; claimed ineffective assistance of counsel; the court relied, in part on the ABA Standards to assess the defendant's claim); 2) *United States v. Blaylock*, 20 F.3d 1458 (9th Cir. 1993) (Defendant convicted of being a felon in possession of a weapon; filed appeal arguing, in part, ineffective assistance of counsel. Court stated: "In addition, under the *Strickland* test, a court deciding whether an attorney's performance fell below reasonable professional standards can look to the ABA standards for guidance. *Strickland*, 466 U.S. at 688." And, "[w]hile *Strickland* explicitly states that ABA standards 'are only guides,' *Strickland*, 466 U.S. at 688, the standards support the conclusion that, accepting Blaylock's allegations as true, defense counsel's conduct fell below reasonable standards. Based on both the ABA standards and the law of the other circuits, we hold that an attorney's failure to communicate the government's plea offer to his client constitutes unreasonable conduct under prevailing professional standards."); 3) *United States v. Loughery*, 908 F.2d 1014 (D.C. Cir. 1990) (Defendant pleaded guilty to conspiracy to violate the Arms Control Export Act. The court followed the standard set forth in *Strickland* and looked to the ABA Standards as a guide for evaluating whether defense counsel was ineffective.)

[3] American Bar Association. *Ten Principles of a Public Defense System*, from the introduction, at: http://bit.ly/ggLidF.

[4] United States Attorney General Eric Holder. *Address Before the Department of Justice's National Symposium on Indigent Defense: Looking Back, Looking Forward 2000-2010.* Washington, DC February 18, 2010. http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html

and dividing the sum to get an average "score." For example, just because a jurisdiction has a place set aside in the courthouse for confidential attorney/client discussions (*Principle 4*)[5] does not make the delivery of indigent defense services any better from a constitutional perspective if the appointment of counsel comes so late in the process (*Principle 3*),[6] or if the attorney has too many cases (*Principle 5*),[7] or if the attorney lacks the training (*Principles 6 & 9*),[8] as to render those conversations ineffective at serving a client's individualized needs. In other words, a system must meet the minimal requirements of *each and every* of the *Principles* to be considered adequate.

The eighth of the ABA *Ten Principles* explains that: "[c]ontracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services." In short, fixed-fee contracts create a direct financial conflict of interest between the attorney and each client. Because the lawyer will be paid the same amount, no matter how much or little he works on each case, it is in the lawyer's personal interest to devote as little time as possible to each appointed case, pocketing the fixed fee and using his time to do other more lucrative private work.

II. *Analysis of Proposed Rule Change* No. M2011-01411-SC-RL2-RL

To be clear, the ABA *Ten Principles* do not prohibit the use of contracts as a method of providing counsel to the indigent accused. As previously mentioned, national standards require that contracts: specify performance requirements and the anticipated workload; provide an overflow or funding mechanism for excess, unusual or complex cases; and separately fund expert, investigative and other litigation support services." The proposed Tennessee rule change does not provide the first two of these three critical safeguards.

The proposed Section 7, when read in light of existing Section 2, seems to suggest that a contract might be let at the fixed fee rates of Section 2 and with a safety valve to allow for receiving an amount in excess of the maximum for a complex or extended case as provided by Section 2(e). Unfortunately, this does not meet the demands of national standards, in that it merely increases the amount of the fixed fee, but does not allow for the attorney to be compensated for all time necessarily expended. Under the proposed Rule, where attorneys in their professional judgment believe that a client's case requires more hours than are provided for under the fixed fee (even the excess fixed fee), the attorney is placed in an untenable ethical and personal conflict situation. The

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[5] ABA *Principle* 4: Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

[6] ABA *Principle* 3: Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

[7] ABA *Principle 5*: Defense counsel's workload is controlled to permit the rendering of quality representation.

[8] ABA *Principle* 6: Defense counsel's ability, training, and experience match the complexity of the case. ABA *Principle* 9: Defense counsel is provided with and required to attend continuing legal education.

rules of ethics require that the attorney spend the time necessary to the defense of a client, but under the proposed Rule the attorney would have to work the extra hours without compensation. The attorney is forced to either violate her ethical mandates or expend her own time on behalf of the client, in essence serving *pro bono* where her own financial interests are pitted against her client's constitutional right to counsel.

I applaud the proposed Rule's clear intent to cap caseloads of contract conflict defenders through the provision stating that all contracts must be for a "specified number and type of cases." It is hard to evaluate what that means, however, without seeing what the specified number would be. There is, after all, a significant difference between capping serious felony cases at 50 cases per year versus 300 cases, even though both would fit the proposed language of an as yet undetermined "specified number."

What concerns me most is that portion of the proposed Rule addressing the manner by which proposals for contracts shall be evaluated. The emphasis that contracts "shall not be awarded solely on the basis of cost" is laudable. The proposed Rule seems to suggest, however, the Administrative Director will rely entirely on the attorneys' statements in their proposals that they have "the ability . . . to exercise independent judgment on behalf of each client" and that they will "maintain workload rates that w[ill] allow [them] to devote adequate time to each client." This is inadequate to meet the national standards' requirement that a contract specify performance requirements and the anticipated workload. Self-regulation in the provision of constitutionally-mandated right to counsel services simply does not work.

The inability of lawyers to self-regulate is one of the reasons why the very first of the ABA *Ten Principles* calls for the establishment of an independent right to counsel oversight board[9] (e.g., OPDSC), whose members are appointed by diverse authorities, so that no single official or political party has unchecked power over the indigent defense function.[10] Although the primary public defense system in Tennessee assures independence through publicly-elected district public defenders, there is no safeguard assuring independence of attorneys in the conflict system. Rather, the conflict system in Tennessee is a patchwork of attorneys generally overseen by either judges or court personnel with no supervision over quality beyond measuring a judge's satisfaction.[11]

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[9] To help jurisdictions in the establishment of independent public defender boards or commissions, NLADA has promulgated guidelines. NLADA's *Guideline for Legal Defense Services* (Guideline 2.10) states: "A special Defender Commission should be established for every defender system, whether public or private. The Commission should consist of from nine to thirteen members."

[10] As stated in the U.S. Department of Justice, Office of Justice Programs report, *Improving Criminal Justice Through Expanded Strategies and Innovative Collaborations: A Report of the National Symposium on Indigent Defense*: "The ethical imperative of providing quality representation to clients should not be compromised by outside interference or political attacks."NCJ 181344, February 1999, at 10.

[11] Courts should have no greater oversight role over lawyers representing defendants than they do for attorneys representing paying clients. The courts should also have no greater oversight of public defense practitioners than they do over prosecutors. As far back as 1976, the National Study Commission on Defense Services concluded that: "The mediator between two adversaries cannot be permitted to make policy for one of the adversaries."*NSC* Report, at 220, citing National Advisory Commission on criminal Justice Standards and Goals (1973), commentary to Standard 13.9.

While the vast majority of judges strive to do justice in all cases, political pressures, administrative priorities such as the need to move dockets, or publicity generated by particularly notorious crimes can make it difficult for even the most well-meaning judges to maintain their neutrality. Having judges maintain a role in the supervision of the conflict public defense services can easily create the appearance of partiality -- creating the false perception that judges are not neutral. Policymakers should guarantee to the public that critical decisions regarding whether a case should go to trial, whether motions should be filed on a defendant's behalf, or whether certain witnesses should be cross-examined are based solely on the factual merits of the case and *not* on a public defender's desire to please the judge in order to maintain his or her job. When the public fears that the court process is unfair, people tend to be less cooperative with law enforcement, less likely to appear as witnesses and for jury duty and, in general, tend to be more cynical about the capacity of government to treat all members of the community in a fair and evenhanded manner.[12]

There are indigent defense systems in the country that operate through contracts and also comply with national standards. For example, the state of Oregon funds 100% of indigent defense services, which are provided through a series of contracts with private attorneys, consortia of private attorneys, or private nonprofit defender agencies, similarly to the contracts in the proposed Tennessee Rule.

The Oregon Public Defender Services Commission (OPDSC) oversees all trial-level indigent defense services provided through these contracts. The OPDSC contracts are the enforcement mechanism to ensure that state standards are met regarding quality, effectiveness, efficiency, and accountability. For instance, every non-profit public defender agency is required to maintain an appropriate and reasonable number of full-time attorneys and support staff to perform its contractual obligations. If a defender agency does not meet this requirement, or to the extent that the agency lawyers are found to be handling a substantial private caseload, the contract will not be renewed.

Oregon enforces strict workload standards in their contracts through a system of case weighting. A typical contract sets a precise total number of cases to be handled by the law firm during the contract term. The cases to be handled are further broken down by the specific types of cases, taking into account the amount of work generally required by each case type. This means that within one office an attorney handling more minor felony cases might carry a higher number of cases than an attorney assigned to defend serious violent felonies that require more time. This allows a contract law firm or non-profit public defense office and the OPDSC to more accurately plan for and ensure compliance with the actual work and staffing needs. Every six months, each public defense contractor has a budget review process with state funding officials. During this review, the contractor can request additional reimbursement by the state for extra work done in cases that turned out to require more than the usual amount of time.

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[12] The failure of this policy was pointed out by the U.S. Supreme Court during the Scottsboro Boys' case over 80 years ago: "[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional." *Powell v. Alabama* 287 U.S. 45 (1932).

Each Oregon contract public defense provider monitors the number of cases it receives and can project the extent to which it will reach its estimated workload maximum on a week-by-week basis. It notifies the court promptly if workloads are being exceeded, and when that occurs then it declines any additional appointments. If, for example, the provider meets its workload level on Wednesday, all new cases for the rest of that week must go to the private bar attorneys contracted to handle the overflow cases. This flexibility allows each provider to consistently provide a uniform quality of service and maintain manageable workloads for attorneys, even during periods of lower-than-normal staffing levels due to turnover, sickness, or other leave. Similar contract provisions ensure appropriate attorney qualifications, training, supervision, continuous representation by the same attorney, etc.

III. *Implementation of Proposed Rule Changes will Result in "Non-Representation" under United States v. Cronic*, 466 U.S. 648 (1984)

On May 6, 2010, New York's highest court ruled that a class action lawsuit brought by the New York Civil Liberties Union (NYCLU) against five counties is an allegation "not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*." The Court declared that *Strickland* "is expressly premised on the supposition that the fundamental underlying right to representation under *Gideon* has been enabled by the State," in reversing an appellate court decision that would have stemmed the case. The Court found that where "counsel, although appointed, were uncommunicative, made virtually no efforts on their nominal clients' behalf during the very critical period subsequent to arraignment, and, indeed, waived important rights without authorization from their clients" is at heart "non-representation rather than ineffective representation."

On November 24th of last year, the Iowa Supreme Court reached much the same conclusion in handing down a unanimous decision in finding that a rigid fee cap of $1,500 per appellate case would "substantially undermine the right of indigents to effective assistance of counsel" because " [l]ow compensation pits a lawyer's economic interest ... against the interest of the client." In reaching this conclusion, the Iowa Court went to great lengths to carefully analyze *Strickland v. Washington*. The Court determined that "the *Strickland* prejudice test does not apply in cases involving systemic or structural challenges to the provision of indigent defense counsel." The Iowa Supreme Court deserves recognition for firmly acknowledging that "[w]hile criminal defendants are not entitled to perfect counsel, they are entitled to a real, zealous advocate who will fiercely seek to protect their interests within the bounds of the law." That cannot occur without public defense attorneys having the time, tools, training and resources to treat each client's case appropriately. The decision, in essence, bans flat fee contracting for right to counsel services.

What these two cases point out is that there is a presumption in *Strickland* that is rarely discussed or challenged. *Strickland* requires that courts "must be highly deferential .... and indulge a strong presumption that counsel's performance was within the wide range of reasonable professional assistance." In short, the *Strickland* presumption of "reasonable" assistance of counsel is rooted in the mistaken belief that states have developed right to counsel systems that meet the expectations

demanded by *Gideon v. Wainwright* and its progeny. The majority of states, including Tennessee, have not done so.[13]

So did the United States Supreme Court blindly assume that states followed prior right to counsel rulings in setting up *Strickland*? The answer is "no," because on the same day that *Strickland* was argued and on the same day that it was handed down, the United States Supreme Court also heard and ruled on another case. *United States v. Cronic*, 466 U.S. 648 (1984), delineates the criteria under which a client receives "non-representation" as contrasted with "ineffective representation."

The *Cronic* court observed that the most obvious instance of this is the complete denial of counsel altogether. The complete absence of counsel is most glaringly obvious in our country's lower courts where misdemeanor cases are heard and felony cases are often begun.[14] It is a common occurrence for such courts to attempt to save money and expedite the processing of cases by pressuring the accused to forego his right to legal representation without adequately informing him of the

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[13] I may be much more inclined to believe that the proposed rule changes were a good faith attempt to provide fiscal responsibility to the Tennessee citizenry were it not for the well-documented underfunding of right to counsel services in your state. Just this year, the Tennessee Administrative Office of Courts released a report which states:

> Funding for the state's public defender system comes from the legislature, and each office should be staffed by enough defenders to represent eligible indigent clients in all cases except those where such representation would create a conflict of interest with another client represented by the public defender. And although local governments are required to fund public defenders at a rate of three positions for every four district attorneys, the state itself does not fund these offices at that level. TCA § 16-2-518 mandates that any local funding for public defenders be at a rate of 75% of funding for the corresponding district attorney general's office, it generally being agreed that approximately 75% of those being prosecuted by the district attorney will be indigent. However, at the state level, 228 full time assistant public defenders are funded, and 379 assistant district attorneys are funded, a ratio closer to three to five. (Sykes, Elizabeth L. and David Haines, *Tennessee's Indigent Defense Fund: A Report to the 107th Tennessee General Assembly*, Prepared by the Tennessee Administrative Office of Courts. January 15, 2011)

This inadequate funding is not something new. In 1999, the Tennessee comptroller's office funded three case-weighting studies to measure the need for increased judges, prosecutors and public defenders. Overseen by the National Center for State Courts, the defender portion was performed by The Spangenberg Group. Their report found that collectively the Tennessee districts operated with fewer than 82% (250 rather than the recommended 306) of the attorneys needed to adequately represent clients (See: The Spangenberg Group, *Tennessee Public Defender Case-Weighting Study*, April 1999, Appendix D-6). And, it should be noted, that the prosecutors case-weighting study lists 369 full-time equivalent prosecutors, a ratio (68%) that is well below the target ratio of 75%. Indeed, as far back as 1977, NLADA concluded that, "[i]t is readily apparent that the present system bears little relationship to an adequately funded system. (See: National Legal Aid & Defender Association, *Tennessee Report*, 1977).

[14] The ability to say with certainty that similar violations are taking place with regularity in Tennessee's General Sessions Courts is hampered by a stunning lack of data. Simply put, here exists no central repository for the collection, analysis and dissemination of public defense data. Tennessee decision-makers are therefore left to form policy based on anecdotal information, and the formation of public attitudes is consigned to speculation, intuition, presumption, and even bias. See, for example, Sykes, Elizabeth L. and David Haines, *Tennessee's Indigent Defense Fund: A Report to the 107th Tennessee General Assembly*, Prepared by the Tennessee Administrative Office of Courts. January 15, 2011. p. 11: "A large majority of criminal cases originate and are disposed of in Tennessee's General Sessions courts. The sheer volume of these cases places one of the greatest demands on the indigent defense fund. Unfortunately, accurate statistics for activities in general sessions courts are not available. Despite recommendations from the Comptroller's office and requests from the Administrative Office of Courts ("AOC"), the legislature has never provided funding to gather and analyze this data. As a result, the typical general sessions case can be described based only on anecdotal information. However, judges and lawyers from numerous jurisdictions across the state report a similar experience: crowded dockets consisting of numerous defendants, some of whom have made bail, and some who have not."

consequences of doing so (such as potential loss of public housing, deportation, inability to serve in the armed forces, and/or ineligibility for student loans). Other courts impose large fines and costs if a client insists on legal representation or simply refuse to appoint an attorney altogether in direct violation of the Sixth Amendment.

Beyond this, *Cronic also* defines as non-representation those circumstances where, although counsel is nominally available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. The Court suggests that the systemic factors in *Powell v. Alabama*,[15] created such as situation. This is the case of the Scottsboro Boys in which a judge appointed unqualified attorneys who met their clients on the eve of trial and failed to devote sufficient time to zealously advocate for their clients in the face of the state court's emphasis on disposing of the cases as quickly as possible.

As noted above, attorneys working under flat fee contracts have a financial incentive to dispose of cases as quickly as possible. But as the United States Supreme Court pointed out in *Powell*: "The prompt disposition of criminal cases is to be commended and encouraged. But, in reaching that result, a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob." Each client is constitutionally entitled to be represented by a public defense attorney who has sufficient time and resources to fulfill the basic requirements of attorney performance on behalf of that client. This means the attorney is able to, among other things: meet and interview the client; prepare and file necessary motions; receive and review the prosecutions responses to motions; conduct a factual investigation, including locating and interviewing witnesses; engage in plea negotiations with the state; prepare for and enter a plea or conduct the trial; and prepare for and advocate at the sentencing proceeding when there is a guilty plea or conviction following trial. The fixed fee contracts of proposed Rule 13, Section 7, will assuredly give rise to conflicts of interest between attorneys and their clients. When the attorneys, acting in their own self-interest, do not dedicate appropriate time to meeting the requirements of ethical representation, this will result in a *Cronic* violation of "non-representation."

Following similar reasoning, the Washington Supreme Court in January 2009, effectively banned indigent defense providers from entering into flat fee contracts because of the inherent conflict of interest they produce between a client's right to adequate counsel and the attorney's personal financial interest.[16]

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[15] *Powell v. Alabama* 287 U.S. 45 (1932)

[16] RULE 1.8 - CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES ... (m) A lawyer shall not: (1) make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm: (i) to bear the cost of providing conflict counsel; or (ii) to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel; or (2) knowingly accept compensation for the delivery of indigent defense services from a lawyer who has entered into a current agreement in violation of paragraph (m)(1).

IV. Conclusion

I strongly urge against the adoption of Tennessee Supreme Court Rule 13 Section 7 as proposed. Rather, the Court should follow the lead of Iowa and Washington by banning flat fee contracts for criminal cases by judicial fiat. Indeed, the Court should impose through court rule[17] as many of the ABA *Ten Principles* as is practicable.

I recognize that this will have a financial impact on the state and respectfully suggest that the proper response is to reduce the number of cases coming into the formal criminal justice system. Public defense systems do not generate their own work and do not have any control over the number of clients that come into the system. Instead, public defender clients are generated through the convergence of decisions made by other governmental agencies. Legislatures may criminalize additional behaviors or increase funding for additional police positions; law enforcement may crack down on a particular problem in a community by making more arrests; and, prosecutors may decide to go forward with marginal cases rather than dismissing them. All of these decisions are beyond the control of indigent defense attorneys and systems, yet all increase the public defense caseload.

Policymakers *can* choose to reduce the number of clients who need public defense representation. Prudent use of taxpayer dollars requires that our criminal justice spending should buy us greater public safety while upholding our core constitutional principles, and that our limited resources should not be squandered on expanding criminal justice bureaucracies that do not increase our safety.[18]

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[17] For example, the Nevada Supreme Court formed an indigent defense task force, later named the Commission on Indigent Defense (Commission). Established April 26, 2007 and led by Nevada Supreme Court Justice Michael Cherry, the Commission was charged to examine and make recommendations regarding the delivery of indigent defense services in Nevada. At its first meeting, Chief Justice Maupin stated that the mission of the Commission was not to decide whether to implement the *ABA Ten Principles*, but rather how best to do so. Three sub-committees were formed, on independence, caseloads, and rural issues. The Commission conducted a statewide survey of indigent defense services and held meetings throughout 2007. Just six months after being established, on November 20, 2007, the Commission issued its "*Final Report and Recommendations of the Supreme Court Indigent Defense Commission*." The Nevada Supreme Court is given authority to regulate all legal practice in the state. *See* NV Constitution Article 6, Section 19, and Supreme Court Rule 39. Based on this authority and the recommendations of the Commission, on January 4, 2008, the Court issued an Order in ADKT No. 411: establishing a single standard to be used for determining indigency; requiring that trial judges be excluded from the process for: appointing counsel; approving fees for attorneys, experts, and investigators; and determining indigency of defendants; implementing performance standards (this was subsequently put off until April 1, 2009); requiring that weighted caseload studies be done for the Clark and Washoe County Public Defender offices, and for the State Public Defender office, and requiring that public defenders in Clark and Washoe counties notify their county commissioners when they are unavailable to accept additional appointments based on ethical considerations; requiring the AO to develop a method of collecting uniform statistics on indigent defendants; and establishing a permanent statewide commission for the oversight of indigent defense. For order, please see: http://www.nlada.net/sites/default/files/nv_adkt411sctorder01-04-2008_0.pdf

[18] For example, many states are significantly reducing the cost of providing public defense by looking carefully at all of their criminal statutes and making reasoned decisions about the types of behaviors that should be punished through jail or prison and those that can be better addressed in some other way. For example, significant defense and prosecutorial resources are expended throughout the country because lawmakers have made it a criminal offense for a person to fail to comply with various administrative regulations – like driving a vehicle that lacks a current inspection sticker or failing to register ownership of a dog. Speaking broadly, what generally happens in these cases is that a person gets a ticket. If that person is indigent, she likely cannot afford to pay the ticket. When she does not pay the ticket, a warrant is issued for her arrest. Eventually she may be arrested and taken to jail. Yet none of this has gotten us any closer to achieving the purpose of the regulation, i.e., this has not caused the vehicle to be inspected or the dog to be registered.

Please feel free to contact me with any questions or concerns. Thank you.

Sincerely,

David J. Carroll, Director of Research
Justice Standards, Evaluations & Research Initiative
National Legal Aid & Defender Association
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Washington, DC 20036
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d.carroll@nlada.org
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At this point, we are criminalizing the indigent person's failure to pay a fine. And because the person is in jail and potentially faces more jail time, we have brought on to taxpayers all the costs of the formal criminal justice system including the cost of public defenders. I understand the need to hold people accountable, but the current economy forces us to question whether it is fiscally wise to jail a person pre-trial at perhaps $115/per day -- perhaps for a significant period because a publicly-paid lawyer does not have the time to get to their case – and then bring in the costs of the entire criminal justice system.

Some of the strongest proponents of reclassification are coming from traditionally conservative or libertarian think tanks. For example, during a 2009 hearing on the right to counsel before a United State House Judiciary Sub-Committee, Cato Institute Adjunct Scholar, Erik Luna remind policy-makers that: "the states have brought any crisis upon themselves through ... overcriminalization – abusing the law's supreme force by enacting dubious criminal provisions and excessive punishments, and overloading the system with arrests and prosecutions of questionable value. State penal codes have become bloated by a continuous stream of legislative additions and amendments, particularly in response to interest-group lobbying and high-profile cases, producing a one-way ratchet toward broader liability and harsher punishment. Lawmakers have a strong incentive to add new offenses and enhanced penalties, as conventional wisdom suggests that appearing tough on crime fills campaign coffers and helps win elections, irrespective of the underlying justification."

AUG 18 2011

FRANKLIN COUNTY BAR ASSOCIATION
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August 17, 2011

Michael W. Catalono, Clerk
100 Supreme Court Building
401 7th Ave. North
Nashville, TN. 37219

RE: Rule 13, Section 7 Rules of the Tennessee Supreme Court No. M2011-01411-SC-RL2-RL

Dear Mr. Catalano,

The undersigned is the President of the Franklin County, Tennessee Bar. I am in receipt of the Order mentioned above whereby section 7 of Rule 13 of the Tennessee Supreme Court Rules are proposed to be changed. Pursuant to this rule change the administrative director would be authorized to enter into contracts for court appointed counsel for a fixed fee. These contracts would be awarded pursuant to the solicitation of proposals for professional services from interested parties. I have been contacted by a number of attorneys in the Franklin County Bar, particularly the younger attorneys. The consensus among the bar is that this is an inappropriate change to the existing procedure. Many of the younger attorneys who rely heavily on appointed cases in their practice feel like they may be undercut by larger firms and cut out of this portion of their practice. It is anticipated that this would be particularly true in rural areas such as Franklin County. In addition thereto there is worry among the bar that the quality of representation of indigent defendant's would suffer as a result of solicitation of what one would anticipate would be reduced fees. This bar does not believe that it is in the best interest of either the bar or the indigent defendants for this proposed amendment to the rule to be approved by the Supreme Court.

Please have this letter taken into consideration when the decision by the Court as to the propriety of approving the proposed amendment to Tennessee Rule of Supreme Court 13 § 7 is made.

I thank you in advance for your help in this matter.

Very truly yours,

Joseph E. Ford
Franklin County Bar Association
President

JEF/ha

ROGER A. SINDLE
Attorney at Law

ALSO ADMITTED TO PRACTICE
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FEDERAL AND STATE COURTS

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827-0013

Michael W. Catalano, Clerk
110 Supreme Court Building
401 Seventh Ave. North
Nashville, TN 37219-1407

AUG 18 2011

August 15, 2011

Re: Proposed Amendment to Tenn. Sup. Ct. R. 13

Mr. Catalano;

Let me clearly state I adamantly oppose this proposed Amendment. I have practiced law for 23 years and have done thousands of Court-appointed cases. I would ask you to contact either or both Judge James Hunter or Judge Dee Gay in Sumner County as to my qualifications.

My opposition is based on the 6th Amendment right to the assistance of counsel for indigent defendants. This principle has been lost in the mad scramble by the AOC to save money. Realizing money is tight does not justify violating Constitutional rights.

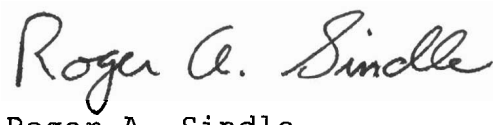
The AOC may claim from now until the end of time COST is not the issue, but COST IS very clearly their focus. In my dealings with the AOC, I have found the staff to be somewhat misleading and speaking in half-truths.

This Amendment will take the Judges as the most knowledgeable individuals of lawyer qualifications out of the decision making. This Amendment will place the emphasis on reducing the time spent on a case rather than effective representation. This amendment and the AOC will place cost reduction foremost rather than the constitutional right.

The American Civil Liberties Union will not be blind to this attempt to satisfy a government body while harming the indigent criminal defendants.

This amendment will cause havoc no one has even dreamed could exist.

Sincerely,



Roger A. Sindle

RAS: jss

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RE
AUG 19 2011

August 16, 2011

Mr. Michael W. Catalano, Clerk
Tennessee Supreme Court
401 Seventh Avenue North
Nashville, Tennessee 37219-1407

RE: Docket No. M2011-01411-SCRL2RL

Dear Mr. Catalano:

I write in opposition to the proposed Amendments to Supreme Court Rule 13.

I have been licensed in the State of Tennessee since 1997. Prior to that I practiced for two (2) years in the State of California and had the opportunity to personally observe the handling of criminal defense cases by a firm in Fresno County, California that was contracted to handle them under a system that is similar to this proposal. The system did not work well.

On the other hand, I have observed the system we have in Tennessee to provide court appointed counsel. Ours works much more smoothly. The judges can select attorneys who are best equipped to represent the individual defendants and the attorneys appointed do a fantastic job given their limited resources.

I realize that it has become politically popular to cut budgets and limit access to the courts. I hope the Supreme Court will not follow suit and will reject the proposed amendment to Supreme Court Rule 13.

Thank you for considering my position.

Sincerely yours,

Edwin A. Anderson, BOPR 018522

EAA/pd

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THE CONSTITUTION PROJECT

Safeguarding Liberty, Justice & the Rule of Law

AUG 22 2011
Clerk of the Court
Rec'd By

August 19, 2011

Mr. Michael W. Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Supreme Court of Tennessee Docket No. M2011-01411-SC-RL2-RL

Dear Mr. Catalano:

I am writing on behalf of The Constitution Project (TCP) to comment on the proposed amendment to Tennessee Supreme Court Rule 13 which would authorize the Administrative Director of the Courts to enter into contracts with attorneys, law firms or associations of attorneys to provide legal services to indigent persons for a fixed-fee. TCP strongly opposes this amendment, because it would undermine the constitutional right to counsel for indigent defendants.

TCP is a constitutional watchdog that promotes and defends constitutional safeguards through constructive dialogue across ideological and partisan lines. In 2004, TCP established the National Right to Counsel Committee—comprising former judges, prosecutors, defense lawyers, law enforcement officials, and scholars—to examine the ability of the American justice system to provide adequate counsel to individuals in criminal and juvenile delinquency cases who cannot afford lawyers.[1] In 2009, the Committee published *Justice Denied: The Continuing Neglect of the Constitutional Right to Counsel*, the most comprehensive examination of our country's system of indigent defense in 30 years.[2] The Committee recommended that states appropriate sufficient funding to provide quality indigent defense services (Recommendation 1), as well as establish and enforce performance and workload standards (Recommendations 5 & 6). The Committee recognized that "[i]nadequate compensation of court-appointed lawyers and contract attorneys contributes to lawyers accepting a high volume of cases that can be disposed of quickly as a way of maximizing income and may serve as a disincentive to invest the essential time required to provide quality representation."[3]

The proposed amendment to Rule 13 would (1) authorize the use of fixed-fee contracts between attorneys and the Administrative Director of the Courts to

[1] A list of National Right to Counsel Committee members is attached as Appendix A.
[2] Nat'l Right to Counsel Comm., The Constitution Project, *Justice Denied: America's Continuing Neglect of Constitutional Right to Counsel* (2009), http://www.constitutionproject.org/pdf/139.pdf. *Justice Denied* has been praised by Attorney General Eric Holder in speeches to the American Council of Chief Defenders and the Brennan Center for Justice; the *Washington Post* has called it an "excellent report"; and it has been cited and relied upon by numerous state supreme courts, policymakers and news outlets around the country.
[3] *Id.* at 195.

provide representation for indigent defendants; (2) prohibit fixed-fee compensation greater than that provided to court-appointed attorneys; (3) require that attorneys with fixed-fee contracts be given first priority for appointment in cases where the public defender is not available or eligible to accept the appointment. Fixed-fee contracts would be awarded in a bidding process. Although the proposed amendment provides that contracts not be awarded solely on the basis of cost, the amendment provides no specific guidelines for the weight of other factors, such as the qualifications or workloads of attorneys under a fixed-fee contract.

If enacted, the Rule 13 amendment would threaten the quality of representation for indigent defendants in the State of Tennessee, as more fully explained below. Other states around the country have begun to recognize the shortcomings of fixed-fee contracts for providing indigent defense services, and I hope that upon further consideration of the rule, Tennessee will join this positive national trend.

I. Fixed-Fee Arrangements Threaten the Quality of Representation for Indigent Defendants.

The proposed amendment to Rule 13 would undermine the federal constitutional right to effective assistance of quality counsel by creating a financial disincentive for attorneys to act in their clients' best interests, and by creating a financial race-to-the-bottom in bidding process for contracts, thereby discouraging qualified attorneys from representing indigent defendants and increasing the caseload of those who continue to represent indigent defendants.

a. **Fixed-fee arrangements create conflicts of interest between attorneys and indigent clients by incentivizing attorneys to invest minimal effort in these cases.** TCP strongly opposes the proposed amendment because fixed-fee arrangements for the provision of indigent defense services remove financial incentives for attorneys to work as many hours as is necessary to adequately defend their clients. Unlike hourly compensation schemes, fixed-fee arrangements place an *ex ante* cap on compensation for attorneys; a fixed-fee contract will compensate an attorney the same amount regardless of how many or how few hours an attorney works on a case. In fact, there is a financial disincentive for an attorney to work as many hours as needed to represent his or her client—especially in complex and time-consuming cases—because of the overhead cost to the attorney or his or her firm. As the National Legal Aid & Defender Association has explained, "[u]nder this type of contract, any work performed by the attorney beyond the bare minimum effectively reduces the attorney's take-home compensation."[4] For this reason, fixed-fee arrangements can result in a conflict of interest for attorneys, who are obligated to act in the interest of their client but who also have a strong disincentive to put adequate time into the cases of their indigent clients, or to engage in the time-consuming research, investigation, and preparation necessary for complex cases.

   The conflict of interest created by fixed-fee models have led to the rejection of this model in several states that have previously employed it. For example, a special master appointed by the Michigan Supreme Court to examine fixed-fee arrangements found that a fixed-fee arrangement "encourages attorneys who are not conscientious to persuade clients to plead guilty as attorneys compensation is not improved materially by trial. This discourages use of the full panoply of constitutional rights."[5] The special master also found that a fixed-fee arrangement "gives disincentive to file serious motions, as no additional compensation is paid for greater efforts," and "discourages plea bargaining in that the prosecutor is aware that the defense attorney has no financial incentive to go to trial."[6] As a result of these findings and others, the Michigan Supreme Court abandoned the fixed-fee system for the provision of indigent defense.[7] Washington State recently prohibited indigent defense attorneys from entering into fixed-fee contracts that require those attorneys to pay the cost of conflict counsel, expert

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[4] Nat'l Legal Aid & Defender Ass'n, *Flat Fee Contracts* (2010), http://www.nlada.net/library/article/na_flatfeecontracts.
[5] *Recorder's Court Bar Ass'n v. Wayne Circuit Court*, 503 N.W.2d 885 (Mich. 1993).
[6] *Id.* at 898 n.7.
[7] Nat'l Right to Counsel Comm., *supra* note 2, at 136.

witnesses, or investigative services.[8] This prohibition arose from a lawsuit[9] brought by indigent defendants against a public defender who took on almost three times the amount of cases recommended under ethical guidelines, because he did not want to lose any of his fixed-fee by giving cases to other attorneys.[10] In 2003, the North Dakota legislature commissioned a blue-ribbon task force to study indigent defense delivery systems in that state. The task force concluded that flat-fee arrangements should be abolished in favor of a statewide public defender system that would not allow for fixed-fee arrangements.[11]

b. **Fixed-fee arrangements discourage attorneys from thoroughly investigating their cases or employing expert witnesses.** Sufficient support services and resources, including access to experts, investigators, and support staff are indispensable to the provision of quality defense representation. As the National Right to Counsel Committee noted, "[i]n their absence, criminal and juvenile proceeding become fundamentally unfair."[12] However, when the cost of investigators, support staff, or expert witnesses is deducted from an attorney's flat fee or must be paid for by the attorney, there is a strong financial incentive against thorough investigations, the use of expert testimony when needed, and hiring sufficient support staff. In the National Legal Aid & Defender Association's *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, contracts under which payment for necessary services such as investigations, expert witnesses, and transcripts would "decrease the Contractor's income or compensation to attorneys or other personnel" should be prohibited, because of the conflict of interest discussed above.[13] Similarly, the California Commission on the Fair Administration of Justice has issued a report revealing that indigent defense attorneys working on a fixed-fee basis were less likely to use investigators or expert witnesses than public defenders or appointed counsel compensated on an hourly basis.[14]

II. The Proposed Amendment to Rule 13 As Currently Drafted Is Particularly Threatening to the Constitutional Right to Counsel.

Any fixed-fee arrangement creates negative incentives as described above. However, the proposed amendment to Rule 13 is particularly problematic because it contains no specific standards or regulations for the competency of counsel or the structure of the fixed-fee arrangements.

a. **The proposed amendment's instructions for evaluating quality of representation in the bidding process are vague and inadequate.** The proposed amendment refers to only three factors for evaluating bids for indigent defense contracts—cost, workload, and ability to exercise judgment on behalf of each client. However, the amendment provides no concrete measurements or specific guidelines for evaluating workload and "ability to exercise judgment." The amendment provides no benchmarks for evaluating whether an attorney's workload is too burdensome and no standards for measuring other critical factors for determining qualifications of indigent defense counsel. These other

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[8] Wash. State Ct. Rules of Prof'l Conduct R. 1.8, http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garpc1.08.

[9] *Best, et al v. Grant County*, No. 04-2-00189-0 (Wash. Super. Ct. Nov. 2, 2005).

[10] Ken Armstrong , Florangela Davila & Justin Mayo, *Part 2: Attorney profited, but his clients lost*, Seattle Times, Apr 5, 2004, http://community.seattletimes.nwsource.com/archive/?date=20040405&slug=defense05.

[11] The Spangenberg Group, State Bar of North Dakota Task Force on Indigent Defense, *Review of Indigent Defense Services in North Dakota* (2004), http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/northdakotareport.authcheckdam.pdf.

[12] Nat'l Right to Counsel Comm., supra note 2, at 196.

[13] Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services. Guideline III-13.

[14] Cal. Comm'n on the Fair Admin. of Justice, *Report and Recommendations on Funding of Defense Services in California* (April 14 2008) http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20DEFENSE%20SERVICES.pdf.

critical factors include a bidder's overall legal experience, their specific experience with criminal litigation and criminal defense work, what kind of support staff is available to a bidder, and their ethical or professional record. Although paragraph (b) of the proposed amendment to Rule 13 provides that cost should not be the sole consideration in the bidding process for the acceptance of indigent defense contracts, the lack of standards for measuring the other factor fails to prevent cost from being the most important or overwhelmingly decisive factor.

Vague or inadequate standards for professional qualifications of indigent defense contractors, such as those in the proposed amendment, undermine the right to effective assistance of counsel.[15] For example, in *State v. Smith*,[16] the Arizona Supreme Court invalidated a county's fixed-fee contract-based system for the provision of indigent defense specifically because the county's contract system did not contain specific or adequate standards for caseload size, attorney competency, and availability of support staff, resulting in an "inference that the adequacy of representation is adversely affected by the system."[17] In the Arizona system, as in the proposed amendment, "No limitation [was] suggested on caseload or hours, nor [was] there any criteria for evaluating ability or experience of potential applicants...[and] No suggestion [was] made that counsel may expect assistance in any way for support personnel."[18] The court also found that because contract bidding system had, like the proposed amendment to Rule 13, no such standards, it "result[ed] in a denial of due process and inadequate representation of counsel."[19]

b. **The "race to the bottom" effect of fixed-fee arrangements reduces the likelihood of attracting highly qualified and experienced attorneys to represent indigent defendants.** Paragraph (a) of the proposed amendment to Rule 13 specifically prohibits contracts that would compensate contract attorneys at a higher rate than attorneys providing indigent defense services through any other arrangement. This provision places a ceiling on compensation for contract attorneys, which encourages bidders to compete on the basis of how much more cheaply they can provide representation—regardless of quality—than appointed counsel can. Additionally, paragraph (c) of the proposed amendment provides that attorneys who provide indigent defense services under flat-fee contracts shall be given first priority over appointed counsel for cases in which a public defender is unable to represent the accused, thus incentivizing attorneys who currently rely on the appointment system to participate in the fixed-fee contract system and to bid down the price of representation of the indigent. Incentivizing low bids combined with the compensation ceiling and a competitive bidding process in which cost is the only concrete factor for comparison among bids creates a race-to-the-bottom for indigent defense compensation.

Tennessee already has one of the lowest compensation levels for appointed indigent defense counsel in the country.[20] Reducing compensation levels through the used of fixed-fee contracts will only make it more difficult to recruit enough qualified attorneys to represent indigent clients. As discussed in *Justice Denied*, inadequate compensation is a significant factor in the failure to attract experienced, well-qualified attorneys to represent indigent defendants.[21] Additionally, the proposed amendment to Rule 13 does not contain a mechanism for additional compensation for exceptionally complex or time-consuming cases, as Sections 2 through 4 provide for appointed counsel.[22] In this way, fixed-fee arrangements are even more restrictive than fee caps and can easily subject contract attorneys to significant financial losses when representing clients in complex cases.

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[15] *See generally,* History of Indigent Defense Contracting in the United States.
[16] *State v. Smith*, 681 P.2d 1374 (Ariz. 1984).
[17] *Id.*, at 1381.
[18] *Id.*, at 1379.
[19] *Id.*, at 1383.
[20] *Id.*, at 1383.
[21] Nat'l Right to Counsel Comm., supra note 2, at 63.
[22] Rule 13, Rules of the Sup. Ct. of Tenn. *See* T.C.A. § 2-4.

Fixed-arrangements are inherently detrimental to the Sixth Amendment rights of indigent defendants because they create a conflict-of-interest between attorneys, who are incentivized to put minimal effort into defending indigents, and their clients. We respectfully recommend that the Supreme Court of Tennessee oppose the adoption of any fixed-fee contract arrangement for the provision of indigent defense services, like the one provided for in the proposed amendment to Rule 13. If the Court does proceed with the use of fixed-fee arrangements for indigent defense services, we respectfully recommend that it revise the propose amendment to provide specific standards for qualifications of attorneys, workloads, fair compensation, and avoidance of conflicts of interest between attorneys and their clients.

Respectfully,

Virginia E. Sloan
President, The Constitution Project

APPENDIX A

National Right to Counsel Committee

Honorary Co-Chairs

Walter F. Mondale
Senior Counsel, Dorsey & Whitney LLP; Vice President of the United States, 1977–1981; United States Senator (D-MN), 1964–1977; former Minnesota Attorney General who organized the amicus brief of 23 states in support of Clarence Earl Gideon in *Gideon v. Wainwright*

William S. Sessions
Partner, Holland & Knight LLP; Director, Federal Bureau of Investigation, 1987–1993; Judge, United States District Court for the Western District of Texas, 1974–1987, Chief Judge, 1980–1987; United States Attorney, Western District of Texas, 1971–1974

Co-Chairs

Rhoda Billings
Professor Emeritus, Wake Forest University School of Law; Justice, North Carolina Supreme Court, 1985–1986, Chief Justice, 1986; Judge, State District Court, 1968–1972

Robert M. A. Johnson
District Attorney, Anoka County, Minnesota; former President, National District Attorneys Association; former Chair, American Bar Association Section of Criminal Justice

Timothy K. Lewis
Co-Chair, Appellate Practice Group, Schnader Harrison Segal & Lewis LLP; Judge, United States Court of Appeals for the Third Circuit, 1992–1999; Judge, United States District Court for the Western District of Pennsylvania, 1991–1992; former Assistant United States Attorney, Western District of Pennsylvania; former Assistant District Attorney, Allegheny County, Pennsylvania

Members

Shawn Armbrust
Executive Director, Mid-Atlantic Innocence Project; as a member of the Northwestern University Medill School of Journalism was instrumental in achieving the 1999 death row exoneration of Illinois inmate Anthony Porter

Jay W. Burnett
Former Judge, 351st Criminal District Court, Harris County Texas, appointed 1984; Judge, 183rd Criminal District Court, Harris County, Texas, 1986–1998; Visiting Criminal District Judge, 2nd Judicial Administrative Region of Texas, 1999–2000

Alan J. Crotzer
Probation and Community Intervention Officer, Florida Department of Juvenile Justice; wrongfully convicted and sentenced to 130 years in prison; served 24.5 years in prison; exonerated based on DNA evidence in 2006

Tony Fabelo
Director of Research, Justice Center of the Council of State Governments; former Senior Associate, The JFA Institute; former Executive Director, Texas Criminal Justice Policy Council, 1991–2003

Norman S. Fletcher
Of Counsel, Brinson, Askew, Berry, Seigler, Richardson & Davis LLP; Justice, Supreme Court of Georgia, 1989–2005, Chief Justice, 2001–2005

Monroe H. Freedman
Professor of Law and former Dean, Hofstra University School of Law; nationally-acclaimed scholar of lawyers' ethics

Susan Herman
Associate Professor of Criminal Justice, Pace University; former Executive Director, National Center for Victims of Crime

Bruce R. Jacob
Dean Emeritus and Professor of Law, Stetson University College of Law; former Assistant Attorney General for the State of Florida, represented Florida in *Gideon v. Wainwright*

Abe Krash
Retired Partner, Arnold & Porter LLP; former Visiting Lecturer, Yale Law School; Adjunct Professor, Georgetown University Law Center; represented Clarence Earl Gideon in *Gideon v. Wainwright*

Norman Lefstein
Professor of Law and Dean Emeritus, Indiana University School of Law—Indianapolis (served as one of the Committee's Reporters)

Charles J. Ogletree, Jr.
Jesse Climenko Professor of Law; Executive Director, Charles Hamilton Houston Institute for Race and Justice, Harvard Law School

Bryan A. Stevenson
Director, Equal Justice Initiative of Alabama; Professor of Clinical Law, New York University School of Law

Larry D. Thompson
Senior Vice President, Government Affairs, General Counsel and Secretary, PepsiCo, Inc.; Deputy Attorney General of the United States, 2001–2003; former United States Attorney, Northern District of Georgia

Hubert Williams
President, Police Foundation; former New Jersey Police Director; former Special Advisor to the Los Angeles Police Commission

Reporters

Norman Lefstein

Professor of Law and Dean Emeritus, Indiana University School of Law—Indianapolis; LL.B., 1961, University of Illinois College of Law; LL.M., 1964, Georgetown University Law Center.

Professor Lefstein's prior positions include service as director of the Public Defender Service for the District of Columbia, as an Assistant United States Attorney, and as a staff member in the Office of the Deputy Attorney General of the U.S. Department of Justice. His professional activities include serving as Chair, American Bar Association (ABA) Section of Criminal Justice in 1986–1987; and as Reporter for the Second Edition of ABA Criminal Justice Standards Relating to *The Prosecution Function, The Defense Function, Providing Defense Services,* and *Pleas of Guilty.* During 1997–1998, Professor Lefstein served as Chief Consultant to a Subcommittee on Federal Death Penalty Cases of the Judicial Conference of the United States, directing preparation of a report on the cost and quality of defense representation in federal death penalty prosecutions. His publications include *Criminal Defense Services for the Poor,* published by the ABA in 1982, and co-authorship of *Gideon's Broken Promise: America's Continuing Quest for Equal Justice,* published by the ABA in 2004. He also has served as a member of the ABA's Standing Committee on Legal Aid and Indigent Defendants and for nine years chaired its Indigent Defense Advisory Group. In 2007, Professor Lefstein concluded seventeen years as Chairman of the Indiana Public Defender Commission.

Robert L. Spangenberg

Research Professor and Founder, The Spangenberg Project, Center for Justice, Law, and Society, George Mason University; B.S., 1955, Boston University; J.D., 1961, Boston University School of Law.

Professor Spangenberg specialized in civil legal services early in his career, developing the Boston Legal Assistance Project, a neighborhood civil legal services program, which he headed for nine years. After a two-year foundation study of civil legal services in Boston and a statewide study of indigent defense in Massachusetts, Professor Spangenberg joined Abt Associates in Cambridge, Massachusetts, where for nine years he conducted national and local studies of indigent defense systems across the country. In 1985, he founded The Spangenberg Group to continue the study of indigent defense nationwide. During his 23 years as President of the organization, he visited all 50 states, testified before legislative bodies about the justice system, and served as an expert witness in court proceedings. The Spangenberg Group published hundreds of reports and studies pertaining to the country's system of justice in criminal and juvenile proceedings, and for more than 20 years, Professor Spangenberg has served as a consultant to the ABA Standing Committee on Legal Aid and Indigent Defendants. In February 2009, Professor Spangenberg joined George Mason University, where he will continue his work on indigent defense matters.

Franklin County General Sessions & Juvenile Court

Thomas C. Faris, Judge

360 Wilton Circle • Winchester, TN 37398
Phone: (931) 962-4133 • Fax: (931) 962-4396

August 19, 2011

AUG 22 2011

Mr. Michael W. Catalono, Clerk
100 Supreme Court Building
401 7th Ave., North
Nashville, TN 37219

Re: Amendment to Rule 13 of the TN Rules of the Supreme Court

Dear Mr. Catalono:

I am writing this letter in opposition to the proposed amendment to Rule 13 of the Tennessee Rules of the Supreme Court. The Judge hearing the case is the person who is familiar with the attorneys who practice in court and would know which one would be the best fit for that particular client. This is particularly important in Juvenile Court, which is driven by the *"best interest of the child"*. With all due respect to the personnel at the Administrative Office of the Courts, they have no knowledge of the children that come through the Juvenile Courts. There is absolutely no way that they would know what is in *"the best interest of the child"*.

In this county, principally young attorneys give of their time and effort in assisting the process in Juvenile Court. This in turn gives them valuable and needed experience. I feel that a bidding war among the younger attorneys would be repugnant, and not in the best interests of the judicial process or the child. I respectfully voice my objections to this amendment.

Sincerely,

Thomas C. Faris

Thomas C. Faris, General Sessions and
Juvenile Court of Franklin County, TN