M2011-1411

# PARKER & PUGH



*Attorneys at Law*
118 Franklin Street
Clarksville, Tennessee 37040
Phone- (931)551-4403
Fax-(931)551-8992

Douglas B. Parker (Retired)
Elizabeth Parker Pugh
John D. Parker

Michael T. Pugh
Shelby S. Silvey

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.

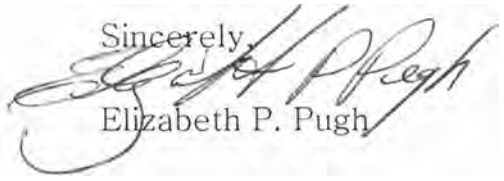
You are probably wondering why any attorney would bother with this mess at all but once again it comes down to everyone getting a free attorney. No one has to hire one so if you want work, you will do appointed work and you won't get paid for months. The Administrative Office of the Courts promised us

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
ATTORNEYS AT LAW
121 E. DEPOT ST.
GREENEVILLE, TENNESSEE 37744

FRANCIS X. SANTORE (1931 - 2004)
FRANCIS X. SANTORE, JR.

P.O. Box 113
(423) 639-3511
Fax (423) 639-0394



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.

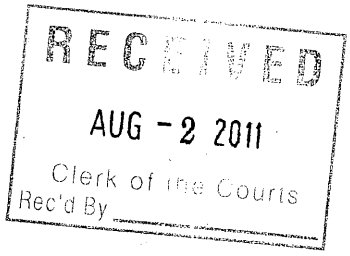
# OLDHAM & DUNNING, LLC

Attorneys at Law

109 Public Square
Gallatin, Tennessee 37066
Telephone: (615) 452-1001
Telefax: (615) 451-9226

Bruce N. Oldham
Sue H. Dunning


July 29, 2011




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 Dunning

SUE HYNDS DUNNING

SHD/ms

OFFICE OF

# Circuit, Criminal and General Sessions Court

**JOHN K. WILSON**
Circuit Judge
423.639.1731
**THOMAS J. WRIGHT**
Circuit Judge
423.639.5204
**KINDALL T. LAWSON**
Circuit Judge
423.272.7776
**JOHN F. DUGGER**
Criminal Judge
423.586.8640

**TERESA WEST**, Clerk
Hamblen County
510 Allison Street Morristown, TN 37814
General Sessions 423.586.5640 Fax 423.585.2764
Circuit 423.317.9267 Fax 423.585.4034

**JOYCE WARD**
General Sessions Judge
Division I
423.585.4540
**JANICE H. SNIDER**
General Sessions Judge
Division II
423.587.1239
**C. BERKELY BELL**
District Attorney General
423.581.6700



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 M. Ward
General Sessions Court Judge for Hamblen County

Kathy Robertson
Judicial Commissioner for Hamblen County General Sessions Court

CARTER & HOWARD
ATTORNEYS AT LAW



Mike Carter
David R. Howard

1208 Nashville Pike
Gallatin, Tennessee 37066
Office: (615) 206-1400
Facsimile: (615) 206-1408

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

717 North Central Avenue
Knoxville, TN 37917

(865) 546-0011
Fax: (865) 546-0038



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

Ben H. Houston II

**Law Office of James A. Rose**
**19 Music Square West, Suite R**
**Nashville, Tennessee 37203**
**(615) 719-5034**
**james@jroseattorney.com**
**Also admitted to practice in the District of Columbia**



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



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

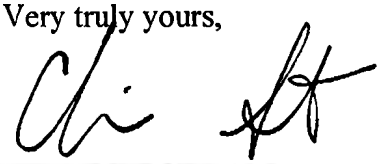
act against the interests of their clients due to financial considerations. A heightened potential of this breach will surface when an attorney, due to improper estimation, underbids to the extent it becomes financially impossible for the underbidding attorney to provide competent counsel and continue 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# 029383

DAVID HAWK
STATE REPRESENTATIVE

201 WAR MEMORIAL BUILDING
NASHVILLE, TENNESSEE 37243-0105
(615) 741-7482
TOLL FREE: 1-800-449-8366 EXT. 1-7482
FAX: (615) 253-0210
E-MAIL:
rep.david.hawk@capitol.tn.gov

# House of Representatives
# State of Tennessee

NASHVILLE

MEMBER OF COMMITTEES

CHAIRMAN
CONSERVATION AND ENVIRONMENT

HOME:
14 WEST RIDGEFIELD COURT
GREENEVILLE, TENNESSEE 37745
RES: (423) 639-8146
OFC. (423) 620-9391

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,

DAVID HAWK
STATE REPRESENTATIVE

201 WAR MEMORIAL BUILDING
NASHVILLE, TENNESSEE 37243-0105
(615) 741-7482
TOLL FREE: 1-800-449-8366 EXT. 1-7482
FAX: (615) 253-0210
E-MAIL:
rep.david.hawk@capitol.tn.gov

House of Representatives
State of Tennessee

NASHVILLE

MEMBER OF COMMITTEES

CHAIRMAN
CONSERVATION AND ENVIRONMENT

HOME:
14 WEST RIDGEFIELD COURT
GREENEVILLE, TENNESSEE 37745
RES: (423) 639-8146
OFC. (423) 620-9391

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

DAVID HAWK
STATE REPRESENTATIVE

201 WAR MEMORIAL BUILDING
NASHVILLE, TENNESSEE 37243-0105
(615) 741-7482
TOLL FREE: 1-800-449-8366 EXT. 1-7482
FAX: (615) 253-0210
E-MAIL:
rep.david.hawk@capitol.tn.gov

House of Representatives
State of Tennessee

NASHVILLE

MEMBER OF COMMITTEES

CHAIRMAN
CONSERVATION AND ENVIRONMENT

HOME:
14 WEST RIDGEFIELD COURT
GREENEVILLE, TENNESSEE 37745
RES: (423) 639-8146
OFC. (423) 620-9391

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

DAVID HAWK
STATE REPRESENTATIVE

201 WAR MEMORIAL BUILDING
NASHVILLE, TENNESSEE 37243-0105
(615) 741-7482
TOLL FREE: 1-800-449-8366 EXT. 1-7482
FAX: (615) 253-0210
E-MAIL:
rep.david.hawk@capitol.tn.gov

# House of Representatives
# State of Tennessee

NASHVILLE

MEMBER OF COMMITTEES

CHAIRMAN
CONSERVATION AND ENVIRONMENT

HOME:
14 WEST RIDGEFIELD COURT
GREENEVILLE, TENNESSEE 37745
RES: (423) 639-8146
OFC. (423) 620-9391

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

**VIRGINIA TOMPKINS**
**POST OFFICE BOX FIVE**
**CASTALIAN SPRINGS, TN 37031**
**(615) 452-5222**



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

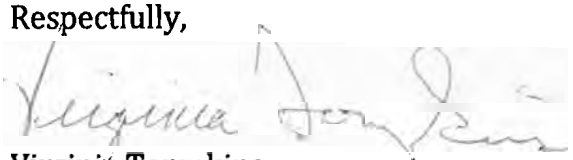
costs thereof, in all areas will likely rise if a random firm, with a random associate is assigned to handle a large volume of cases with nothing other than an economic stake invested in the litigation. It is my personal view that cases assigned en masse and in bulk to a pre-contracted firm or association 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**
**401 Flatiron Building**
**Chattanooga TN 37402 - 2023**
Telephone (423) 266-6600 Facsimile 1-866-859-1812 (Toll Free) E-Mail farrlaw@comcast.net

**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.

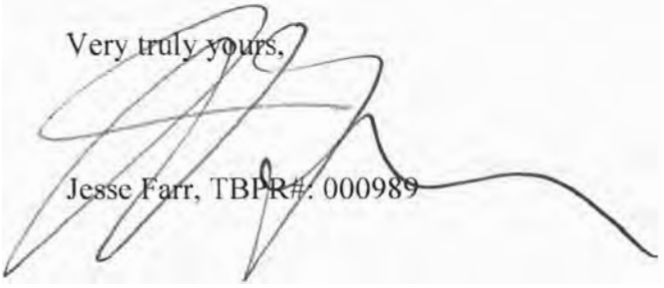
The proposed Amendment will not be a viable cost savings measure. Removal of the authority of the local judge to match attorneys with cases will hamper the local judge's ability to ensure that justice is administered efficiently and that competent counsel is appointed, as well as eliminating the important 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

**THE LAW OFFICES OF JEFFREY D. JOHNSON**
128 E. MARKET ST.
JOHNSON CITY, TENNESSEE 37604
TEL 423-232-0745
FAX 423-232-0746



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.

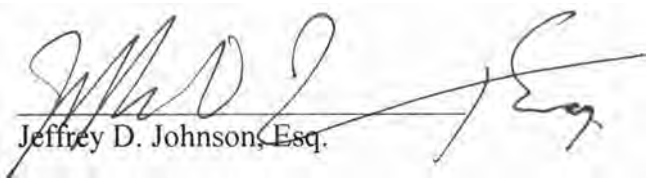
I personally observed the above and continued to work there until last year when my mother became ill and I had to move here to take care of her. I became a member of the Tennessee Bar Association in March of this year. In February I was placed on the federal Criminal Justice Act Panel which only permits 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
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.

[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.

## *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

---

[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

---

[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]

---

[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.

---

[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

---

[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]

---

[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]

---

[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
1140 Connecticut Avenue, NW, Suite 900
Washington, DC 20036
www.nlada.net/jseri
d.carroll@nlada.org
202-329-1318

---

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**
*Joseph E. Ford, President*

17 S. College Street
Winchester, TN 37398

Phone (931) 967-1715
Fax (931) 967-1532
Email joseph.ford@mcbeandford.com

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
IN ALABAMA AND GEORGIA

117 DORAL LANE
HENDERSONVILLE, TENNESSEE 37075

GENERAL PRACTICE
FEDERAL AND STATE COURTS

TELEPHONE: (615) 293-3510
TELEFAX: (615) [redacted]

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

Roger A. Sindle

RAS: jss

# Cannon & Anderson

An Association Of Independent Attorneys

Joel A. Cannon, Jr.
Edwin A. Anderson

THE NORTHLAND BUILDING
2924 TAZEWELL PIKE, SUITE F
KNOXVILLE, TENNESSEE 37918

(865) 522-9000




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

THE CONSTITUTION PROJECT

*Safeguarding Liberty, Justice & the Rule of Law*



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

---

[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

---

[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.

---

[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



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

Jeremy Faison
State Representative
Cocke / Greene County

Committees: Judiciary and Agriculture

# House of Representatives
# State of Tennessee

202 War Memorial
301 6th Ave. North
Nashville, TN 37243

Office: 615-741-6871
1-800-449-8366, ext. 16871

August 19, 2011

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

AUG 23 2011

**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, 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.

State Rep. Jeremy Faison • 202 War Memorial • 301 6th Ave. N. • Nashville, TN 37243
Cell: 423-608-3296 • Fax: 615-253-0225 • Rep.Jeremy.Faison@capitol.tn.gov

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 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.

State Rep. Jeremy Faison • 202 War Memorial • 301 6th Ave. N. • Nashville, TN 37243
Cell: 423-608-3296 • Fax: 615-253-0225 • Rep.Jeremy.Faison@capitol.tn.gov

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 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.

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

Very truly yours,

Jeremy Faison, State Representative
Gal. 2:20

State Rep. Jeremy Faison • 202 War Memorial • 301 6th Ave. N. • Nashville, TN 37243
Cell: 423-608-3296 • Fax: 615-253-0225 • Rep.Jeremy.Faison@capitol.tn.gov

MICHAEL R. JONES, CIRCUIT JUDGE, DIVISION II
Mailing Address:
Montgomery County Courts Center
Two Millennium Plaza
Suite 460
Clarksville, Tennessee 37040

STATE OF TENNESSEE
NINETEENTH JUDICIAL DISTRICT

**Montgomery County**
Phone: (931) 648-7189
Fax: (931) 648-7198
**Robertson County**
Phone: (615) 384-6467
Fax: (615) 382-3136

AUG 24 2011

**Mr. Michael Catalano, Clerk**
**100 Supreme Court Building**
**401 7th Avenue North**
**Nashville, Tn. 37219**

**RE: Proposed Amendment to Supreme Court Rule 13**

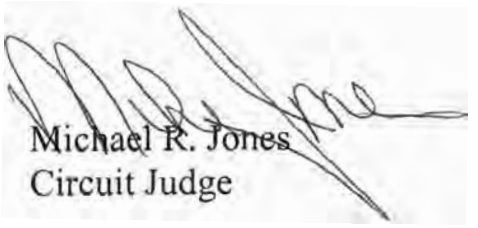
**Mr. Catalano:**

**I express my concern as a trial judge that the proposed amendment is a continuation of the efforts to remove the word "justice" from criminal justice. I fully understand that the cost of providing indigent representation continues to grow each year and the Supreme Court/AOC needs to find ways to reduce this cost to the taxpayers. Leaving the trial judge out of the decision is not the means of accomplishing this goal.**

**My experience includes private practice taking appointed cases in Robertson County, 11 years as District Public Defender and now 11 years as trial judge. In choosing an attorney to appoint a private attorney to a case, I look to the type of case, the experience of the attorney and most importantly his/her prior representation of appointed clients. Generally I know whether or not the defendant has been seen in jail by the attorney or whether the attorney just comes to court on a settlement day to attempt to settle the case. I know who can get along with difficult clients; I know who does not do any hand holding; I know who puts forth the effort to represent an appointed client just as if he/she were retained.**

**I realize that the economic times are such that drastic action has to be taken. Depriving a citizen of his constitutional right to representation is not the right way to do this.**

**I fully support the letter written by Julia P. North, President of the Montgomery County Bar Association.**



Michael R. Jones
Circuit Judge

ORIGINAL

**IN THE SUPREME COURT OF TENNESSEE**



**AT NASHVILLE**

**IN RE: RULE 13, SECTION 7, RULES OF THE TENNESSEE SUPREME COURT**

**Comments from the Tennessee District Public Defenders Conference in response to Order No. M2011-01411-SC-RL2-RL.**

---

The Supreme Court of Tennessee has solicited written comments by September 1, 2011 for the proposed new addition to Supreme Court Rule 13 (hereinafter cited as "the proposed new rule"). The Court's Order summarized that the proposed new rule "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."[1] The Tennessee District Public Defenders Conference submits that the proposed new rule, if enacted, would have a detrimental effect on the representation of all indigent persons in this state. The proposed new rule should be rejected by the Supreme Court of Tennessee.

## INTRODUCTION

Despite the best intentions, the proposed new rule raises serious legal and ethical concerns for attorneys who represent indigent persons. First, the proposed new rule is vague as to the scope of its application and the "fixed fee contract" arrangement. Second, a "fixed fee contract" fails to safeguard an indigent person's effective assistance of counsel. Third, the proposed new rule is contrary to the findings from a recent report from the Administrative Office of the Court (AOC) as well as the nationally recognized standards from the American Bar Association (ABA) and National Legal Aid and Defender Association (NLADA). Finally, the trial judge's statutory authority to appoint legal counsel is undermined by the proposed new rule.

---

[1] Order filed per curiam on July 1, 2011 (No. M2011-01411-SC-RL2-RL).

As written, the proposed new rule applies to civil and criminal cases. However, it is noted that an AOC representative attempted to clarify the intent for the proposed new rule. A recent article from a Chattanooga newspaper stated:

> AOC spokeswoman Laura Click said there has been misunderstanding about the proposal and "alarmist" reactions. Its intent is to contract legal representation for indigent cases. The goal is to streamline the system and save money from the growing Tennessee Indigent Defense Fund, she said.
>
> The system would be used first in judicial hospitalizations, and then might move in child support contempt cases, she said. Those two types of cases together make up about 10 percent of all indigent defense cases.[2]

Giving consideration to Ms. Click's statements, the proposed new rule fails to make the same distinction; *i.e.,* for its application to be limited to judicial hospitalizations and child support contempt cases. If it is the intent of the Tennessee Supreme Court to limit "fixed fee contracts" to the aforementioned cases, the proposed new rule should specifically state such limitations.

## ANALYSIS

### I. The proposed new rule is vague.

Under the proposed new rule, in response to the solicitation of proposals, an attorney seeking the award of a contract is to submit a proposal for professional service to the AOC to represent indigent persons for a specified number and type of cases on a "fixed fee" basis. A "fixed fee" is defined as, "[a] fee that will not vary according to the amount of work done or other factor."[3] The language "fixed fee" implies a single dollar amount negotiated to represent a specified number of clients in a specified period of time. However, Section 7(a) of the proposed new rule states that such fixed fee contracts shall not exceed the rates established in Section 2 of Rule 13 of the Supreme Court. The proposed hourly rate limitation contradicts the definition of "fixed fee." An hourly rate suggests the final value of services performed is undetermined, whereas a

[2] Chattanooga Times Free Press, *Courts propose contracting indigent defense in some cases* (July 30, 2011).
[3] *Black's Law Dictionary*, 651 (7th ed. 1999).

"fixed fee" arrangement promotes a prearranged final fee, regardless of the amount of time the contractor has spent in achieving the result.

In addition, the proposed new rule does not address the requirements regarding the extent and types of services, *e.g.,* investigative services, expert services, research services, support staff, etc., to be provided within the contract. In *Baxter v. Rose,* the Tennessee Supreme Court established that "[c]ounsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed."[4] And, the duty to investigate begins even as the proceedings are commencing, as "a client's expressed intention to plead guilty does not relieve counsel of their duty to investigate possible defenses and to advise the defendant so that he can make an informed decision" during plea consultations.[5] Tennessee has long held that the duties of a trial attorney are three-fold, "(1) to confer, (2) advise and (3) investigate."[6] "Counsel must conduct appropriate investigations into both the facts and the law to determine what matters of defense can be developed."[7] A "fixed fee" agreement may limit, if not discourage, counsel's opportunities to meet these requirements and properly represent an indigent person in court.

## II. The effective assistance of counsel is compromised.

In 1964, the Supreme Court held that the right to counsel in all criminal prosecutions is a fundamental right protected under the Sixth Amendment to the Constitution of the United States.[8] In 1972, this right to counsel was expanded to cover those under prosecution of a misdemeanor.[9]

A right to counsel is more than just having an attorney present, but in having effective assistance of counsel.[10] *Strickland* established the two components a defendant must establish in their

---

[4] *Baxter v. Rose,* 523 S.W.2d 930, 933 (Tenn. 1975) *quoting United States v. DeCoster,* 487 F.2d 1197, 1203-04 (1973).
[5] *Savino v. Murray,* 82 F.3d 593, 599 (4th Cir. 1996).
[6] *State v. McBee,* 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983), *citing United States v. DeCoster,* 487 F.2d 1197, 1203-04 (D.C. Cir. 1973).
[7] *Id.*
[8] *Gideon v. Wainwright,* 372 U.S. 335, 342, 83 S. Ct. 792, 795; 9 L. Ed. 2d 799, 803 (1964).
[9] *Argersinger v. Hamlin,* 407 U.S. 25, 30; 92 S. Ct. 2006, 2009; 32 L. Ed. 2d 530, 534 (1972).
[10] *Strickland v. Washington,* 466 U.S. 668, 686; 104 S. Ct. 2052, 2063; 80 L. Ed. 2d 674, 692 (1982).

claim for ineffective assistance of counsel.[11] First, the defendant must show that his counsel's performance was deficient.[12] And, second, that this deficient performance was a prejudice to the defense.[13] An attorney's performance is judged on a standard of reasonable effective assistance.[14] An ineffectiveness claim requires a demonstration that the representation provided "fell below an objective standard of reasonableness."[15] Counsel is expected to meet certain basic duties in their representation of a client. They are to assist the defendant and exhibit a duty of loyalty, avoiding any conflict of interest.[16] Further, counsel has a duty to investigate, or to make an effort to determine that investigation is unnecessary.[17] However, there is not an established, particular set of rules used to determine the effectiveness of the representation.[18]

In *Baxter v. Rose,* the Supreme Court of Tennessee affirmed that Article I, section 9 of the Constitution of Tennessee, and the Sixth Amendment to the Constitution of the United States are "identical in import," and ensure that a person in Tennessee has the same right to effective counsel established in the federal courts.[19]

The proposed new rule, permitting a "fixed fee" contract to represent an indigent person, may undermine the constitutionally required effectiveness of representation. And, the proposed new rule fails to address what costs are considered within the contract's terms, or those that are to be reimbursed outside the contractual terms.

The Supreme Court of Arizona previously addressed some of the issues associated with a contract system for indigent defense. While the defendant in this case was found to have received effective counsel, the Court addressed the contracts the Arizona County employed in the assignment of counsel representing indigent defendants.[20] In *Arizona v. Smith,* the Court

---

[11] *Id.* at 688, 2064, 693.
[12] *Id.* at 687, 2064, 693.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 688, 2064, 694.
[16] *Id.*
[17] *Id.* at 691, 2066, 695.
[18] *Id.* at 688-9, 2065, 694.
[19] 523 S.W.2d 930, 936 (Tenn. 1975).
[20] In *Arizona v. Smith,* defendant Smith was convicted of burglary and sexual assault. On appeal, the Supreme Court of Arizona addressed whether an attorney, who the defendant claimed had spent only a few hours interviewing him and perhaps six to eight hours preparing for the case

determined that Mohave County's contract system "militates against adequate assistance of counsel for indigent defendants."[21] The Court outlined four reasons why the contract system failed to meet the established standards and guidelines:[22]

> 1. The system does not take into account the time that the attorney is expected to spend in representing his share of indigent defendants.
> 2. The system does not provide for support costs for the attorney, such as investigators, paralegals, and law clerks.
> 3. The system fails to take into account the competency of the attorney. . . .
> 4. The system does not take into account the complexity of each case.[23]

The Arizona Court determined that the system used in Mohave County deprived a defendant of their due process right and the right to counsel protected by the United States and Arizona Constitutions, and placed the blame on the contract system employed and the attorneys involved in that system.[24]

Recently, Cochise County, Arizona proposed a similar system of "fixed fees" for indigent criminal defense. Cochise County attorneys have commented that the proposed system is unfair, perhaps unethical, and "unbecoming of a professional in the legal field."[25] Jason Lindstrom, a Cochise County attorney, succinctly stated:

> The worst case scenario, in my opinion, is the creation of 'client plea-mills,' where criminal resolution is effected [sic] by a 'mass production' mentality, and by routine. Criminal cases should be handled independently from one another, on a case-by-case basis. Otherwise, justice suffers or dies altogether . . . at the hand of economics.[26]

---

because of the attorney's "shocking, staggering and unworkable" caseload, was instrumental in the attorney's ineffective assistance to defendant Smith. 681 P.2d 1374 (Ariz. 1984).

[21] *Id.* at 1381.

[22] *Id.* at 1380, *Citing* NLADA Guidelines for Negotiating and Awarding Indigent Defense Contracts, Guideline III-6 (tentative draft, 1984).

[23] *Id.* at 1381.

[24] *Id.*

[25] Jonathon Shacat, *Proposal for indigent defense concerns lawyers,* Arizona Range News, wilcoxrangenews.com, Aug. 10, 2011, http://www.willcoxrangenews.com/articles/2011/08/10/news/news08.txt.

[26] *Id.*

The basis for an attorney's professional conduct is summarized in the Preamble to the Tennessee Rules of Professional Conduct, which states, in pertinent part, "In all professional functions a lawyer should be competent, prompt and diligent."[27]

Moreover, the rules of professional conduct list ten (10) factors that shall be considered in determining a reasonable attorney's fee, as follows:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation, and ability of the lawyer or lawyers performing the services;
8. Whether the fee is fixed or contingent;
9. Prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
10. Whether the fee agreement is in writing.[28]

The proposed new rule would negatively impact the Rules of Professional Conduct and fails to inspire confidence that an attorney under contract would be encouraged to provide zealous representation to a client. Specifically, there is a disincentive to seek appeal of a trial court decision, as the proposed new rule does not establish whether an appeal is within the scope or terms of the proposed contract. Moreover, the proposed new rule fails to describe the means by which an attorney's expertise would be considered for complex criminal cases.

## III. The proposed new rule is contrary to the AOC's indigent defense cost study and nationally recognized standards for practicing indigent defense.

In January of 2011, an AOC report submitted to the Tennessee General Assembly stated that in those situations where a public defender has a conflict or the public defender's caseload has

[27] Tenn. Sup. Ct. R. 8, Section (5) of the Preamble (2011).
[28] Tenn. Sup. Ct. R. 8, RPC 1.5(a) (2011).

become unmanageable without outside assistance, the appointment of private counsel occurs to assist the public defender.[29]

In discussing the alternative methods for providing outside counsel to assist public defenders, the report acknowledges that other states have used contracts to provide assistance. However, the "flat rate" contracts employed have been viewed negatively as an "*incentive to resolve cases in the least amount of time possible even if doing so is not the best interest of the attorney's clients.*"[30]

While the proposed new rule suggests the awarding of contracts will not be based solely on the basis of cost, the proposed new rule also does not consider the possible negative ramifications of contracted representation suggested in the AOC report. A "fixed fee" contract encourages the reduction of workloads to maximize profit, even while maintaining the minimum professional standards required of an attorney in Tennessee. "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."[31] The proposed contract system may further lower the bar in criminal defense in Tennessee.

Both the ABA and NLADA have established criteria for representation of an indigent person.[32] The criteria cite such issues as an attorney's experience being matched to the complexity of the assigned cases; a control of the attorney's workload to allow quality representation; a system to provide participation of the private bar when the workload exceeds acceptable limits; and "vertical representation."[33] The guidelines established by these organizations are not represented within the proposed new rule.

---

[29] Administrative Office of the Courts, *Tennessee's Indigent Defense Fund: A Report to the 107th Tennessee General Assembly,* 16 (Jan. 15, 2011).
[30] *Id.* (Emphasis added).
[31] *Strickland v. Washington,* 466 U.S. 668, 685; 104 S. Ct. 2052, 2063; 80 L. Ed. 2d 674, 692 (1982).
[32] *See,* American Bar Association Standing Committee On Legal Aid and Indigent Defendants, *ABA Ten Principles of a Public Defense Delivery System,* (Feb. 2002) and NLADA Guidelines For Negotiating and Awarding Governmental Contracts for Criminal Defense Services (Feb. 25, 1984).
[33] American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *ABA Ten Principles of a Public Defense Delivery System,* (Feb. 2002).

## IV. The statutory authority of the trial judges is undermined.

The proposed new rule requires the Administrative Director of the AOC to appoint contract attorneys throughout the state. The appointment of counsel by the Administrative Director countermands the authority of the trial court granted in the current statutory language in Tennessee. The statutory language specifies that "the court shall appoint" an attorney to represent an indigent defendant.[34] The Tennessee Supreme Court has previously held,

> the statutes governing appointment and compensation of counsel for indigent defendants in the trial courts of this State, vest exclusive jurisdiction of all claims for compensation for such services in the trial court where the appointment was made and the services rendered, regardless of whether the claim is asserted as a contractual claim against the State of Tennessee, a statutory claim, a constitutional claim, or otherwise based.[35]

Centralizing appointments in the Nashville office of the Administrative Director removes the special and unique relationship each court throughout the state shares with the attorneys of their respective communities, and dismisses the personal knowledge an adjudicator may have concerning the abilities of the local attorneys they appoint.

## CONCLUSION

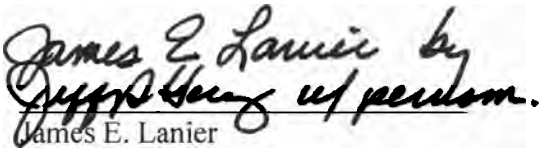
It is the position of the Tennessee District Public Defenders Conference that a "fixed fee contract system" proposed by the new rule will have a detrimental effect on *any* form of representation of an indigent person pursuant to Rule 13. More importantly, it is a particularly poor system for providing representation for an indigent person charged with a criminal offense. Because of the detrimental impact the proposed new rule will impose, the Conference believes that the Court should direct the Appellate Court Clerk to schedule oral arguments from the interested parties that have submitted written comments on the proposed new rule and that those parties should be so notified.

---

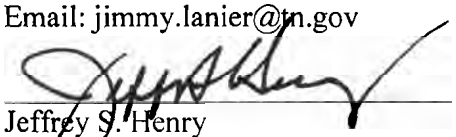
[34] *See,* Tenn. Code Ann. § 40-14-202 (2011).
[35] *Huskey v. State,* 688 S.W.2d 417, 419 (Tenn. 1985).

Respectfully submitted,

Tennessee District Public Defenders Conference

By: 

James E. Lanier
Tenn. B.P.R. #
President
211 Seventh Avenue North, Suite 320
Nashville, TN, 37219-1821
Phone: 615-741-5562
Fax: 615-741-5568
Email: jimmy.lanier@tn.gov

By: 

Jeffrey S. Henry
Tenn. B.P.R. #
Executive Director
211 Seventh Avenue North, Suite 320
Nashville, TN, 37219-1821
Phone: 615-741-5562
Fax: 615-741-5568
Email: jeffrey.henry@tn.gov

JOE R. (JAY) JOHNSON, II
ATTORNEY AT LAW

TELEPHONE (615) 384-0284
FAX (615) 384-3224

101 5TH AVE. WEST, SUITE 50
SPRINGFIELD, TN 37172

EMAIL: iij@bellsouth.net



August 24, 2011

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

Re: Solicited Comments / Proposed Rule 13 Amendment

Dear Mr. Catalano:

I am an attorney licensed to practice law since 1996. When I first obtained my law license, my boss, Larry D. Wilks, immediately instructed me to contact all of the local clerks to get on the appointment list. Fairly quickly I began getting appointments in General Sessions and Circuit Court for criminal matters, as well as Juvenile Court appointments in D & N matters. The judges had the autonomy to appoint me only to matters that I could competently handle as a "newbie" practicing law. As my competence as an attorney increased, I began to be appointed to more complex matters. Taking appointed cases as a young lawyer taught me more about practicing law than all three years of law school combined. The proposed amendment does not give judges that freedom to appoint lawyers that they feel are most qualified to handle particular matters. How are younger lawyers going to cut their teeth if we contract these appointed cases out to the few who are willing to participate in this bidding process?

Should Rule 13 be amended, I predict that within two years the appellate dockets will be completely overwhelmed. The vast majority of attorneys that I know that take appointed work are extremely diligent and ethical in their billing practices. I know that there are financial concerns at work behind this proposed amendment. Times are tough, and the State is trying to cut costs where it can. This does not justify cutting corners in giving the poor quality legal representation.

I would hope that the AOC will actually listen to the attorneys who are responding to this proposal, as said proposal is a disaster waiting to happen. Please feel free to contact me should you or anyone from the AOC wish to further discuss this matter.

Sincerely,

Joe R. Johnson, II

JRJ/jj

Montgomery County Bar Association
MCBA

AUG 26 2011

August 24, 2011

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

**RE: Proposed Amendment to Supreme Court Rule 13**

Dear Mr. Catalano:

At the August 11, 2011 meeting of the Montgomery County Bar Association our Membership elected to respectfully oppose the Proposed Amendment to Supreme Court Rule 13, which would allow the Administrative Office of the Courts [hereinafter AOC] to enter into contracts with firms/individuals for legal services for indigent clients.

As you are aware, during the 2009-2010 legislative session, the Tennessee General Assembly commissioned a study by the AOC regarding the Indigent Defense Fund. The Commission included members of the Legislature, the Bar, the Supreme Court, the AOC, as well as members of the Judiciary and other interested participants. The Commission filed its report in January of this year, with the general recommendation being that contracting for legal services was not advisable. Further, the Commission found that the current system of indigent representation delivery is most likely the best system for its purpose. Finally, the Commission advised that attorneys were not being adequately compensated under the current system.

In spite of the Commission's recommendations, the Court has nevertheless proposed amendment to Rule 13 which would drastically change the current method of compensation. The basis of our objections are twofold:

First, it is our concern that economic conditions are the basis for the Proposal, with appointment contracts being awarded to the lowest bid. The Commission has already found that attorneys who engage in the practice of indigent representation are undercompensated. Bidding for contracts may result in acrimony within the Bar, as well as the risk that lawyers operating under flat rate contract may be tempted to resolve cases in the least amount of time possible. Certainly such is not in the best interest of justice, or the clients.

Secondly, it is our concern that Judges will be unable to exercise their discretion by appointing lawyers to cases based upon their experience and skill. Instead, Judges will be limited to choosing from only those attorneys and firms contracted by the AOC. Not only would judicial discretion be eroded, but lawyers with expertise in particular areas may be bypassed in favor of the less experienced, but cheaper, alternatives available under contract. Again, this cannot be in the best interest of justice. Further, it does the indigent clients, most of whom are already substantially at risk, a grave disservice.

For these reasons, we respectfully request the Court consider the Commission's findings and refuse to ratify this Proposed Amendment.

Sincerely,

Julia P. North
President

JPN/
Rule13Comment.mcba.wpd

August 24, 2011

AUG 26 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 judiciary and as President of the Tennessee General Sessions Judges' Conference to request the Honorable Justices of the Supreme Court to vote not to adopt the Amendment. The overwhelming response from the General Sessions Judges was in opposition to the proposed rule amendment.

It appears that there are five issues that the Court should strongly consider when determining whether or not the proposed Amendment to Supreme Court Rule 13 is in the public interest. They are as follows:

1. Local judges are better situated to match attorneys to cases.
2. A preference contract system will likely result in overcrowding of dockets, continuances, and additional costs.
3. A preference contract system will likely result in inadequate or inexperienced appointed counsel.
4. In cases with multiple co-defendants the courts will be using the current system anyway.
5. The Amendment threatens to remove attorneys who have chosen to specialize and focus their practice and have honed their expertise in particular areas such as guardian-ad-litems in Juvenile Courts.
6. The Amendment will remove a local judge's ability to utilize the attorneys, I describe as, "go to" attorneys, those quality counsel, who are dependable and available to the Court, yet always prepared and ready to assist the Court.

Tennessee is under a constitutional mandate to provide counsel to indigent parties in many different case types wherein a constitutional right is being affected. The indigent representation system as it currently exists affords judges the opportunity to both administer justice efficiently and to assist with the provision of constitutionally competent representation to those indigent individuals appearing before the courts of this state. Having the authority to appoint members of the private bar, as opposed to a few contracted attorneys, allows local judges to maintain economy and efficiency. This authority provides judges with the ability to appoint attorneys who are present in their court when an immediate need arises. Under the proposed Amendment a preference contract attorney may or may not be present.

Removing the local judges' authority to appoint members of the private bar when an immediate need arises will result in overcrowding of dockets, unnecessary delays and continuances and additional costs. Furthermore, I believe local judges are in the best position to determine who should be appointed to a case. Local judges have personal knowledge of the experience levels, dedication, and skills sets of attorneys. This personal knowledge allows local judges to match attorneys to cases before their courts. Removing the local judge's authority to appoint members of the private bar of the local judge's choosing will thwart the local judge's ability to analyze cases and match attorneys' experience and skills sets to particular cases.

Although the pending Amendment states that cost will not be the only factor, it will be a major factor in the contract award process. This being the case, there is a concern that judges will be required to appoint inadequate, overworked, and/or inexperienced attorneys to all cases. Judges, under the operation of the pending Amendment, will be forced to appoint preference contract attorneys to cases when there would have otherwise been more experienced, qualified, and willing attorneys to accept the cases. This will result in a dilution of the quality of representation provided to indigent individuals appearing before the courts of this State.

In criminal matters involving multiple co-defendants, we will be forced to revert to the current system anyway. This is especially evident when contracts are awarded to associations or firms of attorneys. The conflicts that exist for the public defender's office will certainly exist with associations of attorneys or firms. In my opinion, there is no need to add an alternative or additional system to an already functioning system that, in the words of the AOC in its report to the legislature in January of this year, "is likely the best".

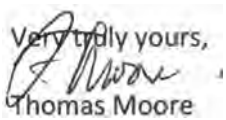
Many attorneys have worked in the indigent representation system for years. These attorneys have dedicated their careers to providing representation to indigent individuals. Many of these attorneys have focused their practice areas and have developed certain expertise in certain areas of the law. In particular, many attorneys act as guardian-at-litems, and that is the majority, if not the entirety, of their practice. These individuals may or may not receive a contract, and if they do not, the courts of this State will lose these valuable attorneys. The result will be a dilution in the quality of the representation provided to indigent individuals entitled to the same.

Many judges across the State have their "go to" attorneys. These are the attorneys who make themselves available to the court for appointment to very difficult cases. These "go to" attorneys are typically very skilled and experienced with certain types of matters, including matters that involve mental health issues, medical issues, drug abuse issues, sex abuse or very serious felonies and difficult fact scenario cases as well as cases involving complicated and difficult issues. These particular attorneys typically do not rely on appointed work to fund their practices. Therefore, these attorneys will most likely not even submit a bid. The operation of the proposed Amendment will eliminate the local judges' ability to utilize the valuable services of these "go to" attorneys in order to ensure the delivery of competent counsel.

Because of reasons set out above I respectfully ask the Chief Justice and the Justices of the Honorable Supreme Court of Tennessee to vote "not to adopt the proposed Amendment to Supreme Court Rule 13".

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

Very truly yours,



Thomas Moore
President of the General Sessions Judges' Conference
General Sessions Judge
Weakley County, TN

JIM COLEY
STATE REPRESENTATIVE
97TH LEGISLATIVE DISTRICT

207 WAR MEMORIAL BUILDING
NASHVILLE, TENNESSEE 37243-0197
☎ (615) 741-8201
FAX: 🖷 (615) 253-0267
E-MAIL: rep.jim.coley@capitol.tn.gov
Toll Free to Nashville:
1-800-449-8366 Ext. 18201

House of Representatives
State of Tennessee

NASHVILLE

HOME ADDRESS:
2498 Kenwood Lane
Bartlett, TN 38134
☎(901) 825-0686

MEMBER OF COMMITTEES:
JUDICIARY VICE CHAIRMAN
CHAIRMAN OF GENERAL SUB OF JUDICIARY
FINANCE
FISCAL REIVEW
ETHICS

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~~ Mike:

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, 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 lawsuits driven by actual or perceived failures in those states' indigent representation system.

A report issued recently 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 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.

Thanking the Justices of the Court for their service to this State and for consideration of my comments, I remain,

Very truly yours,

# Lucas Law Firm

***Attorneys at Law***





**Randy P. Lucas**

**Donna Hartley Lucas, J.D.**
***Rule 31 Mediator***

**E-Mail: lucaslawfirm@aol.com**

**111 College Street**
**Gallatin, Tennessee 37066**
**615-451-1013**
**615-230-5722 Facsimile**


August 25, 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

Dear Honored Justices:

Please allow me to express my opposition to the proposed amendment to Supreme Court Rule 13, Section 7. I am an attorney of considerable experience having practiced law for 28 years in both Indiana and Tennessee. For most of that time I have done indigent defense work as a part of my practice in General Sessions and Criminal Court and have served in every capacity in the Juvenile System.

This proposed change in the rule regarding the appointment of attorneys to indigent persons offers the worst possible solution in providing quality legal representation at an affordable cost to the Administrative Office of the Courts. I understand the budgetary concerns and applaud both this Court and the AOC in a quest to be good stewards of the taxpayers' money. In Indiana, I was a contract public defender from 1986 through 1999. My opinion was that the quality of such attorneys, particularly those chosen on the basis of the lowest bid, varied greatly and often failed to provide clients with the level of representation that they deserved and might otherwise have received. The current rates of compensation in Tennessee are miserly, at best. Anything which means increased work at decreased compensation cannot help but be a detriment to clients and to the justice system as a whole.

My greatest opposition to the proposed rule change is that it removes from the local judges the discretion of who to appoint. They know which attorneys who regularly practice before them are the best equipped through their expertise and experience to provide the best representation for a particular client. This is true in the criminal appointments where expertise in dealing with mental health aspects may be crucial to proper representation, for example, but is particularly true in the dependency and neglect cases in Juvenile Court.

To remove judicial discretion and to replace it with a 'low bidder' type of representation denies the clients adequate representation and will frankly, lead to higher costs through greater numbers of appeals, post conviction relief actions and delays. These unintended consequences will likely erode any of the initial cost savings such a rule might achieve.

The proposed rule will ultimately harm clients, delay cases and increase costs but, more importantly, it will tend to undermine public confidence in our system of providing quality counsel to those who are unable to afford their own attorney.

The current indigent system is rife with problems already. These include ridiculously low levels of compensation, long, unreasonable delays in payment of claims The proposed rule change will simply make these problems worse.

For these reasons, I oppose the proposed amendment to Rule 13, Section 7.

I am,

Very truly yours,

Randy P. Lucas

KEETON & PERRY, PLLC
Attorneys & Counselors at Law
401 Murfreesboro Hwy. • Manchester, Tennessee 37355
931.723.7145 • 931.723.7147 Fax

August 26, 2011

RECEIVED BY FAX
DATE: 8/26/11

**VIA FACSIMILE (615) 532-8757 AND U.S. MAIL**
Mr. Mike Catalano
Tennessee Appellate Court Clerk
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

**RE: Opposition to proposed amendment to Rule 13 of the Tennessee Supreme Court rules**

Dear Mr. Catalano:

I am writing to publicly voice opposition to the proposed amendment to Rule 13 of the Tennessee Supreme Court rules filed July 1, 2011.

First, I am enclosing with this letter the signed petition in opposition of Rule 13 that I am submitting as current president of the Coffee County Bar Association. As you can see, there are approximately thirty-eight (38) attorneys in the Coffee County Bar Association that have signed their names to this document in unified opposition to the proposed measure. The Coffee County Circuit Court Clerk also requested to sign her name to this document.

Second, the following is my personal opinion. Before becoming President of the United States, Abraham Lincoln practiced law for approximately twenty-five (25) years in Illinois and recognized the utmost necessity in protection of the Constitution and all of the safeguards it affords to citizens. President Lincoln voiced in an August 27, 1856 speech:"[d]on't interfere with anything in the Constitution. That must be maintained, for it is the only safeguard of our liberties. And not to Democrats alone do I make this appeal, but to all who love these great and true principles." Constitutional protections and safeguarded liberties of Tennesseans with competent legal representation must not be attacked even though our great country and beloved state may continue to weather uncomfortable economic conditions.

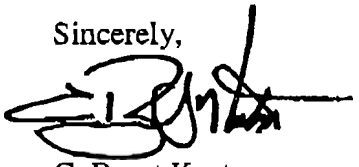
The United States Constitution and Tennessee Constitution provide that individuals that are charged with criminal offenses must be given effective assistance of counsel, which is a necessary component in receiving a fair trial. If these constitutional protections are believed to be more than just words and are acknowledged as protected and treasured rights, then it is not

inconceivable that this proposed amendment would lessen the chances that the rights of Tennesseans will be protected.

Our state system for indigent defense should attempt to strive to be more like the federal indigent defense system. Generally speaking, under the federal system, there is a panel of approved attorneys that are currently paid at a rate of $125 an hour for felony cases with a cap of $9,700. The hourly federal rate has consistently risen over the past five (5) years, i.e., 2009 at $110 an hour; 2008 at $100 an hour; 2007 at $94 an hour; and 2006 at $92 an hour. There is no "contract" system which is being proposed with the subject amendment. The state system is supposed to provide citizens with more liberal constitutional rights and freedoms than the federal system. Under the new proposed plan, I believe the protections of the constitutional rights and freedoms of indigent defendants would be less in comparison to the federal system.

In conclusion, I would ask that the proposed Rule 13 measure not be approved by this Honorable Court.

Sincerely,



C. Brent Keeton
brent@keetonperry.com

Enclosures: As noted

**Coffee County, Tennessee Bar's Peitition Opposing the Prorposed Amendment to Supreme Court Rule 13**

By signing below, I affirm that I am an attorney and/or judge who has reviewed the Proposed Amendment to Supreme Court Rule 13 (Deadline for comments September 1, 2011) and I am in opposition to the adoption of the Proposed Amendment to Rule 13 by the Tennessee Supreme Court.

* Required

| Date:* | Printed Name:* | Signature:* | Position (Judge/Attorney):* | Comments (Optional): |
|---|---|---|---|---|
| August 1, 2011 | C. Brent Keeton | | Attorney - BPR 22147 | |
| 8/1/2011 | Greg B Perry | | Attorney - BPR 025633 | |
| 8-1-11 | Shawn C. Trail | | Attorney 026924 | |
| 8-2-11 | Garth Segraves | | Attorney 023557 | |
| 8-2-11 | Brad Eldridge-Smith | | Attorney 029141 | |
| 8/3/2011 | David L. Clarke | Dave Cle | Attorney 027153 | |
| 8/3/2011 | Heather Duncan | Heather L Duncan | Coffee Co Circuit Court Clerk | *NOT AN Attorney |
| 8/3/2011 | Joshua C. Powell | | Attorney - 29343 | |
| 8/3/2011 | Christina J. Deare | | attorney 026387 | |
| 8/3/2011 | Thompson Kirkpatrick | | atty 9203 | |
| 8/3/11 | James Threet | | Att. 21943 | |
| 8/3/11 | Edward H. North | | Attorney 22963 | |
| 8/3/2011 | | Cynthia Chatham | Attorney | |

**Coffee County, Tennessee Bar's Peitition Opposing the Prorposed Amendment to Supreme Court Rule 13**

By signing below, I affirm that I am an attorney and/or judge who has reviewed the Proposed Amendment to Supreme Court Rule 13 (Deadline for comments September 1, 2011) and I am in opposition to the adoption of the Proposed Amendment to Rule 13 by the Tennessee Supreme Court.

* Required

| Date:* | Printed Name:* | Signature:* | Position (Judge/Attorney):* | Comments (Optional): |
|---|---|---|---|---|
| 8/4/11 | Christopher R. Seaford | | Attorney | I strongly oppose the proposed amendment to Rule 13 |
| 8/4/11 | Mark A. Williams | | Attorney | |
| 8-8-11 | DOUG AARON | | ATTORNEY | |
| 8-8-11 | Walter F. Nichols | | Attorney | |
| 8-8-11 | H. Thomas Parsons | H. Thomas Parsons | Attorney | |
| 8-8-11 | Christina Henley Duncan | | Attorney | |
| 8-8-11 | J. Stanley Rogers | | Attorney | |
| 8-8-11 | | Jason Huskey | Attorney | |
| 8-8-11 | | Robert L. Huskey | attorney | |
| 8-8-11 | Eric J. Burch | | Attorney | |
| 8-10-11 | Lisa R Lee | | Attorney | |
| 8-12-11 | Chasity C. Nicoll | | Attorney | |
| 8-12-11 | JOHN E. NICOLL | | Attorney | |

**Coffee County, Tennessee Bar's Peitition Opposing the Prorposed Amendment to Supreme Court Rule 13**

By signing below, I affirm that I am an attorney and/or judge who has reviewed the Proposed Amendment to Supreme Court Rule 13 (Deadline for comments September 1, 2011) and I am in opposition to the adoption of the Proposed Amendment to Rule 13 by the Tennessee Supreme Court.

* Required

| Date:* | Printed Name:* | Signature:* | Position (Judge/Attorney):* | Comments (Optional): |
|---|---|---|---|---|
| 8-4-2011 | Tracy L. Hershman | Tracy L. Hershman | Attorney 020123 | |
| 8-5-11 | Charles Craig Northcott | | Attorney 020570 | |
| 8/8/11 | Jeffrey Parham | | Atty # 022222 | |
| 8/8/11 | | | | |
| 8/8/11 | Robert A Croy | | Atty # 016058 | |
| 8/12/11 | Ralph Bond | | Atty 018599 | |
| 8/17/11 | Jeffrey D. Ridner | | BPR | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

**Coffee County, Tennessee Bar's Peitition Opposing the Prorposed Amendment to Supreme Court Rule 13**

By signing below, I affirm that I am an attorney and/or judge who has reviewed the Proposed Amendment to Supreme Court Rule 13 (Deadline for comments September 1, 2011) and I am in opposition to the adoption of the Proposed Amendment to Rule 13 by the Tennessee Supreme Court.

* Required

| Date:* | Printed Name:* | Signature:* | Position (Judge/Attorney):* | Comments (Optional): |
|---|---|---|---|---|
| 8/12/11 | Stacy L Lynch | Stacy L Lynch | Attorney | |
| 8/12/11 | William C. Rieder | | Attorney | |
| 8-12-11 | James O Lane, II | | Attorney | |
| 8-12-11 | Gerald Ewell Jr | | BPR 13231 | |

**Coffee County, Tennessee Bar's Peitition Opposing the Prorposed Amendment to Supreme Court Rule 13**

By signing below, I affirm that I am an attorney and/or judge who has reviewed the Proposed Amendment to Supreme Court Rule 13 (Deadline for comments September 1, 2011) and I am in opposition to the adoption of the Proposed Amendment to Rule 13 by the Tennessee Supreme Court.

* Required

| Date:* | Printed Name:* | Signature:* | Position (Judge/Attorney):* | Comments (Optional): |
|---|---|---|---|---|
| Aug. 1, 2011 | Russell Hedges | | Attorney | |
| Aug 1, 2011 | Jeffrey Schofill | | Attorney | |
| 8-1-11 | Rick L. Moore | | Atty | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

LAW OFFICES

W.J. MICHAEL CODY
JOEL PORTER
CHARLES C. NEWMAN
C. THOMAS CATES
JOE M. DUNCAN
JEF FEIDELMAN
ALLEN T. MALONE
W. ROWLETT SCOTT
R. MICHAEL POTTER
DAVID J. HARRIS
SAM L. CRAIN, JR.
NATHAN A. BICKS
STEPHEN D. CRAWLEY
LAUREL C. WILLIAMS
LISA A. KRUPICKA
LEKANNE MARSHALL COX

BETH WEEMS BRADLEY
LES JONES
MELISSA A. MARAVICH
SCOTT J. CROSBY
DOUGLAS F. HALIJAN
R. PORTER FEILD
JOSHUA B. LAWHEAD
JENNIFER S. HAGERMAN
TAYLOR A. CATES
DAVID E. GOODMAN, JR.
DEBRA A. WILES
ERIC J. PLUMLEY
MARY H. MORRIS
TED C. RAYNOR
THAD S. RODDA, JR.

BURCH, PORTER & JOHNSON
A PROFESSIONAL LIMITED LIABILITY COMPANY

130 NORTH COURT AVENUE
MEMPHIS, TENNESSEE 38103

TELEPHONE 901-524-5000
FAX 901-524-5024
www.bpjlaw.com

JOHN R. MCCANN
FRANK B. THACHER, III
LEAH LLOYD HILLIS
MARY C. HAMM
C. FARRIS DEBOARD
TANNERA GEORGE GIBSON
CHARLES B. FOSTER, IV
AARON W. MUNN

LUCIUS E. BURCH, JR. 1912-1996
JOHN S. PORTER 1909-1990
JESSE E. JOHNSON, JR. 1913-1980
CHAS N. BURCH 1868-1938
H.D. MINOR 1868-1947
CLINTON H. MCKAY 1889-1943

RECEIVED BY FAX
DATE: 8-26-11

Writer's Direct Dial: 901-524-5124
E-mail Address: mcody@bpjlaw.com

August 26, 2011

**VIA FACSIMILE**
(615) 532-8757

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 Mike:

I write to express my deep concern regarding the proposed amendment to Tennessee Supreme Court Rule 13 that would authorize the Administrative Director of the Courts to enter into fixed-fee contracts for the provision of indigent defense services. Because fixed-fee contracts are inherently detrimental to the constitutional right to counsel, and because the proposed amendment is particularly problematic as drafted, I join in the comments submitted by The Constitution Project in opposition to this rule change.

As the former Attorney General of Tennessee and former U.S. Attorney for the Western District of Tennessee, I know first-hand the importance of adequately resourced, competent counsel for indigent defendants. Ineffective or inexperienced defense counsel can undermine finality in criminal cases by failing to thoroughly investigate evidence that might establish actual innocence or otherwise demonstrate a defendant's level of criminal culpability. Far from saving money, inadequate compensation for indigent defense attorneys can increase court expenditures because of the lengthy appeals or the need for a re-trial that can result from ineffective assistance of counsel. Moreover, the legitimacy of Tennessee's criminal justice system depends on the ability of any defendant, regardless of means, to receive a fair trial with the assistance of competent counsel.

The proposed amendment to Rule 13 would reduce the quality of indigent defense in Tennessee in several ways. First, because fixed-fee contracts compensate an attorney the same amount regardless of the time or effort put into a client's case, these contracts place an attorney's financial interest in conflict with his or her client's interests. Additionally, the proposed amendment has no concrete competency or

caseload standards for attorneys bidding for contracts. As currently drafted, the bidding process for these fixed-fee contracts would drive down compensation rates for indigent defense services, discouraging experienced or highly qualified attorneys from accepting indigent clients.

The proposed amendment would take Tennessee's criminal justice system in the wrong direction. I respectfully request that you reconsider this rule change.

Thank you for your consideration.

Respectfully,

W. J. Michael Cody

WJMC/bd

AUG 26 2011

**Senator Mike Bell**

302 War Memorial Building
Nashville, TN 37243
(615) 741-1946

261 County Road 757
Riceville, TN 37370
(423) 829-0058

sen.mike.bell@capitol.tn.gov

# Senate Chamber
# State of Tennessee

**NASHVILLE**

**9th Senatorial District**
Bradley, McMinn, Meigs and
Polk Counties

**COMMITTEES:**

Judiciary
Environment, Conservation
and Tourism
Government Operations

August 25, 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.

In my conversations concerning this Amendment, it has become evident that the stated intent of the proposed Amendment is not clearly defined by the language of the Rule. This is most likely the reason for the alarming reactions of certain members of the state bar. The stated intent is to apply the Amendment to only certain types of cases, but the proposed Amendment has no such limiting language.

Of further concern is the ambiguity related to the manner in which contracts under the proposal will be promulgated. For clarity and proper interpretation of the intent, such promulgation should be included in the Rule. Also of concern is the lack of defined standards and expectations regarding quantification of quality, independence and workload requirements. Because this Amendment has such an impact upon the courts, the attorneys who engage in indigent representation practice, and the

indigent individuals of this state, I suggest that the Court withdraw the proposed Amendment and propose a Rule that clearly defines the intent, purpose, application, and operation.

In my opinion, having a good thorough review and comment period that is based upon what is instead of what might be is the better course of action. The proposed Amendment as it stands now is subject to review based upon over speculation and alarming reactions because the language of the Rule does not provide for what is, but rather for what might be. Should the Court decide to withdraw the Amendment and propose an Amendment that is more clearly defined in scope, purpose, and intent, I believe the Court will receive more insightful comments that will assist the Court in determining whether the clearly defined Amendment is in the public interest. In closing, I believe it goes without saying that intents change and policymakers change. A Rule containing the language set forth in the pending Amendment is subject to a change in intent and a change in policymakers. Since the Rule deals with a statewide and important system and because it deals with the manner and amount of disbursement of state funds, I firmly believe it wise to more clearly define the Rule so there are no questions as to intent, purpose, application or operation.

For the reasons stated herein, I respectfully request the Honorable Justices of the Supreme Court not to adopt the pending Amendment to Supreme Court Rule 13.

Sincerely,

Mike Bell

Senator Mike Bell

MB:cj

DALE FORD
STATE REPRESENTATIVE
6th LEGISLATIVE DISTRICT

MEMBER OF COMMITTEES
Vice Chairman
AGRICULTURE COMMITTEE
Chairman
SUB OF AGRICULTURE
TRANSPORTATION
SUB-OF TRANSPORTATION
ETHICS COMMITTEE
JOINT COMMITTEE
SELECT COMMITTEE CHILDREN AND YOUTH
VETERANS AFFAIRS
INFANT MORTALITY/TEEN PREGNANCY

House of Representatives
State of Tennessee
NASHVILLE

LEGISLATIVE ADDRESS:
202A WAR MEMORIAL BLDG.
NASHVILLE, TENNESSEE 37243-0106
PHONE: (615) 741-1717
TOLL FREE: (800) 449-8366 Ext. 44741
FAX:: (615) 253-0301

DISTRICT ADDRESS:
678 BRETHERN CHURCH ROAD
JONESBOROUGH, TN 37659
(423) 426-3591

E-Mail Address:
rep.dale.ford@capitol.tn.gov

August 24, 2011

AUG 26 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.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.

2. 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.

3. I do not believe the proposed Amendment is in the public interest.

4. 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, 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 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.

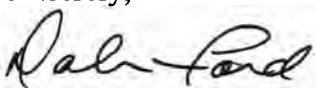
For all of the reasons stated above as well as many others, the Amendment is simply not in the public interest. Adoption of the Amendment will have the effect of removing the authority and discretion of local judges, who know their local attorneys better than anyone would in a centralized system, thereby 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 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.

Thanking the Justices of the Court for their service to this State and for consideration of my comments, I remain,

Sincerely,



State Representative Dale Ford
6th District

DF:mh

THE LAW OFFICE OF

BETH A. GARRISON
103 BLUEGRASS COMMONS BLVD.
HENDERSONVILLE, TENNESSEE 37075
TELEPHONE: (615)824-3761, EXT. 201
TELEFAX: (615) 264-2720
bethgarrison@bellsouth.net



August 26, 2011

Supreme Court of Tennessee
Mr. 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

Dear Honored Justices:

In response to the request for comments from Tennessee judges and attorneys regarding the proposed changes to Supreme Court Rule 13 addressing appointment of counsel for indigent defendants, I wanted to take this opportunity to respectfully voice my opposition to the proposed amendment.

My perspective on this issue is two-fold. As a sole practitioner, I frequently accept court-appointed cases. In addition to my private practice, I also have had the privilege of serving as president of the Sumner County Bar Association this past year. My experience in both capacities has been that the court-appointed counsel system currently in place is the most beneficial process to meet the needs of indigent defendants and that the proposed change would not be an improvement on the present method.

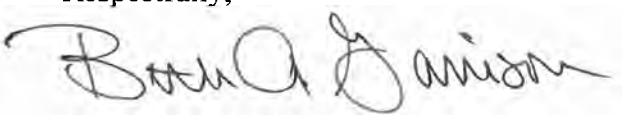
The judicial discretion currently exercised results in appointments made commensurate with the individual attorney's experience and the gravity of the offense(s) charged. Such judicial discretion is invaluable. I have observed judges appointing an attorney to a particular matter because of that attorney's legal experience with the specific issues and/or types of charges faced by an individual defendant, particularly in criminal or juvenile courts. Negating this judicial discretion in favor of a system which amounts to appointment of attorneys based on the lowest bid on a spreadsheet is extremely ill-advised.

Furthermore, the proposed change to the method of appointing counsel for indigent defendants is the first step down a dangerous slippery slope. Representation of indigent defendants would no longer be focused on providing the most competent, thorough and targeted defense but would instead become focused on closing the greatest number, or a specific number, of cases in the least amount of time. This method would

not serve indigent defendants well and would do nothing to improve the general public's perception of the legal system and judicial process.

It is my opinion, as well as the opinion of the attorneys I have spoken with in my capacity as bar association president, that this proposal would not effect workable, reasoned or beneficial change. Based upon these factors and my experiences, I do not believe this proposal to be in the best interest of indigent defendants, the bar of the State of Tennessee or the legal system as a whole.

Respectfully,



Beth A. Garrison
President, Sumner County Bar Association

David Davis
107 Surrey Lane
Johnson City, TN 37604

AUG 29 2011

August 23, 2011

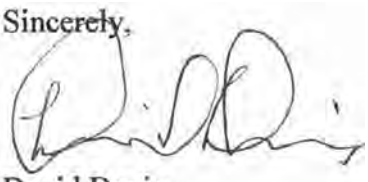
Michael W. Catalano, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear Mr. Catalano,

In response to the Court's request for comments on Docket No. M2011-01411-SC-RL2-RL regarding a pending Amendment to Supreme Court Rule 13, I am writing you today as a former Member of the Tennessee Legislature and the U.S. House of Representatives to request the Honorable Justices of the Supreme Court to vote not to adopt the Amendment. In my opinion, I do not believe the proposed Amendment is in the public interest and adoption of the Amendment may increase the overall costs associated with the delivery of indigent representation and thereby cost the taxpayers of Tennessee more than the current system. Furthermore, the Amendment appears to be outside of the original legislative intent. And, finally, I believe that local judges are well suited to ensure proper delivery of representation based upon the complexity of individual cases. Adoption of the Amendment will have the effect of removing the authority and discretion from our local judges.

Thank you and the Justices of the Court for your service to this State and for giving me the opportunity to outline my concerns regarding the pending Amendment to Supreme Court Rule 13.

Sincerely,



David Davis
Former Member of Congress
TN-01

# GIBSON COUNTY BAR ASSOCIATION

*President: Terri Crider, (731) 784-2818*
*Vice President: Pamela Vawter, (731) 686-8355*
*Secretary/Treasurer: Michael R. Hill, (731) 686-8355*

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

AUG 29 2011

RE: Comments to the proposed amendment to Rule 13, Section 7
No: M2011-01411-SC-RL2-RL

Dear Mr. Catalano:

The Gibson County Bar Association, on behalf of its members, submits the following comments pertaining to the proposed amendment to Rule 13, Section 7. In short, we strongly oppose approval of this proposal and request that the Supreme Court refuse to vote in favor of this amendment as currently drafted. Our Association parrots the many problematic issues identified by the private lawyers, law firms, judges, bar associations, TACDL, the Constitution Project, NLADA, and the Public Defenders' Conference, among others, who are unanimous in their opposition to this amendment. The proposed amendment will, in all likelihood, result in underrepresentation to indigent defendants (a "plea mill," as characterized by another commentator), increased costs to the State via ineffective assistance of counsel and/or "non-representation" claims, and other detrimental effects.

This proposal explicitly contradicts the results of the AOC report submitted to the Tennessee General Assembly in January of this year and seemingly fails to consider the failed results a contract-based system produced in Georgia, Arizona, and other states. Further troubling is the fact that appointment authority will be removed from our local judges (in potential violation of the Tennessee Code) and placed in the hands of an administrative body in Nashville.
Like the Franklin County Bar Association, we believe the proposed bid system will have a particularly adverse effect in our jurisdiction. The majority of appointments in our jurisdiction are handled by sole practitioners working out of their homes or small firms with minimal overhead. Most of these attorneys rely heavily on these appointments, due to economic and market conditions. We are concerned that our local attorneys will be undercut by larger firms from outside our area that can absorb these expenses – effectively crushing these small practices. Also, these attorneys and small firms have established relationships with the local courts and judges; in turn, the local judges are better positioned to appoint particular attorneys in particular cases – matching an attorney's skills with a defendant's needs. Removing appointment authority from the local judge will have consequences.

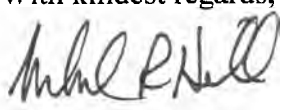
As proposed, the amendment will seek "blind bids" for legal services. Contract submitters will necessarily bid for handling cases in a particular court without the benefit of knowing the nature

or seriousness of the allegations, the complexity of the case, the strength of the proof against the defendant, the time and effort to represent a particular client within the Rules of Professional Conduct, or the depth of investigation necessary to properly evaluate the allegations. The potential conflict of interest becomes readily apparent.

What is perhaps most striking about this entire process is the complete disregard for the conclusions reached by the AOC study and the utter lack of transparency surrounding this proposal. There is no indication that the attorneys currently handling indigent appointments were consulted in creating this proposal and many only learned of the proposal "through the grapevine." Certainly, the AOC has an ascertainable idea of the attorneys currently in the indigent claims system – the fact that none were advised of the proposal's filing supports the notion that their comments and suggestions were unwanted and that the State was simply attempting to push through a purported "cost-saving" measure without stopping to contemplate the actual costs going forward.

Tennessee currently underfunds its right-to-counsel services and pays among the lowest hourly rates to its privately-appointed indigent defense attorneys. We suggest, as an alternative to the pending amendment, that the Honorable Justices refuse to approve this proposal and instead establish a commission of attorneys and judges actively engaged in indigent defense, at the criminal and juvenile level, to formulate an alternative proposal.

With kindest regards,



Michael R. Hill
Secretary/Treasurer

cc: Sen. Lowe Finney
Rep. Curtis Halford
Sen. Mae Beavers
Rep. Eric Watson
Sen. Roy Herron

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

AUG 29 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.

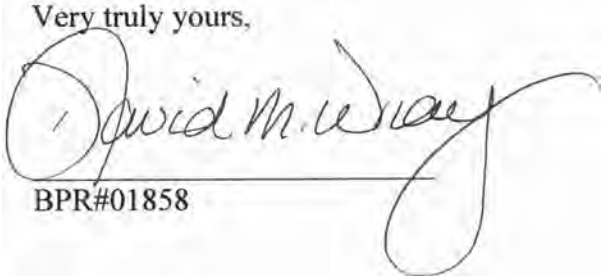
In addition to the confidentiality and independent judgment ethical issues, contracting may place an attorney in such a financial position that he or she may not be able to, or simply will not, deliver proper representation and cause a breach of his or her ethical obligations to indigent clients. As 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#01858

LAW OFFICE OF JAMES L. BAUM



August 26, 2011

Michael W. Catalano, Clerk
100 Supreme Court Building
401 7th Ave. N.
Nashville, TN 37219-1407

Re: Rule 13, Section 7 Rules of the Tennessee Supreme Court
M2011-01411-SC-RL2-RL

Dear Mr. Catalano:

I would like to take the opportunity to comment on the proposed amendment to Rule 13 to urge the Justices of the Tennessee Supreme Court to decline this amendment. The AOC does not realize that the practice of law is both a profession and a business.

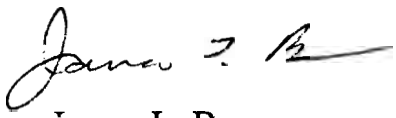
In Dickson County it is common practice for older attorneys to assist and answer questions from younger attorneys. If you introduce a competitive contract situation, I think you will lose this mentoring process.

Additionally, I have grave concerns about the AOC's ability to monitor the quality of representation provided to indigent clients. This is the same AOC that boldly proclaimed that on-line processing of attorney claims would speed payment. While that was true for a while, it is my understanding that the AOC reduced the number of staff processing these claims and now it is slower than ever. I would expect the same type results from this amendment.

P.O. BOX 338, BURNS, TN 37029
(615) 740-6899 FAX (615) 740-6986

For these reasons, I would request the Justices of the Tennessee Supreme Court to not allow the AOC to introduce competitive bidding into the process of providing legal representation to indigent clients.

Sincerely,



James L. Baum

# David A. Collins

Attorney-At-Law
211 Printers Alley Bldg.
Fourth Floor
Nashville, Tennessee 37201

Telephone (615) 242-9557 • Facsimile (615) 256-0011
Pager (615) 276-4189




August 26, 2011

Honorable Michael Catalono
Supreme Court Clerk
100 Supreme Court Bldg.
401 Seventh Avenue North
Nashville, TN 37219-1407

RE: Rule 13, Section 7, RULES OF THE SUPREME COURT
No. M2011-01411-SC-RL2-RL

Dear Mr. Catalono:

I am writing in opposition to the above referenced change in the rules regarding appointed counsel for indigent defendants. I am sure the individual or individuals who thought of this proposed change were well intentioned. However, I am reminded of a favorite saying my grandmother had, "The road to hell is paved with good intentions" and that would certainly appear to apply in this case.

While this concept *might* have merit in cases involving judicial commitments, child support, etc., it certainly has no merit when considering criminal offenses. The standards regarding judicial commitments and/or child support have been set forth either in court decisions or by statute or both. Such is not the case in criminal cases.

While the standards of representation of defendants has been established vis-à-vis what constitutes ineffective assistance of counsel, there exists no such standards beyond that. Each criminal case is somewhat unique in that there are varying facets and varying degrees of difficulty presented in each case.

Over the years (I have been licensed since 1975) I have had more appointments in homicide cases than any other type of case. A rough estimate is that I have tried somewhere between thirty to forty such cases in my career. No two cases have billed out the same. Some took three times the amount of out of court hours to prepare for than in court hours to try the same and in others, the reverse was true. There is absolutely no way to know in advance how many hours such a case would entail and in my opinion, only a fool would try and guesstimate how many hours it would take.

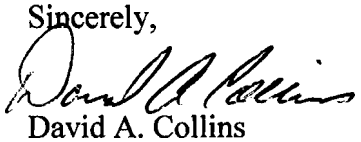
The whole bidding process for legal services for the indigent I find repulsive and non-professional. Of course, I am old school and abhor all the television ads now airing for lawyers but that bad decision has already been made.

The right to counsel was grounded in our Federal and State constitutions and court decisions at both levels have over and over again stressed that just because a person is poor does not mean they can be denied effective and competent legal representation. I feel confident that if the founding fathers had ever dreamed someone would put the right to competent representation for the poor on the auction block to be awarded to the lowest bidder such would have been prohibited in those sacred documents.

The system, like everyone else, gets what it pays for. Stated another way, if you pay peanuts you hire monkeys. The amount paid under the current system has not been altered in well over a decade. While years ago the judiciary got the legislature to provide for an annual cost of living increase in pay for judges, attorneys out here in the trenches representing the indigent are paid at rate established back in the 1980's.

I urge the Supreme Court in the strongest possible terms to reject this proposal.

Sincerely,



David A. Collins

Knoxville Bar Association

August 30, 2011

Knoxville Bar Association
505 Main Street, Suite 50
P.O. Box 2027
Knoxville, TN 37901-2027
PH: (865) 522-6522
FAX: (865) 523-5662
www.knoxbar.org



Michael W. Catalano, Clerk of the Tennessee Supreme Court
Re: Proposed Amended Rule 21, Section 4.07
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407


In re: Proposed Amendment to Tennessee Supreme Court Rule 13, Section 7

Dear Mike:

Attached please find an original and seven copies of the Comment of the Knoxville Bar Association in reference to the above matter. Upon entry of the comments, please send me a time stamped copy for our records. I have enclosed a self addressed envelope for that purpose.

Thank you for your assistance.

Sincerely,

Marsha S. Wilson
Executive Director

Cc: Michael J. King, President, Knoxville Bar Association
Garry W. Ferraris, Co-Chair, KBA Professionalism Committee
Hon. John F. Weaver, Co-Chair, KBA Professionalism Committee

IN THE SUPREME COURT OF TENENSSEE
AT NASHVILLE

**IN RE: RULE 13, SECTION 7**
**RULES OF THE TENNESSEE SUPREME COURT**

No. M2011-01411-SC-RL2-RL

**COMMENT OF THE**
**KNOXVILLE BAR ASSOCIATION**
**OPPOSING THE PROPOSED AMENDMENT TO**
**TENENSSEE SUPREME COURT RULE 13, SECTION 7**

The Knoxville Bar Association (hereafter "KBA"), by and through its President, Michael J. King, its Professionalism Committee, and Executive Director Marsha Wilson, files this comment opposing the proposed amendment to Tennessee Supreme Court Rule 13, Section 7, 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.

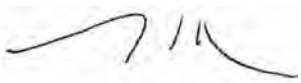
The KBA comes to its conclusion to oppose the amendment after careful consideration. In particular, the KBA asked its Professionalism Committee to review the proposed rule carefully and to report to the Board. After receiving the report of the Professionalism Committee, at the regularly scheduled meeting on August 17, 2011, the KBA Board of Governors unanimously authorized providing a comment in opposition to the proposed rule.

In particular, members of the KBA, including insurance defense counsel, have had significant experience with entities attempting to control costs by entering into fixed price contracts for future representation. Those arrangements have largely provided unsatisfactory to one or both parties based on the difficulty engaging the number of hours necessary to handle a given case or type of case. That problem is exacerbated when contracting for representation in multiple cases.

The KBA also concluded that the proposed rule does not provide sufficient direction as to the type of cases envisioned for contract representation, the contractual arrangements that would be required or the "adequate procedures to insure compliance," cited in subsection (d) of the proposed rule.

Respectfully submitted this _____ day of August, 2011.

KNOXVILLE BAR ASSOCIATION



MICHAEL J. KING [BPR No. 015523]
President, Knoxville Bar Association
505 Main Avenue, Suite 50
Knoxville, TN 37902
(865) 522-6522
www.knoxbar.org

Libby Sykes
Administrative Director
Administrative Office of the Courts
511 Union St Suite 600
Nashville TN 37219

Barbara Deans
President, Ben Jones Chapter
National Bar Association
365 Marianna Cove
Memphis TN 38111

Ricky A.W. Curtis
President, Bristol Bar Association
3229 Highway 126
Blountville, TN 37617

Jeffrey Kinsler
Dean, Belmont University College of Law
1900 Belmont Blvd
Nashville TN 37217

Robert Stinson Thompson
President, Bradley County Bar Association
Logan - Thompson, PC
PO Box 191
Cleveland TN 37364

Kevin Smith
Dean, Cecil C. Humphreys School of Law
3715 Central Avenue
Memphis TN 38152

Christopher Brent Keeton
President, Coffee County Bar Association
Keeton & Perry, PLLC
401 Murfreesboro Hwy
Manchester, TN 37355

Jason Holly
President, Carter County Bar Association
Holly & Holly PLLC
420 Railroad Street
Elizabethton TN 37643

John Whitson
President, Cocke County Bar Association
Law OFC of J Derreck Whitson
P.O. Box 1230
311 East Broadway
Newport TN 37822

Matthew Willis
President, Dyer County Bar Association
Ashley Ashley & Arnold
PO Box H
322 Church Ave. N.
Dyersburg TN 38025

Lucie K. Brackin
President, Association for Women Attorneys
The Landers Firm
65 Union Avenue, 9th Floor Cotton Exchange Bldg
Memphis TN 38103

Melanie Elaine Davis
President, Blount County Bar Association
Kizer & Black
329 Cates Street
Maryville TN 37801

Janet E. Erb Mynatt
President, Anderson County Bar Association
**Legal Aid Society of Middle Tennessee & the** Cumberlands
P.O. Box 5209
Oak Ridge, TN 37831

Andrew Frazier
President, Benton County Bar Association
PO Box 208
116 E Main
Camden TN 38320

Kristie Anderson
President, Campbell County Bar Association
PO Box 196
Jacksboro TN 37757

Ira M. Long, Jr.
President, Chattanooga Bar Association
Weill & Long
1205 Tallan Building
Two Union Square
Chattanooga TN 37402

Billy Townsend
President, Bar Association for Decatur, Lewis, Perry, Wayne Counties
Townsend Law Office
26 West Linden Ave
Hohenwald TN 38462

Lynda Hood
Executive Director, Chattanooga Bar Association
Chattanooga Bar Association
801 Broad St Suite 420 Pioneer Bldg
Chattanooga TN 37402

Walter Alan Rose
President, Cumberland County Bar Association
Law Offices of W. Alan Rose
28 W Fifth Street
Crossville TN 38555

Beth Brooks
President, East Shelby County Bar Assn
2299 Union Ave
Memphis TN 38104

John White
President. Bedford County Bar Association
Bobo Hunt & White
**PO Box 169**
111 North Spring St Ste 202
Shelbyville TN 37162

Tom Scott
Chair, Board of Professional Responsibility
**Ball & Scott**
550 W Main St Ste 601
Knoxville TN 37902

Hewitt Chatman
President, Ballard-Taylor Bar Association
**511 Algie Neely Rd**
Denmark TN 38391

Nancy Jones
**Chief Counsel**, Board of Professional Responsibility
Board of Professional Responsibility
1101 Kermit Drive Suite 730
Nashville TN 37217

Matthew Maddox
President, Carroll County Bar Association
Maddox Maddox & Maddox
**PO Box 827**
19695 E Main St
Huntingdon TN 38344

David Stanifer
President, Claiborne County Bar Association
**Stanifer & Stanifer**
PO Box 217
1735 Main St
Tazewell TN 37879

Timothy Potter
**President**, Dickson County Bar Association
Reynolds Potter Ragan & Vandivort PLC
210 E. College St.
Dickson TN 37055

Dora Salinas
**Secretary**, Cheatham County Bar Association
104 Frey St
Ashland City TN 37015

Bratten Cook
**President**, Dekalb County Bar Association
104 N 3rd St
Smithville TN 37166

Tonya Kennedy Cammon
President, Federal Bar Assn Chattanooga Chapter
Grant Konvalinka & Harrison PC
633 Chestnut Street, Suite 900
Chattanooga TN 37450

Walter Crouch
President, Federal Bar Assoc. Nashville Chapter
Waller Lansden Dortch & Davis LLP
PO Box 198966
511 Union St Suite 2700
Nashville TN 37219

Glenn Jeffrey Cherry
President, Fifteenth Judicial District
Lowery, Lowery & Cherry PLLC
150 Public Square
Lebanon TN 37087

Terri Crider
President, Gibson County Bar Association
Flippin & Atkins P.C.
P.O. Box 160
1302 Main Street
Humboldt TN 38343

Creed Daniel
President, Grainger County Bar Association
Daniel & Daniel
PO Box 6
Courthouse Sq 115 Marshall Ave
Rutledge TN 37861

Mark Allen Cowan
President, Hamblen County Bar Association
Swanson & Cowan LLP
717 W Main St Ste 100
Morristown TN 37814

Karen Goforth Crutchfield
President, ETLAW
Leitner, Williams, Dooley & Napolitan
180 Market Place Blvd
Knoxville TN 37922

Michael Edwin Gabel
President, Federal Bar Assn N Memphis Chapter
Federal Express Corp
3620 Hacks Cross Road, Bldg B F12
Memphis TN 38125

Brack Terry
President, Federal Bar Association NE TN Chapter
Terry Terry & Stapleton
PO Box 724
918 W First North St
Morristown TN 37815

Joseph Ford
President, Franklin County Bar Association
McBee & Ford
17 S College St
Winchester TN 37398

Robert Curtis
President, Giles County Bar Association
Law Office of Robert W. Curtis 111
P.O. Box 517
Pulaski TN 38478

Todd Shelton
President, Greene County Bar Association
Rogers Laughlin Nunnally Hood & Crum PC
100 S Main St
Greeneville TN 37743

Harriet Thompson
President, Hardeman County Bar Association
PO Box 600
205 East Market St.
Bolivar TN 38008

Carmon Hooper
President, Haywood County Bar Association
PO Box 55
10 S Court Square
Brownsville TN 38012

John Williams
President, Humphreys County Bar Association
Porch Peeler Williams Thomason
102 South Court Square
Waverly TN 37185

Dennis Roach
President, Jefferson County Bar Association
Law Office of Dennis Roach
1004 N Hwy 92 Suite B
Jefferson City TN 37760

Steven Curtis Rose
President, Kingsport Bar Association
West & Rose
PO Box 1404
Kingsport TN 37662

William Douglas
President, Lauderdale County Bar Association
PO Box 489
109 N Main St
Ripley TN 38063

Douglas Templeton Jenkins
President, Hawkins County Bar Association
107 E. Main Street, Suite 321
Rogersville TN 37857

Patricia Wilsdorf
President, Hickman County Bar Association
Harvill & Assoc PC
820 Hwy 100
121 Cabin Dr.
Centerville TN 37033

Jody Shane Pickens
President, Jackson-Madison County Bar Association
Dist Atty General
P.O. Box 2825
Jackson TN 38302

William Cockett
President, Johnson County Bar Association
Smith & Cockett
PO Box 108
Mountain City TN 37683

Timothy Naifeh
President, Lake County Bar Association
227 Church St
Tiptonville TN 38079

George Boston
President, Lawrence County Bar Association
Boston Holt Sockwell & Durham PLLC
PO Box 357
235 Waterloo St
Lawrenceburg TN 38464

Candice Reed
President, Lawyers Assn for Women
Marion Griffin Rep
Counsel on Call Inc.
112 Westwood Place Suite 350
Brentwood TN 37027

Marty B. McAfee
Chair, Lawyers Fund for Client Protection
McAfee & McAfee
246 Adams Ave
Memphis TN 38103

Sydney Beckman
Dean, LMU Duncan School of Law
601 W. Summit Hill Drive
Knoxville TN 37902

Lee Bowles
President, Marshall County Bar Association
Bussart Law Firm
520 N Ellington Pkwy
Lewisburg TN 37091

Donald Winder
President, McMinn-Meigs County Bar Association
Reid Law Firm
PO Box 628
10 W Madison Ave
Athens TN 37371

Dwaine Thomas
President, Monroe County Bar Association
The Law Office of Dwayne B. Thomas
PO Box 99
102 College St
Madisonville TN 37354

Michael Davis
President, Morgan County Bar Association
PO Box 925
Wartburg TN 37887

Melanie Gober Grand
Executive Director, Lawyers Association for Women
Lawyers Assn for Women
PO Box 190583
Nashville TN 37219

Randall Self
President, Lincoln County Bar Association
Randall E Self Attorney At Law'
PO Box 501
131A E Market St
Fayetteville TN 37334

John Cannon
President, Memphis Bar Association
Shuttleworth Williams PLLC
22 North Front, Suite 850
Memphis TN 38103

Robert J. Mendes
President, Nashville Bar Association
MGLAW, PLLC
2525 West End Avenue, Suite 1475
Nashville TN 37203

Lindsay Cameron Gross
President, Putnam County Bar Association
100 S. Jefferson Avenue
Cookeville TN 38501

Mark Blakley
President, Scott County Bar Association
Stansberry Petroff Marcum & Blakley PC
PO Box 240
Huntsville TN 37756

Beth Belew
President, Paris/Henry County Bar Association
Ainley Hoover Clark & Hoover
200 N Popiar St
Paris TN 38242

Hewitt Chatman
President, Ballard Taylor Chapter - National Bar Association
511 Algie Neely Road
Denmark, TN 38391

Scott Hall
President, Sevier County Bar Association
105 Bruce St
Sevierville TN 37862

Kaz Kikkawa
President, Tennessee Asian Pacific American Bar Asssociation
c/o Branstetter, Stranch & Jennings, PLLC
HCA Inc.
One Park Plaza 1-4-E
Nashville TN 37203

Kristi Rezabek
Lawyers Association for Women
Anne Schneider Chapter
Tennessee Court of Appeals - Western Section
P.O. Box 909
Jackson, TN 38302

Ashley Harrison Shudan
President, Loudon County Bar Association
Ford & Nichols
P.O. Box 905
Loudon TN 37774

Julia Palasek North
President, Montgomery County Bar Association
Rassas, North & Associates
PO Box 361
Clarksville TN 37041

Joe Loser
Dean, Nashville School of Law
4013 Armory Oaks Drive
600 Linden Square
Nashville TN 37204

Gregory Leffew
President, Roane County Bar Association
PO Box 63
109 North Front Avenue
Rockwood TN 37854

Gigi Woodruff
Executive Director
Nashville Bar Association
315 Union Street Suite 800
Nashville TN 37201

James Taylor
President, Rhea County Bar Association
1374 Railroad St Ste 400
Dayton TN 37321

Chantelle Roberson
President, S.L. Hutchins Chapter - National Bar Assn.
Miller & Martin PLLC
832 Georgia Avenue Ste 1000
Chattanooga TN 37402

Beth Angel Garrison
President, Sumner County Bar Association
103 Bluegrass Commons Blvd
Hendersonville TN 37075

Suzanne Keith
Executive Director
Tennessee Association for Justice
1903 Division St
Nashville TN 37203

Donna Lee Roberts
Lawyers Association for Women
Marion Griffin Chapter
Stites & Harbison PLLC
401 Commerce Street Suite 800
Nashville, TN 37219

Edward Knight Lancaster
President, Maury County Bar Association
TFIC
PO Box 998
Columbia TN 38402

William Stover
President, Napier-Looby Bar Assn
W. Stover Attorney at Law
800 Broadway 2nd Floor
Nashville TN 37203

Daryl Colson
President, Overton County Bar Association
211 N Church St
Livingston TN 38570

Thomas Steven Santel, Jr.
President, Rutherford-Cannon Co. Bar Association
Cope, Hudson, Reed & McCreary, PLLC
P.O. Box 884
Murfreesboro TN 37130

Charles Anthony Maness
President, Obion County
Charles Anthony Maness Atty
PO Box 2041
Union City TN 38281

Jennifer Lynn Evans Williams
President, Robertson Co. Bar Association
Attorney at Law
109 5th Avenue W
Springfield TN 37172

Amanda Branam Rogers
President, SETLAW
Luther Anderson PLLLP
P. O. Box 151
Chattanooga TN 37401

Erik Cole
Executive Director
Tennessee Alliance for Legal Services
50 Vantage Way Suite 250
Nashville TN 37228

Barri Bernstein
Executive Director
Tennessee Bar Foundation
618 Church St Suite 120
Nashville TN 37219

Adele Anderson
Administrator
Tennessee Board of Law Examiners
401 Church Street Suite 2200
Nashville TN 37243

Robert Cooper, Jr.
Attorney General, State of Tennessee
PO Box 20207
Nashville TN 37202

Isaac Conner
President, Tennessee Alliance for Black Lawyers
Manson Johnson Stewart & Associates
1223 5th Ave. N.
Nashville TN 37208

Phillip H. Miller
President, Tennessee Association for Justice
Phillip Miller & Associates
631 Woodland Street
Nashville, TN 37206

Allan Ramsaur
Executive Director
Tennessee Bar Association
221 4th Ave N, Suite 400
Nashville TN 37219

Ricky Wilkins
President, Tennessee Board of Law Examiners
The Law Offices of Ricky E. Wilkins
66 Monroe Ave Ste 103
Memphis TN 38103

John C. Burgin, Jr.
Chair, Tennessee Commission CLE and Specialization
Kramer Rayson LLP
800 S. Gay Street, Suite 2500
Knoxville TN 37929

C. Melanie McCaa Stewart
President, Tennessee Defense Lawyers Assn
Stewart & Wilkinson PLLC
9040 Garden Arbor Drive, Suite 101
Germantown, TN 38138

James Wally Kirby
Executive Director
Tennessee District Attorney Generals Conference
226 Capitol Blvd Ste 800
Nashville TN 37243

Tessa Smith
Executive Director
Tennessee Lawyers Assn for Women
TN Lawyers Assn for Women
P. D. Box 331214
Nashville TN 37203

James Witherington
President, Tipton County Bar Association
POBox 922
205 S Main Street
Covington TN 38019

Suanne Bone
Executive Director
TN Assn of Criminal Defense Lawyers
121 21st Ave. N. Ste 311
Nashville TN 37203

Stephen Thomas Grew
President, Twelfth Judicial District
P.O. Box 758
Dunlap, TN 37327

Kenneth Myers
President, Union County
POBox13
105 Monroe St
Maynardville TN 37807

Jeanne (Rickey) Schuller
Chief Legal Counsel, Tennessee Department of Childrens Services
436 6th Ave N Floor 7
Nashville TN 37243

Wynne Caffey
President, Tennessee Lawyers Assn for Women
Ramsey Elmore Stone & Caffey
5616 Kingston Pike Suite 301
Knoxville TN 37901

Jeffrey Henry
Executive Director, Tennessee Public Defenders Conference
211 Seventh Ave N Ste 320
Nashville TN 37219

Laura Clift Dykes
President, TN Assn of Criminal Defense Lawyers
Metro Public Defenders OFC
404 James Robertson Parkway #2022
Nashville, TN 37219

Mario Ramos
Secretary, TN Assn of Spanish Speaking Attys
Mario Ramos PLLC
611 Commerce St Suite 3119
Nashville TN 37203

Lois Shults-Davis
Secretary, Unicoi County Bar Association
PO Box 129
111 Gay Street
Erwin TN 37650

Doug Blaze
Dean, University of Tennessee College of Law
1505 W. Cumberland Ave
Knoxville TN 37996

Chris Guthrie
Dean, Vanderbilt University School of Law
131 21st Ave South Room 108
Nashville TN 37203

Stephanie Anne Sherwood
President, Washington County Bar Association
2203 McKinley Road, Suite 137
Johnson City TN 37604

William Mitchell
President, White County Bar Association
Mitchell Law Office
112 South Main Street
Sparta TN 38583

Kim Rene Helper
President, Williamson County Bar Association
District Atty Office
P.O. Box 937
Franklin TN 37065

Stevie Roller
President, Warren County Bar Association
111 W Court Sq Ste 1
McMinnville TN 37110

Beau Edward Pemberton
President, Weakley County Bar Association
Law Office of James H. Bradberry
P.O. Box 789
Dresden TN 38225

Ursula Bailey
President, William Henry Hastie Chapter - National Bar Assn.
Stacy, Whitt & Cooper
706 Walnut Street, Suite 902
Knoxville TN 37902

**CYNTHIA H. MOORE**

**ATTORNEY AT LAW**

(615) 868-7497 - (615) 868-9217 Fax
P.O. Box 918
Nashville, TN 37116-0918



August 29, 2011

Michael Catalano, Clerk
**TENNESSEE SUPREME COURT**
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219

RE: Proposed Amendment to Tennessee Supreme Court Rule 13
TN Supreme Court Docket No: M2011-014110-SC-RL2-RL

Dear Mr. Catalano:

Thank you and the Honorable Justices of the Tennessee Supreme Court for the opportunity to respond to the proposed Amendment to Tennessee Supreme Court Rule 13. I have practiced before the Davidson County Juvenile Court for over 9 years, representing both indigent parents accused of abuse and/or neglect and indigent children as their guardian ad litem. I respectfully oppose this Amendment, as written, for the reasons outlined in this letter.

The adoption of the proposed Amendment to Rule 13, as written, could result in the following negative consequences:

1) Judges and Magistrates could lose all control over who is appointed to represent indigent parents and children appearing in their Courtroom. They could be left with attorneys with whom they are completely unfamiliar and who have little knowledge of how the Davidson County Juvenile Court functions. Their hands could be tied and they could be forced to select from a list of approved contract attorneys, with whom they may be unfamiliar, rather than those attorneys who have practiced before them for years.

2) Davidson County Juvenile Court operates with a One Judge/One Family approach. If a case comes back to Court, after having previously been before the Court, it is automatically reassigned to the Magistrate who has a history with the family. The case is also reassigned to the attorney who previously handled the case.

I have at least 9 or 10 cases, which seem to routinely end up before the Court about every 2 or 3 years. I have represented some children on and off for the past 9 years. These children/families know me. If the Amendment, as written, is adopted I could

end up being overlooked for reappointment to these children/families. I have represented many other children/parents at least two times, and am also familiar with their history. This same situation could potentially arise for every attorney who has practiced in Davidson County Juvenile Court for any length of time.

3) The proposed Amendment to Rule 13 as written, might save money initially, but at the cost of many indigent clients losing their Constitutional right to effective legal representation. The Administrative Office of the Courts (hereinafter, AOC) has already implemented drastic measures during the past year to save money. The AOC hired a compliance officer, who has reportedly conducted audits of various attorneys. They have also implemented a policy of cutting or not approving Extended and Complex claims, unless the AOC finds that the case is "extraordinary."

I know they have saved money in that area, at least on my claims. Since the fall of last year, I have made it my practice to submit nearly all of my claims at the cap, even though the case may not be adjudicated or I am still working in the post-disposition phase. This leaves me completely pro bono on a number of cases. I have recently submitted my only two claims for Extended and Complex compensation since last fall. I have not yet heard from the AOC as to whether they will be paid.

Even assuming each claim was deemed Extended and Complex by the AOC, the Extended and Complex cap is extremely low, especially for guardians ad litem who have been appointed to a case for years. The caps are also low for an attorney representing a parent accused of abuse or severe abuse. Cases of abuse or severe abuse, in general, must go to trial. It is very difficult to represent a parent through such a trial at the cap. Yet, we do it everyday. I have never asked to be relieved from a case due to financial hardship, nor have I ever known any Davidson County Juvenile Court attorney to do so. However, out of financial necessity, I can see that day may be approaching.

I respectfully request the Justices to closely review Tennessee Supreme Court Rule 40 regarding the ethical duties required of guardians ad litem. In my opinion, it is impossible, to meet all of these requirements under the current pay schedule. Yet, the majority of attorneys I know are ethical and strive to meet those requirements, even though they are grossly under compensated and many times completely uncompensated for the work done.

With regard to the AOC staff in general, they have always been very helpful and professional in all of my contacts with them. In several instances, Director Sykes, Pam Hancock and David Byrne, Esq., helped me get paid on several claims that they could have easily denied. Patricia Brown has also been very helpful and patient with me in the past. I completely understand the AOC's desire to save money, however, I disagree that this Amendment will accomplish this goal.

I was concerned by a comment made by an AOC representative at a recent meeting between the Davidson County Juvenile Indigent Defense Bar and the AOC. The comment was as close as I can recall, "Indigent defense work was never meant to be the sole means of support for attorneys." Well, what if an attorney has chosen to do only indigent defense work with his or her practice? What exactly is wrong with that? And shouldn't that choice be applauded, rather than dismissed, as being somehow inappropriate? If there is any thought that indigent defense attorneys are somehow getting rich off the backs of the poor, please let me correct any misconception. Most attorneys I know are middle class and are struggling to remain in that class. I do not see many Mercedes parked in the Juvenile Court Parking lot. While there is certainly nothing wrong with driving a fancy car or living in a mansion, I certainly have neither nor do any of my colleagues who practice solely indigent defense work.

4) The proposed Amendment to Rule 13 as written, is in direct conflict with the study completed by the AOC in January 2011 with regard to the indigent defense fund.

5) Juvenile Court is an entirely different "legal animal," for lack of a better term. Different rules and procedures apply. If the Court adopts the proposed Amendment to Rule 13, and assuming a contract is entered with a law firm, whose attorneys have no experience with Juvenile Court matters, the result could be disastrous. It could result in an increase of malpractice claims, state liability, an increase in appellate cases and most importantly, a deprivation of the Constitutional right to effective assistance of counsel afforded to indigent litigants and children.

Theoretically, large law firms could easily afford to make a low ball offer and enter into a contract with the AOC to provide indigent representation. Those of us solo practitioners are not in any position to accept any less than what we are now earning. And we desperately need more. We need to at least be able to submit an Extended and Complex Claim with the assurance that it will be paid.

6) The adoption of the proposed Amendment to Rule 13, as written, would be a slap in the face to those attorneys who have dedicated their career to indigent defense. I have appeared before the Court of Appeals before and have been thanked for my work. No, I have never appeared before the Tennessee Supreme Court. However, I am hopeful that the Honorable Justices will use their wisdom and refuse to adopt this Amendment.

7) The Amendment to Rule 13, as written, is against public policy, legislative intent and is simply an unethical way to appoint attorneys to represent indigent litigants who are constitutionally entitled to counsel. The proposed Amendment also presents potential ethical issues for attorneys appointed to represent indigent clients on a contract basis.

8) The proposed Amendment lacks clear and concise standards.

9) The Comment period was inappropriately short for such an important proposed Rule Amendment. The proposed Amendment to Rule 13 could very easily revamp Tennessee's entire indigent defense system. It is extremely rare to see a comment period of two months, especially in this instance, considering the potential negative impact this Amendment could have if adopted by the Court. Judging from the number of letters in opposition this proposal has garnered within two short months, it is safe to assume that others share some of the same concerns that I do.

In closing, thank you for the opportunity to offer my comment in opposition to the proposed Amendment to Rule 13. Numerous attorneys, members of the Tennessee Legislature, members of the Judiciary, several County Bar Associations, the Tennessee District Public Defenders Conference, several National organizations, a former Tennessee Attorney General, etc., have all spent their valuable time to research and write thought provoking letters and briefs unanimously in opposition to the proposed Amendment to Rule 13. Please review the pages and pages of letters and briefs in opposition and refuse to adopt this Amendment to Rule 13. Thank you for your consideration.

Sincerely,

Cynthia H. Moore

Cynthia H. Moore
BPR: 021909

# *Law Office of Rebecca Brady*

Attorney & Counselor at Law
rebecca@rebeccabradylaw.com

Phone: 931.526.6006
Fax: 931.526.6009

321 E Spring St Suite 302
Cookeville TN 38501

August 27, 2011

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

AUG 30

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

Dear Mr. Catalano,

I am writing to add my comments to the list of judges and attorneys who already disfavor the above-referenced Amendment. My understanding of the proposal is that the "contracts" will be awarded as a specific amount of money for a specific (but undisclosed) number of cases and therefore the State will pay less for representation of poor persons.

My argument is a simple one if you accept the following facts:

1. The number of people who need court appointed attorneys is not going to decrease.
2. The number of hours required to competently represent the client is not going to decrease.

Therefore, the only thing that will be decreasing is the hourly wage that court appointed attorneys are paid – unless, of course, we are trying to force attorneys to spend less time on their court-appointed cases. Either of these possibilities is an attack upon our zealous representation of our clients and our professionalism, not to mention an attack upon the quality of representation that the State's poorest citizens will receive.

Of course there are persons out there that abuse the system! In any government program with across-the-board rules there are bound to be a few individuals who exploit the system for their own financial gain. But the AOC's own study made it clear that this proposal is not the appropriate way to address those few who are milking the system. Does anyone really believe that it is in the State's best interests to sell the protection of our citizens' Constitutional Rights to the lowest bidder? Really?

Sincerely,

Rebecca Brady

Rebecca Brady

# State of Tennessee

TWENTIETH JUDICIAL DISTRICT

CHERYL BLACKBURN, JUDGE
CRIMINAL COURT - DIVISION III

JUSTICE A. A. BIRCH BUILDING
408 SECOND AVENUE, NORTH
SUITE 6110
NASHVILLE, TENNESSEE 37201
(615) 862-5940
FAX (615) 880-2329

August 29, 2011

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

Re: Proposed Amendment to
Supreme Court Rule 13, Section 7
No. M2011-01411-SC-RL2-R6

Dear Mr. Catalano:

In July, the Supreme Court issued an order concerning amendments to Rule 13, Section 7, of the Rules of the Supreme Court and requested comments before September 1, 2011. I am writing to address the important issues raised by the proposed amendment related to indigent representation in the criminal trial court setting. There has been some publicity indicating that the Supreme Court and Administrative Offices have no "current" plans to use the proposed amendments for criminal trial representation, however, the proposed amendment section (c) clearly states this will apply to criminal matters.

There are several important issues raised by the proposal which are not addressed by the vague wording of the amendments. I will address my issues and concerns in no particular order of importance.

I. Competence of the Contract Attorney

Under Section 7(b) the proposal of representation will be evaluated to determine "quality" of representation, which includes the ability to exercise independent judgment and maintain a reasonable workload.

This vague, undefined statement raises many questions which include but not limited to:

- Are these the only criteria to be used?
- Who makes the decision regarding "quality of representation"?
- What are the qualifications of persons determining "quality of representation"?
- Trial judges are vested with the responsibility of protecting a defendant's constitutional rights to effective assistance of counsel. Will the trial judge be allowed any input with the process?
- Is the competence of the contract attorney to be considered?
- What are the qualifications of the staff of the AOC to make determinations of courtroom competence of the contract attorney?
- Will the staff familiarize themselves with all the local rules of courts to determine "quality of representation"?

There are attorneys who practice law who might be interested in bidding on a contract but have had no experience or limited experience in criminal trial work. Because each defendant has a constitutional right to a jury trial, every case should be approached as if it will result in a trial without consideration of the time involved. Will the trial courts be confronted with new claims in post-conviction petitions pertaining to "forced" guilty pleas because the contract attorney could not afford the time to go to trial or had no experience to try a case?

Several judicial districts are developing plans for a "certification" process for attorneys who accept appointments in criminal cases. The local rules would then be amended to require an attorney to receive "certification" before a judge would appoint the attorney in a criminal case. This is the process used in the federal courts. Would the new proposed amendment take precedence over the local rules regarding "certification"?

II. Types of Criminal Cases

The proposed amendments do not address limiting the "contract approach" process to certain felonies. For example, it might be prudent to apply the rule only to C, D, and E felonies so that the more serious first degree murder, A and B felonies would not come under the umbrella of the rule.

The trial judges are aware of attorneys in their district who will agree to accept appointments on the most serious felonies, but who do not actively solicit those appointments. The attorneys who handle these most complicated cases will not participate in the bid process. This is especially true for first degree murder, rape of a child, aggravated child sex abuse, and complicated drug conspiracy cases. These cases require extensive legal abilities and work and should not be subjected to the "lowest bidder" process.

III. Judicial Override

There is no provision in the proposed rule for a trial judge, based on sufficient reasons, to override the determination of who should be appointed to criminal cases in their court. Section 7(c) of the proposed rule specifically says that a "contract attorney" shall be given first priority where the public defender is not available or eligible.

There are some attorneys who because of past performance, failure to comply with court rules, disrespect for the court's rules, failure to communicate adequately with clients, etc. who will not be appointed by a particular judge. Forcing a judge to appoint these individuals should not be required simply because they became "contract attorneys" with the AOC.

As previously discussed, there are very qualified attorneys who accept appointments on the most serious and complex cases who will not participate in the "bid" process. Is the trial judge's authority to appoint the most appropriate and skilled attorney in their courts to be circumvented by rules which allow for no individual judgment on the part of the judge?

IV. Due Process Concerns

The result of the application of the proposed amendment as applied to criminal cases is to create a third class of defendant for due process considerations. The first class refers to those defendants who can afford their attorney and has voluntarily entered into a "contract" with the attorney. The second class are those indigent defendants who are represented by the public defender's office. The third class of the defendants become those who, for reasons not their fault, are to be represented by contract attorneys who submitted proposals to the AOC to provide the services at a "reduced" or "bulk" rate with no regard to the specifics of their case. The due process concerns should be obvious, but many will not surface until the trial court is presented with petitions in the post-conviction context.

In summary, I think this proposed rule as applied to criminal cases is flawed and will create far more problems than it will solve. It will greatly impact the quality of justice in criminal cases for those individuals who cannot be represented by the Public Defender Offices.

Sincerely,

Cheryl Blackburn

Cheryl Blackburn

CB/mk

Judge Kimberly M. Hinson
Perry County General Sessions & Juvenile Court
Post Office Box 83
Linden, Tennessee 37096
(931) 589-5317
Facsimile: (931) 589-2350

August 30, 2011

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

RE: Proposed Amendment to Supreme Court Rule 13, Section 7

Honorable Supreme Court Justices:

I am writing to oppose the proposed amendment to Supreme Court Rule 13, Section 7. I believe the proposed amendment will negatively affect the quality of representation for indigent individuals.

As a General Sessions and Juvenile Court Judge, I keep a list of attorneys who are available and willing to take appointments to represent indigent defendants. In a rural county such as Perry, most attorneys must practice in several counties to earn a decent living. However, I pride myself in only appointing attorneys who are serious about tenacious representation of indigent individuals. These attorneys are dedicated to putting in the necessary time to accomplish quality representation. As the judge, I scrutinize fee claims and make changes if necessary. There have been times when I have taken attorneys off my appointment list because either they do not meet their obligation to their client or they are difficult to work with. All of the attorneys who take appointments in the Perry County General Sessions or Juvenile Courts are dedicated to indigent defense and none are over billing for their time.

It has always been and should continue to be the judge's job to initially scrutinize the work and fee claims of the attorneys who practice in their court. My concern regarding the proposed amendment is that it takes away the discretion of the judges to appoint attorneys who are best suited to represent indigent defendants. Pursuant to the proposed amendment, attorneys and/or law firms would have no incentive to put in the necessary time to ferret out the complex issues that occasionally arise in Juvenile Court. Rather, the proposed change would encourage attorneys or law firms to represent as many indigent defendants as possible and spend the least amount of time in order to make the most money. In essence, the courts would be dictated to by the Administrative Office of the Courts as to who must be or should be appointed. The Administrative Office of the Courts has issued a statement that the new rule would be limited to certain types of cases, namely child support contempt and judicial hospitalizations. However, nothing in the proposed amendment limits what types of cases the Rule would apply to. Moreover, child support contempt, as prosecuted in Perry County Juvenile Court and many other courts across the state, is criminal in nature. These indigent defendants face incarceration and thus deserve effective assistance of counsel. Most contempt hearings are not complex. However, some involve individuals with mental

and/or physical disabilities and in those particular cases, an attorney has a duty to present a defense involving medical records which may take time to obtain. Pursuant to the proposed amendment attorneys would not have any incentive to take the time to adequately represent these individuals. Given that an indigent defendant charged with criminal contempt can be sentenced to up to 180 days incarceration, even child support cases deserve to be scrutinized on an individual basis.

I realize that the state is experiencing a terrible budget crisis. However, when the general assembly wanted to make cuts to the Indigent Defense Fund and appointed a committee to look into the best ways to do that, the report back from the committee indicated that the state needs to fund the Indigent Defense Fund more, rather than making cuts. Moreover, other states, such as Iowa and Washington, have banned these exact types of arrangements because they create a direct conflict of interest between the attorney and each client. The better way to get the costs under control is to identify the attorneys who abuse the Indigent Defense Fund for their own personal gain and reprimand them individually. Additionally, judges who approve abusive fee claims should also be reprimanded, if necessary. Judges who appoint attorneys have a duty to safeguard the Indigent Defense Fund for the entire State.

Sincerely,

Kimberly M. Hinson
Perry County General Sessions and Juvenile Court Judge

ROBERT B. PYLE
**Attorney at Law**
Suite 102, Flatiron Building
707 Georgia Avenue
Chattanooga, Tennessee 37402
(423) 785-6021
(423) 266-6337 (fax)
RobertPyle@EpbInternet.com



August 29, 2011

Michael W. Catalano, Clerk
Tennessee Supreme Court
401 7th Avenue, North
Nashville, Tennessee 37219

Re: Proposed Amendment to Supreme Court Rule 13

Dear Mr. Catalano:

As a lawyer who routinely accepts appointments in the Hamilton County Juvenile Court (D & N cases both as Guardian ad Litem and parent's attorney, delinquencies, and child support cases) I have read with interest the proposed amendment to Supreme Court Rule 13. I have also reviewed many of the comments which were sent to the Court by concerned attorneys. I share their concerns with the proposed changes and agree with their conclusions that the changes are ill-advised.

One concern I have which I did not see mentioned is continuity of representation which could affect the quality of representation. The Hamilton County Juvenile Court considers prior relationships with an indigent party in selecting the attorney to be appointed. If a child has been in state custody before it makes sense to have a familiar face as GAL. For a delinquent child, using the same attorney actually reduces the time to get to know the dispositional phase issues. I have had at least three cases where a state psychologist has ruled a child unable to stand trial. Without using an attorney familiar with the child, these defenses might have been overlooked or underappreciated. I had a mother ruled incompetent to stand trial in Juvenile Court as a D & N parent. She had a history of misdemeanor convictions where the attorney appointed to represent her had missed that defense. (I have provided the district public defender with a copy of the psychologist's report for use in any future charges).

I am also concerned that a Maximus type company might enter the bidding and win contracts involving D & N cases. These cases have the potential to continue for two or more years. Having a corporate provider could lead to continuity problems with their high staff turnover. It would be all too easy for quantity case management to overwhelm individual case quality.

Please reject the proposed amendments to Supreme Court Rule 13.

With Highest Regards,

Robert B. Pyle

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,

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 law school student who expects to engage 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. Failures to provide adequate indigent representation systems result in additional liabilities to the State and additional costs to the State.
5. 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.
6. The proposed Amendment lacks clear and concise standards.
7. 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 will rely on court appointed indigent representation work to put food on my family's tables and to meet financial obligations, such as the privilege tax and CLE fees I will pay each year to maintain licensure. 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. 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.

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 plan to engage in the practice of indigent representation on a daily basis and am very passionate about this work. It is apparent that attorneys who engage in indigent representation practice are not compensated adequately, but they 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 who rely on appointed work to supplement or maintain their 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 they 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. 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".

V. 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 potential to 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 in order to 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.

VI. 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 future 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 future in the hands of what "might" be instead of what will necessarily be.

VII. 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.

VIII. 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,

LAW STUDENTS OF UT-KNOXVILLE COLLEGE OF LAW

# Petition in Opposition to the Proposed Amendment to Supreme Court Rule 13

| | |
|---|---|
| From: | Students of the University of Tennessee School of Law with an interest in indigent defense. |
| Subject: | We, the undersigned, are concerned students urging the members of the Supreme Court to vote not to adopt the proposed amendment to Supreme Court Rule 13. |

| Printed Name | Signature | Address | Comment | Date |
|---|---|---|---|---|
| Qun Li | | — | — | 08/19/11 |
| Houston Havasy | | 825 CHEROKEE BLVD. KNOXVILLE, TN 37919 | 2L | 08/18/11 |
| Abby Smith | | 3636 Talahina Ave #54 Knoxville, TN 37919 | 3L | 8/18/11 |
| Billy Nelson | | 2264 Harbert, Memphis, TN 38104 | — | 8/19/11 |
| Jay Bitter | | — | 2L | 8/18/11 |
| [illegible] Amanda Mars | | 5735 Oakhill Dr. 37912 | JL interested in criminal defe | 8/18/11 |
| Christin Lunsford | | " " " " | 2L | 8/18/11 |
| Matt McGraw | | — | 2L | 08/18/11 |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

**JOHNNIE R. TURNER**
STATE REPRESENTATIVE
85TH DISTRICT

HOME :
752 WEST LEVI ROAD
MEMPHIS, TENNESSEE 38109
(901) 785-6750

LEGISLATIVE OFFICE:
SUITE 38, LEGISLATIVE PLAZA
NASHVILLE, TENNESSEE 37243-0185
(615) 741-6954
1-800-449-8366 ext 44565

House of Representatives
State of Tennessee

**MEMBER OF COMMITTEES**
CHILDREN AND FAMILY AFFAIRS
CONSUMER AND EMPLOYEE AFFAIRS

MEMBER OF SUB-COMMITTEES
CHILDREN AND FAMILY AFFAIRS

**TREASURER**
BLACK CAUCUS

August 30, 2011

Michael W. Catalano, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37129-1407

AUG 31 2011

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

Dear Mr. Catalano:

Thank you for giving me the opportunity for input regarding an issue very important to me and to the constituents I serve. As a member of the Tennessee General Assembly, I serve on the Children and Family Affairs Committee and the Children Affairs Subcommittee. I am also a member of the Tennessee Black Caucus of State Legislators and the Women's Caucus of the Tennessee General Assembly. Most importantly, I represent a large number of low income individuals who, if incarcerated, would be negatively impacted if Supreme Court Rule 13 is amended.

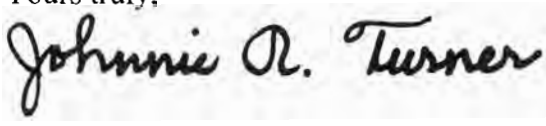
I have sought input from several organizations that understand and provide services to the indigent. I have also received comments from many in the legal system, especially lawyers. They were unanimous in their opposition to the proposed Amendment of Rule 13. Among the concerns they and I have are:

- The Amendment, as written, has unintended consequences.
- Contracting for legal services for the indigent is not the best method to ensure the quality of representation each of them is entitled to receive.
- Rather than implementing the Amendment as proposed, a better solution to the problem would be to hire additional public defenders. This would result in a better quality of representation for the indigent and the costs would be much less that those incurred in implementing the proposed Amendment.

Given the amount of concern generated by this proposed Amendment, I recommend that the implementation of the changes to Supreme Court Rule 13 be postponed.

Thank you for any consideration given to comments and requests made.

Yours truly,



Johnnie R. Turner
State Representative, District 85

Submission information

Form: **Submit Comment on Proposed Rules**
Submitted by TN Courts
Monday, August 29, 2011 - 7:47pm
166.205.15.76

**Your Name:**
Chris Dixon

**Your email address:**
Mtsu_edu@mindspring.com

**Rule Change:**
Supreme Court Rule 13 - Appointment of Counsel for Indigent Defendants

**Docket number:**
M2011-01411-SC-RL2-RL

**Your public comments:**
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,
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.

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.

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.

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.

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.

. 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".

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.

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.

. 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.

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#_____

Submission information

Form: Submit Comment on Proposed Rules
Submitted by TN Courts
Wednesday, August 31, 2011 - 12:42pm
75.65.89.100

**Your Name:**
R. Todd Mosley, BPR#24626

**Your email address:**
todd@mosleyfirm.com

**Rule Change:**
Supreme Court Rule 13 - Appointment of Counsel for Indigent Defendants

**Docket number:**
M2011-01411-SC-RL2-RL

**Your public comments:**
Mr. Catalano,

I have read through the comments to Proposed Rule 13 and will not repeat the numerous points raised in the unanimous opposition to the proposed rule. I will simply point out that if the AOC wishes to cut costs of the indigent representation system, it should re-examine Section 4(a)(2) of the current Rule 13 which prohibits reimbursement of expenses for "time of a paralegal, law clerk, secretary, legal assistant, or other administrative assistants".

I currently take appointments in Shelby County for Juvenile, General Sessions and Criminal Courts. I know many of the attorneys in Shelby County that take cases appointed in these cases. Many are like me and are solo practitioners with no administrative staff. The rate at which the AOC pays attorneys for work simply does not justify employing staff. However, many tasks performed out-of-court that is necessary for the representation of indigent clients are of a routine nature that could accomplished by support staff with minimal instruction and oversight by the attorney.

I reviewed a typical Dependency and Neglect claim that I submit to the AOC for reimbursement and and found that for the 5 hours of out-of-court work performed, I could have delegated approximately 1.5 hours to support staff. If I had paid that person $15 an hour, I could have only submitted a claim for 3.4 hours and been paid the AOC $136. After paying the staff $20, my net for out-of-court work would be $116, which is too much of a cut to justify when I also have to pay for health insurance, office rent, malpractice coverage, continuing education, law license fees, self-employment taxes, and even a tax to the State of Tennessee for the "privilege" of being a lawyer. So instead, I have to do all the work myself and submit an out-of-court claim for 5 hours, for a total of $200. Under a better system, the AOC would reimburse for support staff and that 5 hours would be billed at 3.4 hours for attorney work at $40 an hour, total of $136, and a law student could submit a claim for 1.6 hours. If the support staff bills the AOC at $20 per hour, the AOC would still save $32 in the end.

For 2010, I estimate I performed about 375 hours of out-of-court work. If 32% of those 375 hours could have been performed by support staff at half the attorney rate, the savings to the AOC would be approximately $2400.

Sincerely,
Todd Mosley


**From:** <"rule13_key>
**To:** <webmaster@tncourts.gov>
**Date:** 08/31/2011 4:19 PM
**Subject:** **TN Courts: Submit Comment** on Proposed Rules

Submitted on Wednesday, August 31, 2011 - 4:19pm
Submitted by anonymous user: [216.59.101.243]
Submitted values are:

Your Name: John P. Gross, Indigent Defense Counsel, NACDL
Your email address: jgross@nacdl.org
Rule Change: Supreme Court Rule 13 - Appointment of Counsel for Indigent Defendants
Docket number: M2011-01411-SC-RL2-RL
Your public comments:
August 31, 2011
Michael W. Catalano
Clerk of the Supreme Court of Tennessee

Re: Proposed Amendment to Tenn. Sup. Ct. R. 13, Section 7: Contracts for Indigent Representation (No. M2011-01411-SC-RL2-RL)

Dear Mr. Catalano:

I write you on behalf of the National Association of Criminal Defense Lawyers (NACDL) regarding the proposed change to Tennessee Supreme Court Rule 13, Section 7 which would authorize the Administrative Director to enter into contracts establishing a fixed fee for the representation of indigent persons.

NACDL is the preeminent national organization advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL's 10,000 direct members– and more than 90 state, local and international affiliates with an additional 40,000 members – include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness within America's criminal justice system.

NACDL has serious reservations regarding the adequacy of fixed fee contracts for the provision of indigent defense. In fact, courts in both Arizona and Iowa have held such contracts to violate the Right to Counsel under the 6th Amendment and the Due Process Clause of the 14th Amendment. See State v. Smith, 140 Ariz. 355, 681 P.2d 1374 (Arizona 1984) and Simmons v. State Public Defender, 791 N.W.2d 69 (Iowa 2010). Although the ABA does not consider such systems categorically deficient in the provision of legal services to the indigent, such systems require a number of procedural safeguards to ensure that indigent defendants receive adequate representation. While the proposed amendment calls for an evaluation of proposed contracts to determine the quality of representation to be provided and indicates contracts will not be awarded solely on the basis of cost, NACDL fears that such flat fee contracts inevitably lead to what can be characterized as a "race to the bottom".

While the amendment does reference the need for contracts to allow for the exercise of an attorney's independent judgment on behalf of clients and recognizes the need "to maintain workload rates that would allow the

attorney(s) to devote adequate time to each client," it lacks many of the elements of a fixed fee contract recommended by the American Bar Association (ABA). The ABA Standards for Criminal Justice, Standard 5-3.3 "Elements of the Contract for Services," requires that contracts for the provision of defense services include (1) allowable workloads for individual attorneys and measures to address excessive workloads; (2) minimum levels of experience and specific qualification standards for contracting attorneys; (3) limitations on the practice of law outside of the contract by the contractor; (4) reasonable compensation levels and a designated method of payment; (5) sufficient support services and reasonable expenses for investigation services, expert witnesses and other litigation expenses; (6) supervision, evaluation, training and professional development; and (7) a system of case management and reporting. It is also worth noting that the National Legal Aid and Defender Association's "Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services" contain similar provisions.

These types of systems for the provision of legal services to the indigent have been widely criticized. In an April 2000 special report entitled "Contracting for Indigent Defense Services," the Bureau of Justice Assistance pointed out some of the deficiencies in these types of contract systems including:

1) They place cost containment before quality;
2) they create incentives to plead cases out early rather than go to trial;
3) they result in lawyers with fewer qualifications and less training doing a greater percentage of the work;
4) they offer limited training and supervision to attorneys under contract;
5) they reward low bids rather than realistic bids;
6) they provide unrealistic caseload limits or no limits at all;
7) they fail to provide for support staff or investigators;
8) they result in case dumping that shifts cost burdens back to the institutional defender
9) they do not provide independent monitoring or evaluation of performance outside of costs per case; and
10) they do not include a case management system and do not incorporate a strategy for case weighing.

While jurisdictions have looked to these types of fixed fee contracts to provide financial stability and as a way of managing costs, these contracts often impose additional costs on tax payers. A study released by the Justice Policy Institute in July 2011 entitled "System Overload: The Costs of Under-Resourcing Public Defense" concludes that without adequate resources for the defense of the indigent more people are incarcerated due to increased levels of pretrial detention and excessive prison sentences. In addition, the lack of quality representation results in more wrongful convictions and erodes public trust in our judicial system.
NACDL urges the Court to reject the proposed amendment. Absent the additional ABA recommended contract provisions, this type of fixed fee contract for legal services fails to ensure the rights of indigent defendants to the effective assistance of counsel and due process of law.

Respectfully submitted,

Lisa Wayne
President
National Association of Criminal Defense Lawyers

The results of this submission may be viewed at:
http://www.tncourts.gov/node/602760/submission/692


**From:** "roy henderson" <royhende@gmail.com>
**To:** <janice.rawls@tncourts.gov>
**Date:** 08/31/2011 6:48 PM
**Subject:** TN Courts: Submit Comment on Proposed Rules

Submitted on Wednesday, August 31, 2011 - 6:47pm
Submitted by anonymous user: [69.55.112.53]
Submitted values are:

Your Name: roy henderson
Your email address: royhende@gmail.com
Rule Change: Supreme Court Rule 13 - Appointment of Counsel for Indigent Defendants
Docket number: m2011-01411-sc-rl2-rl
Your public comments:
Financing the appointment of counsel for indigent defendants might find public merit if consideration were given to financing of Counsel from funds generated via law enforcement's statewide auctioning/sale of confiscated items seized as part of search and seize procedure.

Jewelry, vehicles, boats, planes, cash, etc., are items of this seizure process and would form a meritworthy contribution to the indigent defense fund, and alleviate a possible misperception by the public that such funds and items remain within the domain of the law enforcement community, i.e., law enforcement could be seen as directly benefitting from enforcing laws related to search and seizure.

The results of this submission may be viewed at:
http://www.tncourts.gov/node/602760/submission/693

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

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

---

The Tennessee Association of Criminal Defense Lawyers (TACDL), responds to the Supreme Court's invitation for comments on the proposed change to Tennessee Supreme Court Rule 13, section 7, authorizing the Administrative Office of the Courts (AOC) to contract with lawyers, law firms or associations of lawyers to provide legal services to indigent persons.

TACDL is a non-profit corporation chartered in Tennessee in 1973. It has over 750 members statewide, mostly lawyers actively representing criminal defendants. TACDL seeks to promote study and provide assistance within its membership in the field of criminal law. TACDL is committed to advocating the fair and effective administration of criminal justice. Its mission includes education, training, and support to criminal defense lawyers, as well as advocacy before courts and the legislature of reforms calculated to improve the administration of criminal justice in Tennessee.

TACDL believes that the proposed rule change should be rejected. As worded, the change does not clearly identify the problems to be addressed and is ambiguous in the scope of legal and support services that will be affected or offered. In terms of the delivery of services for the defense of indigent citizens accused of crimes, the proposed change to Rule 13 creates a large number of known and unknown ethical issues for attorneys and the judiciary to navigate. The burden, financially and administratively, to every component of the criminal justice system will undoubtedly increase, with no way under the proposed rule to gauge the magnitude of the impact. The proposed change also comes at a time when the Supreme Court has been asked to review the hourly rates for critical, constitutional services. Those rates have not been adjusted in 17 years.

Foremost, considerable confusion exists in legal circles about the type of cases that the proposed change will encompass. Public and private remarks and discussions have engendered enormous confusion. Inconsistent signals have been sent and received. If the proposed change is not intended to encompass the delivery of services for the defense of indigent citizens accused of crimes, then section 7 should be revised to telegraph that intent in a clear and unambiguous fashion. Likewise, if section 7 is intended to operate as a "pilot program" only in certain areas of indigent representation, that intent should be communicated

transparently. TACDL stands willing and prepared to assist the Court in these efforts.

Regarding ethical issues in the realm of criminal defense representation, the proposed change must be thoroughly considered and evaluated, inter alia, in light of an attorney's ethical responsibilities to be competent, to devote the required attention and preparation, as determined in part by what is at stake, to avoid pressure to quickly resolve a matter in order to maintain earnings, and to avoid conflicts of interest. The Court should consider inviting specific comments on the ethical efficacy of the proposed rule as applied to the delivery of services for the defense of indigent citizens accused of crimes.

The January 15, 2011 Report by the Administrative Office of the Courts to the 107th Tennessee General Assembly correctly emphasizes that the real growth in indigent legal service spending is in the non-criminal area, particularly with the growing demand for legal services involving the welfare of children, both in juvenile and trial courts. The AOC Report estimates that spending in child welfare proceedings now accounts for almost 35% of total spending from the indigent defense fund.

The language of the proposed rule specifically states that contract attorneys are to be given first priority for appointment to any case where a district public defender is not available or eligible for appointment. That language appears directly at odds with the AOC Report's acknowledgement that the contract system of delivering indigent legal services has been roundly criticized and with the Report's assessment that the current system is likely the best system of its kind for the purposes for which it is being used.

In addition, it should be recognized that implementing the proposed rule would exacerbate the problems with the current hourly rate structure under Rule 13. The proposed rule makes it clear that while the contract should not be based solely on the low bidder basis, it should in no case be for more than allowed under the current Section 2. Those seeking contracts will have to agree to provide legal services for no more than the current hourly rates, which have not been adjusted in 17 years. TACDL notes that it currently has a petition pending before the Court to increase the hourly rates, yet no action has been taken. Insisting that lawyers fight to the bottom as they continue to provide indigent defense services extraordinarily below average overhead rates perverts the cause of justice in Tennessee.

TACDL further believes that implementation of the proposed rule would increase indirect costs to the system. In an address to the National Association of Criminal Defense Lawyers in February of 2010, Attorney General Eric Holder wisely observed, "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."

In the studies done thus far, contracting seems to fall into the "poor systems" category. Quality of representation goes down and any reduction in initial costs stand to be consumed by post-conviction and constitutional challenges through litigation.

TACDL can foresee that implementation of the proposed rule would increase the burden on understaffed public defender offices. Pursuant to Rule 13, Section 7(c), contract attorneys shall be given first priority for appointment to any case "where a district public defender is not available or eligible for such appointment" and in which the litigant is otherwise entitled to the appointment of counsel pursuant to this rule. From the plain language of the proposed rule, it could be understood to mean that District Public Defenders should be appointed in cases other than criminal defense with contract counsel available in the event of a conflict. This eventuality would substantially increase the population of cases that public defenders would be required to cover.

Should the Court determine to implement a contract system despite these concerns, TACDL suggests that the intent of the proposed rule be clarified in two ways. First, the following suggestion adds language limiting the contract system to mental health proceedings, child support contempt, and child welfare proceedings:

> Section 7. Contracts for Indigent Representation.
>
> (a) In addition and as an alternative to the procedures for appointment and compensation of court-appointed counsel for judicial hospitalization, child support contempt, and child welfare proceedings, the Administrative Director is authorized to enter into contracts for such services with attorneys, law firms, or an association of attorneys. Such contracts may establish a fixed fee for representation in a specified number and type of cases; provided, however, that any such fixed fee shall not exceed the rates specified in Section 2.

Second, the language referring to the public defender's office in Section (c) of the proposed rule should be struck as its inclusion explicitly allows application to indigent criminal cases, which is apparently inconsistent with what has been communicated to the organized bar as the proposed rule's intention. Therefore, it is suggested that the proposed rule be amended to state:

(c) Attorneys providing legal services under any contract entered into pursuant to this Section shall be given first priority for appointment to any case for such appointment and in which the litigant is otherwise entitled to the appointment of counsel pursuant to this rule.

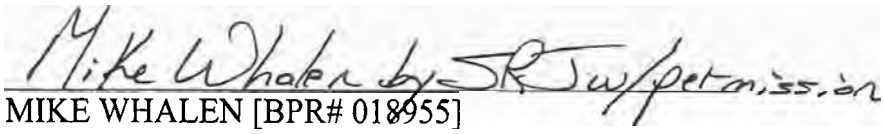
In conclusion, it is TACDL's position that the institution of a contract system for the delivery of indigent defense services, criminal or non-criminal, should be rejected. The above-suggested revisions to the proposed rule are provided, however, in the event the Court is inclined to adopt such a system in non-criminal cases.

For all these reasons, TACDL maintains that the proposed Rule 13 change be rejected.

Respectfully submitted this 31st day of August, 2011, by:

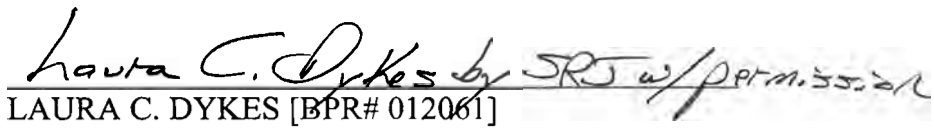
STEPHEN ROSS JOHNSON [BPR# 022140]
President, TACDL
Ritchie, Dillard, Davies & Johnson, P.C.
606 W. Main Street, Suite 300
Knoxville, TN 37902
(865) 637-0661
FAX: (865) 524-4623
johnson@rddjlaw.com

J. ROB McKINNEY, JR. [BPR# 016807]
President-elect, TACDL
214 2nd Ave. North, Suite 103
Nashville, TN 37201-1637
(615) 259-9009
FAX: 615-242-5967
rob@robmckinneylaw.com

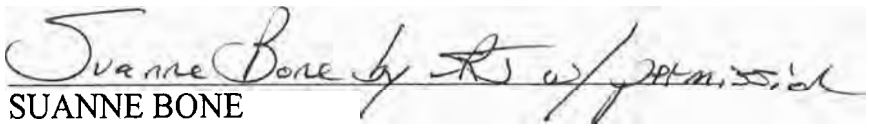


MIKE WHALEN [BPR# 018955]
Treasurer, TACDL
905 Locust Street
Knoxville, TN 37902-2711
(865) 525-1393
FAX: (865) 523-4623
whalenlaw@bellsouth.net

SAMUEL L. PERKINS [BPR# 011857]
Secretary, TACDL
The Perkins Law Group, PLLC
156 Court Ave.
Memphis, TN 38103-2212
(901) 523-8832
FAX: (901) 522-8243
sperkins@slperkinslawgroup.com



LAURA C. DYKES [BPR# 012061]
Immediate Past-President, TACDL
Office of the Public Defender
404 James Robertson Parkway, Suite 2022
Nashville, TN 37219-1538
lauradykes@jis.nashville.org
(615) 862-5730
FAX: (615) 862-5736



SUANNE BONE
Executive Director, TACDL
530 Church Street, Suite 405
Nashville, TN 37219
(615) 329-1338
Fax: (615) 329-1339
Web: www.tacdl.com
E-mail: office@tacdl.com

Jennifer L. Evans Williams
ATTORNEY AT LAW
Certified as Child Welfare Law Specialist

109 Fifth Avenue West
Springfield, Tennessee 37172

evanswilliams@bellsouth.net
(615) 384-3388 - Facsimile (615) 384-9035

September 1, 2011

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

I am writing to you on behalf of the Robertson County Bar Association concerning the proposed amendment to Supreme Court Rule 13. At our bar association meeting on July 27, 2011, we collaboratively decided to respectfully oppose this amendment.

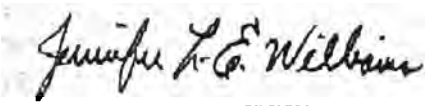
As a bar association who remains actively involved in the representation of indigent persons in our county and surrounding counties, we are quite concerned that this amendment will not serve the best interests of the indigent persons entitled to representation. In essence, this amendment would require our Judges and Magistrates to choose attorneys from a list of contracted attorneys, thus limiting the vast experience of those members of the bar who have years of experience in representing indigent persons. Each indigent person is entitled to competent legal counsel with experience in the area of law for which appointed. If the Court is limited to appointing the contract attorney, who is most likely the lowest bidder to Administrative Director of the Courts, the indigent persons are denied the opportunity of being diligently represented by attorneys of the bar with years of experience in that area of law. Each case carries with it specific needs and challenges and to limit the choice of attorneys who may be appointed effectively denies due process to indigent defendants.

Additionally, it is concerning that the number of cases assigned to the contract attorney will be substantially greater than the number of cases managed by the private attorney. As such, it would lead to speedier resolution to matters without extensive discovery in order to resolve a greater numbers of cases rather than ensuring each individual defendant receives the in depth representation to which that person is entitled.

A great number of attorneys in this bar association take pride in our representation of the interests of the indigent. Those defendants who are unable to afford to privately retain counsel are of no less importance than those defendants of greater means. To deny them the quality and experience of all members of the bar association would be a grave injustice for which our Constitution is meant to protect.

We respectfully request your reconsideration of this proposed amendment in light of our concerns and those of surrounding bar associations. Thank you for your time and consideration.

Best regards,



Jennifer L. Evans Williams
Bar President

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,

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.

I routinely take court appointments in the areas of dependency and neglect, civil contempt, and juvenile delinquency. It is an honor to serve the public, and I am proud to represent the indigent defendants of this state in the capacity of court appointed counsel in these proceedings. Many of my colleagues routinely take court appointments, and most take pride in their work and zealously represent their clients regardless of what they are paid. I sincerely believe that most court appointed lawyers take appointments because they enjoy the types of cases to which they are appointed. This amendment takes for granted the judges' familiarity with their local bar of attorneys, and their inherent wisdom in making appointments to the most qualified attorneys. It is my understanding that the contract system has failed in a handful of states already, and that the bigger picture is that the state will actually pay more in the long term in post-conviction relief appeals and other lawsuits. Earlier this year, the Administrative Office of the Courts found through their own research that contracting with firms was probably a bad idea, and that the court appointed attorneys of this state were underpaid.

While the overall issue is saving money, the amendment if passed will affect the most vulnerable classes of persons in the state. In the few years that I have practiced, I have learned that justice while blind, is definitely not free, and typically doesn't come cheap either. According to the AOC study of January 2011, the system that

we have in place is, while not perfect, it is likely the best system. I would respectfully request the Honorable Justices of the Supreme Court vote not to adopt the proposed amendment.

Very truly yours,

BPR# 024118

Wm. T. (Bill) Robinson III
President

AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5109
Fax: (312) 988-5100
abapresident@americanbar.org

Defending Liberty
Pursuing Justice

August 31, 2011

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

SEP 1 2011

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

Dear Mr. Catalano:

I write on behalf of the American Bar Association to express our serious concern about the proposed Tennessee Supreme Court Rule 13 §7, which in current form does not contain sufficient safeguards to ensure that the rights of defendants will be fully protected and their interests safeguarded. With nearly 400,000 members, the ABA is the world's largest voluntary professional membership organization. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law.

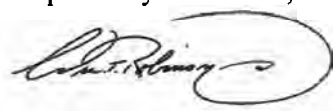
Our concerns are embodied in the ABA Ten Principles of a Public Defense Delivery System, the widely referenced set of standards that we understand have been brought to the attention of the Court -- specifically, Principle 8, which addresses contracts with private attorneys for public defense systems. The ABA Ten Principles briefly convey key elements of an adequate system; more detailed guidance is available through other ABA policies that include the Criminal Justice Standards upon which the Ten Principles are based. The Criminal Justice Standards on Providing Defense Services, Standards 5-3.1 through 5-3.3, and the commentary to those Standards, provide helpful discussion of the issues involved in contracting for defense services. A copy of the Standards and the Commentary are enclosed for your review.

While the proposed Tennessee rule comports with ABA Standard 5-3.1, urging that contracts should not be awarded primarily on the basis of cost, the proposed rule omits many of the safeguards and essential procedures discussed in ABA Standards 5-3.2 and 5-3.3. These latter Standards discuss in-depth aspects of contracting that relate to

contracting parties and procedures, as well as recommended elements of the contract for services. We urge that any new rule on this subject in Tennessee address these additional important matters, to assure that Tennessee lawyers who enter into such contracts fully comply with their professional responsibilities and that the Tennessee justice system meets minimal constitutional guarantees.

The ABA stands ready to assist the Court in this project and appreciates the opportunity to provide these comments.

Respectfully submitted,



Wm. T. (Bill) Robinson III
ABA President and Member of the Tennessee Bar

# PART III.

# CONTRACT DEFENSE SERVICES

## Standard 5-3.1. Use of contracts for services

**Contracts for services of defense counsel may be a component of the legal representation plan. Such contracts should ensure quality legal representation. The contracting authority should not award a contract primarily on the basis of cost.**

### *History of Standard*

This standard is new.

### *Related Standards*

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense, Preamble and Guideline IV.3 (1984).

National Legal Aid and Defender Association, National Study Commission on Defender Services 2.6 (1976).

### *Commentary*

**Defining Contracts for Defense Services**

Contracts for defense services are not a new phenomenon. Two of the largest defender offices in the country, Philadelphia and New York City, have, since their inception, been private nonprofit corporations that contract with city government for the provision of defense services.[1] By the same token, every attorney who accepts appointment as part of an assigned counsel panel has, in some sense, a contractual rela-

1. *See In re* Articles of Inc. of Defenders Ass'n of Philadelphia, 453 Pa. 353, 307 A.2d 906, *cert. denied*, 414 U.S. 1079 (1973) (holding that nonprofit defender association is sufficiently independent from city government to avoid conflict of interest); Wallace v. Kern, 481 F.2d 621 (2d Cir. 1973) (holding that New York City's nonprofit legal services corporation, the Legal Aid Society, does not act under color of state law for purposes of civil rights liability).

tionship with the government. However, contracts for defense services, as used here, refer to the provision of defense services over a period of time to a determined population of individuals or in a determined jurisdiction at a contractual rate offered and controlled by a government or representative thereof. In that sense, then, the older nonprofit corporations, while serving, for all intents and purposes as public defender offices, technically would be contract offices, while the private assigned counsel would not.

When contract programs began to proliferate widely in the early 1980s, observers found it easier to describe contracts for defense services than to precisely define them. In one of the earliest studies, the authors focused on the major elements of contracts: the negotiation and award process, the parties, the services provided, and the payment mechanisms.[2] A 1982 national survey was the first to take note of the growth of contracts as a primary means of defense service delivery. The survey noted that such contracts provided services through "individual private attorneys, local bar associations, nonprofit organizations, or law firms joined for the purposes of securing a contract."[3] The same survey provided a profile of contract defense service programs: counties were usually responsible for making the contract award; contracts were most often awarded to individual practitioners or private law firms; the average number of cases involved was between 100 and 250 cases per attorney; and contracts typically involved "block grants" of a fixed number of cases at a fixed price. Almost one-fourth of the reporting counties had an existing public defender program, with the contract designed solely for provision of services in cases involving conflicts of interest or declarations of unavailability by the public defender program. One-half of the counties reportedly used competitive bidding for representation through contracts, while the remaining half normally negotiated a contract with a single lawyer or law firm.[4] These characteristics continue to be typical of contemporary contract programs.[5]

---

2. Spangenberg, Davis and Smith, *Contract Systems Under Attack: Balancing Cost and Quality*, 39 NLADA BRIEFCASE 5, 7 (Fall 1982).

3. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY 19 (Sept. 1986).

4. *Id.* at 19–20.

5. Two local studies focus on the problems of conflicts of interest and the development of contracts for services. THE SPANGENBERG GROUP, A STUDY OF THE PRACTICAL ALTERNATIVES THAT WOULD REDUCE THE NUMBER OF PUBLIC DEFENDERS' CONFLICT OF INTEREST CASES IN LOS ANGELES COUNTY (Final Report, July 1986); THE SPANGENBERG GROUP, STUDY

**Growth in Contract Systems**

Contract systems for the delivery of defense services were a new phenomenon in the 1980s. A national study of defense services in 1973 did not include contract services as a means for the delivery of defense services.[6] By 1986, however, the use of contract defense systems had grown to include 11 percent of all counties in the United States.[7] That growth was the fastest of any system for the provision of defense services during the relevant period. The growth continues. Arizona, Idaho, Kentucky, New Mexico, North Dakota, Oregon, and Washington now provide a majority of their defense services through the use of contracts for services. In 1984, Alaska, a statewide public defender jurisdiction, created the separate Office of Public Advocacy to contractually handle conflict and other cases. Contract offices were also created in Los Angeles, St. Louis, and the Harlem Neighborhood Public Defender Program of New York City to handle conflicts of interest and declarations of unavailability by the existing public defender offices.

Criticism of the use of contracts, particularly through bidding and the use of block grant awards, grew with the proliferation of contract systems. The oldest experiment with the use of contracting through bids, in San Diego, California, was so heavily criticized nationally that the county eventually abandoned the system for a public defender model.[8]

In the case of contracts for defense services, there were two reasons for rapid growth in their use. First, the law of conflicts of interest grew more strict as a result of decisions by the United States Supreme Court that suggested that representation of multiple defendants created serious problems of conflicts of interest.[9] Public defender programs grew concerned about the appearance of impropriety and developed policies for the declaration of conflicts of interest in all multiple-defendant cases,

---

OF THE PROPOSED KING COUNTY OPERATED AND MANAGED PUBLIC DEFENSE PROGRAM (Final Report, Oct. 1989).

6. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE OTHER FACE OF JUSTICE (1973).

7. BUREAU OF JUSTICE STATISTICS, CRIMINAL DEFENSE FOR THE POOR, 1986 at 1–3 (Sept. 1988).

8. *See* Mayer, *Low Bid, Low Service*, AM. LAWYER, April 1985, at 33; Schachter, *Contract System May Put Lawyers at Odds with Clients*, L.A. TIMES, Dec. 8, 1985, at Part II, 1; Galante, *Contract Public Defenders Slammed*, NAT. L.J., April 7, 1986, at 3, col.2.

9. Holloway v. Arkansas, 435 U.S. 475 (1978) and Wheat v. United States, 486 U.S. 153, 154 (1988). In *Wheat*, several defendants sought to remain with the same lawyer after attempts to waive conflicts of interest. The Court held that the trial judge may override the choice of lawyers and order separate counsel when "a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Id.* at 163.

as well as in other cases that presented potential conflicts of interest.[10] The rise in declarations of conflicts, in turn, led the counties, or in one case, the entire state of Alaska, to create second public defender offices or contracts for services with lawyers as a means to institutionally control costs.[11]

A second reason for the growth in contracts was an attempt to control burgeoning costs due to increased caseloads in public defender offices. Some of the earliest use of contracts for services was accompanied by the use of bidding systems that encouraged bidders to compete to submit the lowest possible bid in order to obtain the stable, predictable and sometimes sizeable income provided by winning a contract. Unfortunately, most of these early contracts were not accompanied by any criteria for awarding the contract, for monitoring performance, for dealing with any unanticipated rise or fall in caseload, or for contract renewal or termination. Instability in systems was promoted by the simple fact that the contract provider could change from year to year, and even if the contractor remained the same, market pressures frequently compelled submission of lower and lower bids in order to keep the contract. The desire for economy in services all too often overrode constitutional obligations.

Results were uniformly dismal. Contracts were criticized in national studies[12] and several contractual programs failed to survive judicial scrutiny on constitutional grounds.[13] In 1985, the ABA House of Delegates adopted a resolution opposing the award of contracts for defense services on the basis of cost alone, and urging governments to consider

---

10. *See* Broderick and Cohen, *When Public Defenders Have Conflicts of Interest*, 2 CRIM. JUST. 18 (1987).

11. *See* Turner, *Tucson PD Office Clones Itself*, NAT. L.J., April 11, 1988, at 3.

12. Lefstein, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 49–55 (ABA Standing Committee on Legal Aid and Indigent Defendants, May 1982); WILSON, CONTRACT BID PROGRAMS: A THREAT TO QUALITY INDIGENT DEFENSE SERVICES (NLADA 1982).

13. *See, e.g.*, State v. Smith, 140 Ariz. 355, 681 P.2d 1374 (1984) (Mohave County contract system so overworks contract attorneys as to deny defendants' rights to due process and counsel under Arizona and U.S. Constitutions); People v. Barboza, 173 Cal. Rptr. 458, 627 P.2d 188 (1981) (contract with county creates disincentive to declaration of conflicts of interest, which violates rules of criminal procedure); Gendron v. State Bar of California, 35 Cal. 3d 409, 673 P.2d 260 (1983) (disciplinary action against contract defender upheld); *but see* People v. Knight, 239 Cal. Rptr. 413, 194 Cal. App. 3d 337 (2d Dist., 1987) (no ineffective assistance merely because services provided through contract).

additional factors such as "attorney workload maximums, staffing ratios, criminal law expertise, and training, supervision and compensation guidelines." The need for national standards to guarantee the delivery of quality defense services through control of the contracting process was apparent.

**The Emergence of Local and National Standards**

The National Legal Aid and Defender Association developed a set of national standards for the delivery of contracts for services entitled *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*. That document, the product of nearly four years of effort and drawing heavily on the *ABA Standards for Criminal Justice*, was approved by the NLADA Board of Directors in 1984, after which it was circulated to the ABA for review and comment. At its annual meeting in 1985, the ABA House of Delegates approved a resolution urging jurisdictions using contracts for services to do so in accordance with both the ABA *Standards* and the NLADA *Guidelines*.

State and local defender programs and other awarding agencies have also begun to adopt contract standards. States that have taken such action include Massachusetts, North Dakota, Oregon, and Washington.[14] Though controls on the use of contracts grow, many continue to fear that the issue of cost will override concern with quality legal services.[15]

Contracts for defense services, under these standards, should be no more than a "component" of the legal representation plan. It is assumed that contracts should not be the primary provider, as they often are in practice. The role of primary provider, under the standards, is reserved for the public defender office, which is considered to be the most effective means of protection of the delivery of quality legal representation.[16] The contract model may be an effective way to assure the important involvement of the private bar in the delivery of defense services, but

---

14. *See, e.g.*, Spears, *Contract Counsel: A Different Way to Defend the Poor*, 6 CRIM. JUST. 24 (Spring 1991); WASHINGTON DEFENDER ASSOCIATION, STANDARDS FOR PUBLIC DEFENDER SERVICES (Oct. 1989).

15. *See, e.g.*, Nelson, *Quality Control for Indigent Defense Contracts*, 76 CAL. L. REV. 1147 (1988). Concerns with privatization of services have also arisen in the area of prisons, and criticism of private prisons has also been vocal. *See, e.g.*, Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531 (1989).

16. *See* standard 5-1.2 and commentary.

that involvement may also be accomplished by the use of a coordinated assigned counsel panel.

The key with all components of an effective defense services program is not merely cost but also the provision of quality legal representation. While it should be obvious that no contract for defense services should be awarded on the basis of cost alone, the apparent economies in the use of contracts make the admonition necessary on the face of the standard. If the contractor follows even the rudimentary components of the contracting process, as set forth in these standards, appropriate attention will be given to the balance of cost and quality.

Reference to the use of contracts has also been incorporated throughout this chapter, where contracts may make up an important component of service delivery.[17]

## Standard 5-3.2. Contracting parties and procedures

**(a) The contracting authority and each contractor should be identified in the contract. Procedures for the award of contracts should be published by the contracting authority substantially in advance of the scheduled date of award.**

**(b) The contracting authority should ensure the professional independence of the contractor by means of a board of trustees, as provided in standard 5-1.3.**

**(c) The contracting parties should avoid provisions that create conflicts of interest between the contractor and clients.**

### *History of Standard*

This standard is new.

### *Related Standards*

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Defense Services I-1, I-2, II-1, II-2, II-3, III-1, III-13, IV-1, IV-2, and IV-3 (1984).

17. *See* standards 5-1.3, 5-1.6, 5-5.4, 5-7.3, and 5-8.1.

## *Commentary*

Subsection (a) is based on the NLADA *Guidelines for Negotiating and Awarding Governmental Contracts for Defense Services* (hereinafter *Guidelines*).[1] Under the *Guidelines*, the "contracting authority" is "the public office, officer, or agency which has the authority to prepare bids, negotiate, or otherwise conclude a contract and to obligate funds for those unable to afford defense services."[2] The "contractor" is "an attorney, law firm, professional association, lawyer's association, law school, bar association or non-profit organization" which can or does contract for defense services.[3] The language regarding precontract publication of procedures is new with this standard. Such publication gives to potential contractors both notice and an opportunity to adequately prepare for submission of a contract proposal.

Subsection (b) reiterates the theme of independence for the contracting attorneys, a central concern in the provision of legal services to a sometimes unpopular and politically disempowered constituency. The use of a board of trustees or directors also provides support and insulation for the contracting attorneys or entities.[4]

Subsection (c) addresses a particular concern with the provision of services through contracts. Contracts may create disincentives for the declaration of a conflict of interest, where the contractor must reimburse the county for the cost of outside counsel. Such contracts have been held to violate statutes or court rules barring conflicts of interest.[5]

## Standard 5-3.3. Elements of the contract for services

**(a) Contracts should include provisions which ensure quality legal representation and fully describe the rights and duties of the parties, including the compensation of the contractor.**

**(b) Contracts for services should include, but not be limited to, the following subjects:**

**(i) the categories of cases in which the contractor is to provide services;**

**(ii) the term of the contract and the responsibility of the**

1. *See* commentary to standard 5-3.1.
2. GUIDELINES, Guideline I-1.
3. GUIDELINES, Guideline I-2.
4. *See* commentary to standard 5-1.3.
5. People v. Barboza, 29 Cal. 3d 374 (1981); People v. Mroczko, 35 Cal. 3d 92 (1983).

**contractor for completion of cases undertaken within the contract term;**

**(iii) the basis and method for determining eligibility of persons served by the contract, consistent with standard 5-7.1;**

**(iv) identification of attorneys who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;**

**(v) allowable workloads for individual attorneys, and measures to address excessive workloads, consistent with standard 5-5.3;**

**(vi) minimum levels of experience and specific qualification standards for contracting attorneys, including special provisions for complex matters such as capital cases;**

**(vii) a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses;**

**(viii) limitations on the practice of law outside of the contract by the contractor;**

**(ix) reasonable compensation levels and a designated method of payment;**

**(x) sufficient support services and reasonable expenses for investigative services, expert witnesses and other litigation expenses;**

**(xi) supervision, evaluation, training and professional development;**

**(xii) provision of or access to an appropriate library;**

**(xiii) protection of client confidences, attorney-client information and work product related to contract cases;**

**(xiv) a system of case management and reporting;**

**(xv) the grounds for termination of the contract by the parties.**

## *History of Standard*

The standard is new.

## *Related Standards*

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1, 5.1 (1989).

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Contracts for Defense Services III-2 through III-23 (1984).

## *Commentary*

The elements of a contract for defense services are surprisingly complex if quality services are to be provided. Compliance with the items listed here is the most significant guarantee of quality in the delivery of contractual services.

Subsection (a) suggests that each contract should be developed through a careful and considered process. The elements of a good contract for services, the minimum of which are listed in subsection (b), obviate the use of standard form contracts.

The elements of a contract included in subsection (b) generally parallel the structure of the chapter with regard to the structure and funding of effective defense services. They draw heavily on specific components elucidated in the *Guidelines.* As elsewhere in the chapter, but not explicitly in the *Guidelines,* the standard gives special attention to the problems created by capital cases.

In addition to the explicit elements listed here, the contracting parties should have an agreement with regard to the provision of malpractice insurance for the attorneys and their staffs.

# The Law Office of Daniel Kidd

Wilson Office Complex
1308 Wilson Road, Ste. 103
Knoxville, TN 37912
Tel. (865) 688-5120 Fax (865) 688-5121
www.danielkiddlawoffice.com


Thursday, September 01, 2011

08/31/2011

Michael W. Catalano, Clerk
100 Supreme Court Building
40 1 Seventh Avenue North
Nashville, TN 372 19- 1407

By Fax

Re: Proposed Amendment to Supreme Court Rule 13 – Appointment of Counsel for Indigent Defendants

RECEIVED BY FAX
DATE: 9-1-11

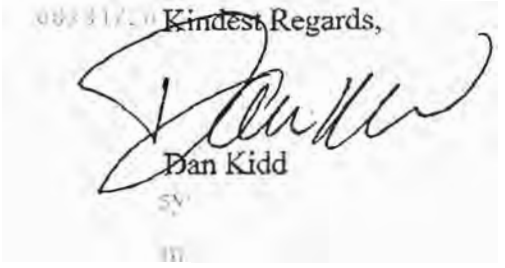
Mr. Catalano,

I wish to join my brothers and sisters of the bar, as all as the many learned Judges across this state who have voiced their opposition to the proposed changes to the above referenced Rule. I would suggest that if the Administrative Office of the Courts or the Legislature wish to implement this disaster of an idea as a cost-savings measure, there is no need to stop with this Rule. Why not put bids out for filling judicial vacancies as well? There have been rumblings of dissatisfaction with the Judicial Nominating process and this would seem to quell that clamor. Then we could do the same for Court Clerks, school teachers, police officers and firemen and right on down the line until every single project which requires even one penny of public money is put through the bidding process. Tennessee could save millions. We should not operate our Courts like we are selling justice on e-Bay. The proposed change(s) to this Rule is (are) horrible. If we are going to be motivated simply by money-saving ideas, why keep up the charade of protecting defendants constitutional rights and just do away with the entire Indigent Defense Fund all together?

Most attorneys who represent indigent clients are not in it for the money. With very few exceptions, the great majority of attorney who accept appointments earn most of their income from private pay clients. We choose to represent poor people because we know our judicial

system, despite being the best in the world, is sometimes unfair but is almost always confusing, intimidating and frustrating for all defendants but especially for those who are unrepresented. We need to be compensated fairly for our work in and out of the courtroom. This proposal of contracting out for legal assistance may very well backfire on the AOC if the lowest bid is more than the maximum already allowed by the Rules. Now that would be justice.

Kindest Regards,



Dan Kidd

# THE SPELL LAW OFFICE, LLC

MITZI H. (SPELL) POLLARD*
ATTORNEY AT LAW
E-MAIL: spell@bellsouth.net

* Certified as a Rule 31 Listed Family Law and Civil Mediator

5865 RIDGEWAY CENTER PKWY, SUITE 300
MEMPHIS, TENNESSEE 38103-0543
(901) 529 – 9299
FACSIMILE (901) 529 - 9322



September 1, 2011

**SENT VIA FACSIMILE (615) 532-8757**

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:

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 written for the following reasons:

1. 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.
2. Bidding for contracts will necessarily result in decreased pay to attorneys who, as the AOC has found, are already undercompensated.
3. 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.
4. The proposed Amendment is vague and lacks clear and concise standards.
5. The proposed Amendment and its operation present a threat of serious ethical problems.

1. 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.

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.

II. 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. In fact, the majority of my business involves indigent representation. 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.

III. 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.

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 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, and to match attorney skill sets and experience to cases. In my humble opinion, the proposed Amendment threatens to remove local judicial authority to accomplish all these critical things.

IV. The proposed Amendment is vague and 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.

V. The proposed Amendment and its operation present 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.

## VI. 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,

Mitzi H. Pollard

Mitzi H. Pollard, BPR#:021936

/MHP

September 1, 2011

Steve Reiter
PO Box 23862
Nashville, TN 37202
e-mail: parkadvocate99@gmail.com



Janice Rawls
Chief Deputy Clerk
Tennessee Supreme Court
Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219

RE: Public Comment on proposed rule amendment regarding indigent defense

Janice Rawls:

I strongly oppose a proposed rule amendment to our indigent defense system currently under consideration by the Tennessee Supreme Court. Shifting to a fixed fee arrangement will only short change the rights of defendants and create unnecessary financial pressure on legal advocates. We can do better.

The current reimbursement rate for attorneys taking on indigent cases is already woefully inadequate, and this proposal makes a bad situation worse.

I am sure that we could look at more cost effective ways to deal with our current situation. It should be pointed out that the aggressive enforcement policies by police departments on the poor and vulnerable, such as the homeless, are probably one of the largest contributing factor to the needed increases in funding levels. The police, in order to demonstrate a high activity level, cite a disproportionate number of individuals based on socioeconomic status. For example, the Metropolitan Nashville Police Department (MNPD) concedes that their top 50 offenders, in other words the ones with the most violations in a year's time frame, are overwhelmingly homeless.

Sweeping the streets of the poor might make some people feel good, but in the end solves nothing. This is poor public policy.

The United States has the highest incarceration rate in the world. We have far too many wrongfully convicted individuals because our check and balance system on the Prosecutor's office is broken.

I couldn't help but notice in *The Tennessean* article dated August 31, 2011 written by Brandon Gee that "there were 126,000 claims submitted to the state last year, including 24,000 in Davidson County". I believe the 24,000 number is accurate and the 20th Judicial District is

the busiest district in the state of Tennessee. I believe the number is high, not because crime is out of control in Nashville, TN, but because of the intentional social profiling practices targeting a certain class of individuals. I am confident that a comprehensive analysis of the increases in indigent defense would bear this out.

The court system should focus more on rendering decisions that promote constitutional policing policies that prohibit illegal stops, searches, and arrests. Until that is done, we will continue to see the unnecessary clogging of our courts.

Sincerely,

Steve J Reiter

Steve J. Reiter

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

SEP 1 2011

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

---

## COMMENT OF TENNESSEE BAR ASSOCIATION

---

The Tennessee Bar Association ("TBA"), by and through its President, Danny Van Horn; Chair of its Criminal Justice Section, David Eldridge; Chair of its Access To Justice Committee, David Esquivel; General Counsel, Paul C. Ney; and Executive Director, Allan F. Ramsaur, and recommends that the Court not adopt the proposed amendments to TN. Sup. Ct. R. 13, Section 7; that the Court establish the comprehensive independent system for indigent representation or in the alternative that the Court establish, with professional guidance, a pilot program permitting contracting for representation of persons subject to mental health commitment or subject to contempt for child support.

## I. THE COURT SHOULD NOT ADOPT THE AMENDMENT TO ITS RULE 13, SECTION 7

Since the outset of the reimbursement of counsel who provide indigent representation in the 1960s, the Executive Secretary of the Tennessee Supreme Court, later the Administrative Office of the Courts ("AOC"), has served effectively as the agency charged with payment of claims for indigent representation. The role of that office has never been to establish professional standards, monitor the adequacy of the services or otherwise administer programs of indigent representation. Indeed, this Court has on two occasions established and later disbanded advisory commissions with the responsibility for advising the Court and addressing standards for indigent representation. In each instance, these commissions developed and proposed standards for representation generally endorsed by the bench and bar.

Despite the good track record of the AOC administering a system of reimbursement of counsel on indigent representation and continued expansion of responsibility from beyond indigents who are criminally accused into mental health proceedings, contempt matters, termination of parental rights and other areas, the AOC has never been called upon to establish standards and administer

programs in the manner proposed in this rule. Entities within the TBA and several other commentors have pointed out ways in which the award of contracts in other jurisdictions have led to grave concerns regarding the adequacy of the services provided under low-bid contracts.

These concerns are coupled with the substantial confusion which appears to exist regarding the intentions of the AOC regarding this amendment. The amendment speaks broadly permitting the AOC to contract all indigent representation services and, yet, both public and private statements by the AOC have indicated an intention only to pursue contract systems for representation in cases under the mental health law and child support contempt.

While TN. Sup. Ct. R 13, § 1(e)(5) requires that counsel "continue to represent an indigent party throughout the proceedings, including any appeals…", the amendment to the rule makes no mention of those continuing responsibilities. This is yet another indication that the proposal requires substantial further work and consideration before adoption.

The TBA submits that the foregoing should lead the Court to a conclusion that granting broad authority as proposed in this rule would be unwise at this time.

## II. THE COURT SHOULD ESTABLISH AN INDEPENDENT, COMPREHENSIVE, PROFESSIONAL SYSTEM FOR ADMINISTRATION OF INDIGENT REPRESENTATION SERVICES

In response to proposed amendments to TN. Sup. Ct. R. 13 in 2003, the TBA, along with several other entities, proposed the establishment of Tennessee Indigent Representation Services. These services would be administered by a commission made up of judges, lawyers and citizens with expertise and background in indigent representation services. This group would hire an executive director and the commission would administer all indigent representation services. This independent body, under the judicial branch, would develop standards of training, experience and performance of appointed counsel and otherwise take over general superintendence of what is conceived to be a comprehensive system for appointment and compensation of counsel. Attached as Exhibit A are the joint comments filed at that time along with the proposed amendment to Rule 13.

The TBA submits that the establishment of this system would enhance confidence of the bench and bar that the system is being administered to the highest professional standards consistent with fiscal responsibility. The establishment of this system would obviate the need for the Court to continue to undertake an

examination of these issues ad hoc, but rather elevate the Court's response to recommendations from a professional body which it appoints and oversees.

## III. AS AN ALTERNATIVE, THE COURT COULD ESTABLISH, WITH PROFESSIONAL GUIDANCE, A PILOT PROGRAM PERMITTING CONTRACT REPRESENTATION OF PERSONS SUBJECT TO MENTAL HEALTH COMMITMENT OR SUBJECT TO CONTEMPT FOR NONPAYMENT OF CHILD SUPPORT.

Since the express purpose of the proposed amendment to Rule 7 is to address itself to representation of those subject to the mental health law and those subject to contempt for nonpayment of child support, the TBA proposes that the rule could be amended to accomplish this limited purpose. Consistent with the TBA's recommendation that an independent body with professional expertise be involved in the setting of standards and administration of the program, the TBA recommends that a twelve-person (12) advisory group work with the AOC.

This opportunity to undertake a two-year pilot with the guidance of an advisory body with the adequate oversight would offer a limited examination of the issues presented by a contract system. During the operation of the pilot the advisory

group could make recommendations for necessary changes to fulfill the responsibilities of the bench and bar to protect the rights of those involved while maintaining appropriate accountability. Attached as Exhibit B is an amendment to the proposed TN. Sup. Ct. R. 13, § 7 with provisions for the oversight panel and limiting the scope of the amendment providing for a two-year pilot.

## CONCLUSION

For the reasons cited, the TBA urges the Court not to adopt the rule as proposed The TBA urges the Court to delve further into an examination of a comprehensive system for administration of indigent representation services or to permit development of a pilot program for limited classes of cases.

RESPECTFULLY SUBMITTED,

By: 

DANNY VAN HORN (018940)
President, Tennessee Bar Association
Butler, Snow, O'Mara, Stevens &
Cannada, PLLC
6075 Poplar Avenue, Suite 500
Memphis, Tennessee 38119
(901) 680-7331

By: /s/ by permission

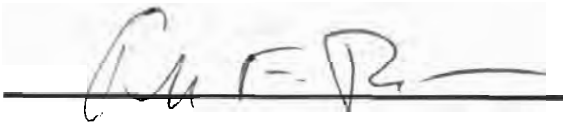
DAVID ELDRIDGE (012408)
Chair, Tennessee Bar Association
Criminal Justice Section
Eldridge & Blakney PC
400 West Church Avenue, Suite 101
Knoxville, Tennessee 37902
(865) 544-2010

By: /s/ by permission

DAVID ESQUIVEL
Chair, Tennessee Bar Association
Access To Justice Committee
Bass, Berry & Sims PLC
150 3rd Avenue South, Suite 2800
Nashville, Tennessee 37201
(615) 742-6285

By: /s/ by permission

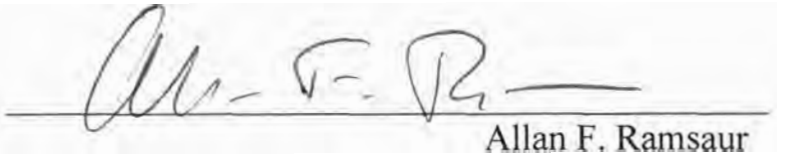
PAUL C. NEY (007012)
General Counsel,
Tennessee Bar Association
Waddey & Patterson
3504 Richland Avenue
Nashville, Tennessee 37205
(615) 242-2400

By: 

ALLAN F. RAMSAUR (5764)
Executive Director,
Tennessee Bar Association
Tennessee Bar Center
221 Fourth Avenue North, Suite 400
Nashville, Tennessee 37219-2198
(615) 383-7421

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "C" by regular U.S. Mail, postage prepaid on September 1, 2011.



Allan F. Ramsaur

**Exhibit A – Joint Comments and Proposed Amendments to Rule 13 - 2003**

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

| | | |
|---|---|---|
| IN RE: | ) | |
| | ) | |
| PROPOSED AMENDMENTS TO TENN.S.CT.R. 13 | ) | M2003-02181-SC-RLS-RL |
| | ) | |

**JOINT COMMENTS ON THE PROPOSED AMENDMENTS TO TENN.S.CT.R. 13 BY THE TENNESSEE BAR ASSOCIATION, THE TENNESSEE PUBLIC DEFENDERS CONFERENCE, THE TENNESSEE POST-CONVICTION DEFENDER, AND THE TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

## I. INTRODUCTION

On November 3, 2003, the Tennessee Bar Association, the Tennessee District Attorneys General Conference, the Tennessee Public Defenders Conference, the Tennessee Post-Conviction Defender, and the Tennessee Association of Criminal Defense Lawyers ("Joint Commentors") filed a joint motion to extend the period for commenting on the proposed amendments to Tenn.S.Ct.R. 13. The purposes of this request were to enable discussions among representatives of the moving entities and to further investigation, as detailed in the motion. Movants' aim was to prepare and submit joint comments as to the ways in which the proposed rule could better address not only the just, speedy and economical disposition of criminal actions and post-conviction proceedings but also the provision of counsel and services to indigent persons in other proceedings described in the proposed rule.

On November 13, 2003, the Court extended the comment period and directed the movants to consider particularly and comment on: (1) the compensation of guardians ad litem and attorneys in dependency and neglect cases; (2) the feasibility and desirability of restructuring the indigent defense system so that requests for services are decided by a central administrative entity rather than by trial courts; and (3) the proposed fee schedule and monetary caps for investigators, experts, and interpreters.

**Exhibit A – Joint Comments and Proposed Amendments to Rule 13 - 2003**

Representatives from the present groups and representatives of the District Attorneys General Conference met on 5 separate occasions. The careful, professional devotion of all involved has been noted in more than one instance. The group also held an extended, three hour meeting with representatives of the Administrative Office of the Courts and Lisa Rippy on behalf of the Chief Justice. The insight which they provided was invaluable. Regrettably, the District Attorney's General Conference ultimately decided that they could not join in the final work product of the group. Several of the suggestions from the District Attorneys General Conference are incorporated into the proposals. The present groups express their appreciation for the professional demeanor and cooperative attitude of the District Attorneys' representatives.

II. THE COURT SHOULD ESTABLISH AN INDEPENDENT BODY WITHIN THE JUDICIAL DEPARTMENT TO ADMINISTER REPRESENTATION AND OTHER SERVICES FOR THE INDIGENT PARTIES.

The joint commentors strongly believe that establishing a centralized administrative agency is crucial to the proper final resolution of many concerns raised by, and presumably animating, the proposed Rule 13. Review of the ABA standards and guidelines, studies of Tennessee's indigent defense system, information from other states, and discussions about problems and abuses of the present system all have indicated that the economical and efficient resolution of these problems demand the creation of a centralized agency charged not only with the promulgation of meaningful standards but with the efficient and economical management and supervision of those standards.

Although the relatively recent enactment of the District Public Defender system and the Tennessee District Public Defenders Conference has gone a very long way toward improving indigent representation in Tennessee, significant issues relating to the administration and operation of the complex and ever-growing system of indigent representation are not within the power of the Conference to address or resolve. The independent body approach, if adopted by the Court, would satisfy this long overdue, and much needed supplement; provide the

foundation for principled, incremental improvements in the system; offer a mechanism for providing substantial savings, which is not to say limiting what appears to be unavoidable growth; and relieve the courts, not only of the burden of administering the system on a day-to-day basis and eliminate dual roles of administering and enforcing the administration of the system on the part of the courts.

The first proposal annexed hereto as Exhibit A, outlines the creation of Tennessee Indigent Representation Services (TIRS) an independent agency within the Supreme Court to administer indigent representation services. Movants strongly believe that TIRS is the more workable of the two proposals. The adoption of the proposed rule creating TIRS would permit the active management of a true system rather than the fragmented, rules-based, reactive scheme in place now. This will substantially enhance the administration of and further promote the economic and efficient delivery of indigent services in Tennessee.

TIRS would completely remove any appearance of conflict between the courts roles as administrator, on the one hand, and their roles as the final adjudicator of closely-related legal claims and issues, on the other. TIRS would also, among other things, (1) develop uniform, state-wide standards for the appointment, performance, and compensation of counsel and service providers; (2) prescribe, administer, and monitor uniform, cost-effective procedures and rates for state-wide support services; and (3) relieve the Court of the day-to-day oversight of these matters,.

## III. IF THE COURT CHOOSES NOT TO ESTABLISH THE OFFICE OF TENNESSEE INDIGENT REPRESENTATION SERVICES AT THIS TIME, THE COURT SHOULD ADOPT SUBSTANTIAL AMENDMENTS TO PROPOSED RULE 13.

The present rule and the rule proposed by the Court in September each provide a framework for dealing with indigent representation and related services. This framework administered by the trial courts, this Court and the Administrative Office of the Courts is a

rules-based, locally administered, ad hoc non-system for administration of indigent defense services. The movants reiterate that they believe that the far preferable system is one in which brings active standards- based management and resources to the problems presented. However, should the court decide to stay with the present system, the groups' jointly recommend several changes, represented in the attached Exhibit B draft of the proposed rule. The highlights of the changes which we recommend , in order of their inclusion in draft, include:

Explicit provisions for the appointment and compensation for experts, investigators and other support services in parental rights termination proceedings, dependent and neglect proceedings and delinquency proceedings.

- Clarifying that the determination of indigence for a juvenile must be made independently of the parents' willingness to ask for representation for their child.

- Inclusion of standards established under the Tennessee Rules of Professional Conduct for conflicts of interest and withdrawal.

- Establishment of a single hourly rate for all compensation.

- Inclusion of a different cap for post- dispositional dependency and neglect and parental rights termination cases.

- Inclusion of skills oriented standards for counsel in capital cases.

- Establishment of a flat rate overhead for lawyers to be paid in lieu of detailed telephone, research and copying expense, record- keeping and auditing.

- Re-establishment of a review mechanism for decisions of the director of the Administrative Office of the Courts.

A few of these changes require some additional explanation. The joint commentors fervently believe the present rates of compensation and caps on compensation place an extreme financial burden on the lawyer who wishes to do a competent, thorough job in representing an indigent party. See TRPC 6.2. With the different rates of compensation for in court and out of court time, the rule diminishes the investigation and preparation that effective counsel should do. The different rates , rather , emphasize "seat of the pants" in-court behavior.

Because the rate of compensation is so low, a lawyer in a fully- staffed and effectively run law office could spend all of the money received from representing an indigent party on staff, office equipment and library and research capabilities. We believe that offering an hourly overhead rate and eliminating the detailed record keeping required for long distance telephone, research, local travel and the like will be a step in the right direction.

## IV. THE COURT SHOULD REQUIRE PROCEDURES THAT PERMIT DEFENSE COUNSEL, WITHOUT CONSULTATION, NOTICE AND PARTICIPATION OF THE PROSECUTOR ,TO REQUEST AND OBTAIN NECESSARY EXPERT,INVESTIGATIVE AND RELATED SERVICES AND TO BE REIMBURSED FOR THOSE SERVICES.

Among the most fundamental duties,of lawyer to a client, are loyalty, independence of professional judgement confidentiality and competency. Counsel for an indigent party who seeks to have services provided to practice competently should not have to compromise loyalty and

independence and confidentiality to fulfill that duty. In order to maintain confidentiality, independence of judgement and loyalty, counsel must be permitted to seek necessary expert, investigative, and related services without the intervention of another party in the matter, namely the state. TRPC 1.7[14] and TRPC 1.8(f).

Admirably, the proposed rule has attempted to parse those areas in which ex parte hearings on request for services without the opportunity for those requests to be contested have been held to be constitutionally required . We recommend that the issue be resolved in all cases by a blanket rule.

This issue generated the clearest and cleanest line of departure with District Attorneys General Conference. The District Attorneys believe hearings on matters should be open and the state should be able to contest such requests.

## V. THE RATES OF COMPENSATION AND EXPENSES FOR THOSE APPOINTED TO PROVIDE SERVICES TO INDIGENT PARTIES SHOULD BE ADEQUATE TO ALLOW THE INDIGENT PERSON TO OBTAIN NECESSARY SERVICES.

Many of the comments filed by others in the comment process have focused on the question of rates and other allowances for experts and investigators. The joint commentors have little more than an anecdotal basis on which to determine the adequacy of such compensation. It is also quite difficult for the lawyers, who are the lowest paid out of any of the experts in the proposed system to make a recommendation with respect to increased rates.

One of the strongest motivations of the establishment of Tennessee Indigent Representation Services is the joint commentors' belief that the Office Tennessee of Indigent

Representation Services, with its mandate to actively manage the system , can perform the necessary studies and reviews to determine levels of compensation which are necessary to provide adequate services. It is contemplated for example, that defense counsel who believes that she needs a DNA expert might call the office to inquire about the availability and possible cost of such an expert in her area. This kind of active front in involvement may yield great benefits.

## IV. CONCLUSION

The joint commentors have invested more than 450 person hours in reviewing, drafting, and refining proposals . The commentors humbly believe that "TIRS" is both highly desirable and feasible. If the Court is not yet ready to establish this independent body within the Judicial Branch, substantial improvements in Rule 13 can and should be me made.

Respectfully Submitted,

**Tennessee Bar Association**

By _____

John R. Tarpley
Tenn. B.P.R. # 9661
President
Tennessee Bar Association
Lewis, King, Krieg & Waldrop
201 4th Avenue North, Suite 1500
Nashville, TN 37219
615.383.7421

By: _____

Gail Vaughn Ashworth
Tenn. B.P.R. # 10656
General Counsel
Tennessee Bar Association
Gideon & Wiseman, PLC
200 4th Avenue North, Suite 1100
Nashville, Tennessee 37219

By: _____

Allan F. Ramsaur
Tenn.B.P. R #5764
Executive Director
Tennessee Bar Association
221 4th Avenue North, Suite 400
Nashville, Tennessee 37219-2198
615.383.7421

**Tennessee Public Defenders Conference**

By:

_____

John H. Henderson
Tenn.B.P.R. # 3806
President and District Public Defender
21st Judicial District Public Defender Office
407-C Main Street
P.O. Box 68
Franklin, Tennessee 37065-0068
615.790.5519

_____

William Andy Hardin
Tenn.B.P.R. # 14113
Executive Director
Tennessee Public Defenders Conference
211 7th Avenue North, Suite 320
Nashville, Tennessee 37219-1821
615.741.5562

_____

Jeffrey Henry
Tenn.B.P.R. # 2420
Director of Research and Training
Tennessee Public Defenders Conference
211 7th Avenue North, Suite 320
Nashville, Tennessee 37219-1821
615.741.5562

**Tennessee Post-Conviction Defender**

By: _____

Donald E. Dawson
Tenn.B.P.R. # 10723
Post-Conviction Defender
Office of Post-Conviction Defender
530 Church Street, Suite 600
Cornerstone Building
Nashville, Tennessee37243
615.741.9385

**Tennessee Association of Criminal Defense Lawyers**

By: _____

Paul J. Morrow, Jr.
Tenn.B.P.R. # 5559
President and Deputy Post-Conviction Defender
Office of Post-Conviction Defender
530 Church Street, Suite 600
Cornerstone Building
Nashville, Tennessee37243
615.741.9385

By: _____

Mark E. Stevens
Tenn.B.P.R. #
6th Judicial District Public Defender
6th Judicial District Public Defender Office
1209 Euclid Avenue
Knoxville, Tennessee 37921
865.594.6120

By: _____

Jerry P. Black, Jr.
Tenn.B.P.R. # 2069
Associate Professor
University of Tennessee College of Law
1505 W. Cumberland Avenue
Knoxville, Tennessee 37966-1805
865.974.2331

By: _____

Michael J. Passino
Tenn.B.P.R. # 5725
323 Union Street
Nashville, Tennessee 37201
615.255.8764

# EXHIBIT A
## Rule 13- Tennessee Indigent Representation Services

**§ 1. Title.**
This Rule shall be known and may be cited as the "Tennessee Indigent Representation Services" Rule.

**§ 2. Purpose.**
Whenever a person is determined to be indigent and entitled to counsel, it is the responsibility of the State under the federal and state constitutions to provide that person with counsel and the other necessary expenses of representation. The purpose of this Rule is to:

(1) Enhance oversight of the delivery of counsel and related services provided at State expense;

(2) Improve the quality of representation and ensure the independence of counsel;

(3) Establish uniform policies and procedures for the delivery of services;

(4) Generate reliable statistical information in order to evaluate the services provided and funds expended; and

(5) Deliver services in the most efficient and cost-effective manner without sacrificing quality representation.

**§ 3. Office of Tennessee Indigent Representation Services.**
(a) The Office of Tennessee Indigent Representation Services, which is administered by the Director of Tennessee Indigent Representation Services and includes the Commission on Tennessee Indigent Representation Services, is created within the Judicial Department. As used in this Rule, "Office" means the Office of Tennessee Indigent Representation Services, "Director" means the Director of Tennessee Indigent Representation Services, and "Commission" means the Commission on Tennessee Indigent Representation Services. "Public Defender" means a district public defender, the state post conviction defender or the public defender selected in Metropolitan Nashville and Davidson County or Shelby County. "Appointed counsel" means an attorney other than a public defender appointed to represent an indigent party under this rule.

(b) The Office shall exercise its prescribed powers independently of the director of the Administrative Office of the Courts. The Office shall have all powers necessary and proper to fulfill its duties under this Rule including, but not limited to, entering into contracts, owning property, and accepting funds, grants, and gifts from any public or private source to pay expenses incident to implementing its purposes.

(c) The director of the Administrative Office of the Courts shall provide general administrative support to the Office. The term "general administrative support" includes purchasing, payroll, and similar administrative services.

(d) The budget of the Office shall be a part of the Judicial Department's budget. The Commission shall consult with the director of the Administrative Office of the Courts, who shall assist the Commission in preparing and presenting to the General Assembly the Office's budget, but the Commission shall have the final authority with respect to preparation of the Office's budget and with respect to representation of matters pertaining to the Office before the General Assembly.

(e) The director of the Administrative Office of the Courts shall not reduce or modify the budget of the Office or use funds appropriated to the Office without the approval of the Commission.

**§ 4. Responsibilities of Office of Tennessee Indigent Representation Services.**
(a) The Office shall be responsible for establishing, supervising, and maintaining a system for providing legal representation by appointed counsel and related services for all indigent parties in the following cases:

(1) Cases in which an indigent person is subject to a deprivation of liberty or other constitutionally protected interest and is entitled by law to legal representation;

(2) Cases in which an adult is charged with a felony or a misdemeanor and is in jeopardy of incarceration;
(3) Contempt of court proceedings in which the party is in jeopardy of incarceration;
(4) Proceedings initiated by a petition for *habeas corpus*, early release from incarceration, suspended sentence, or probation revocation;
(5) Proceedings initiated by a petition for post-conviction relief;

(6) Parole revocation proceedings pursuant to the authority of state and/or federal law;
(7) Judicial proceedings under Tennessee Code Annotated, Title 33, Chapters 3 through 8, Mental Health Law;
(8) Cases in which a superintendent of a mental health facility files a petition under the guardianship law, Tennessee Code Annotated, Title 34; and
(9) Cases under Tennessee Code Annotated section 37-10-304 and Tennessee Supreme Court Rule 24, relative to petitions for waiver of parental consent for abortions by minors;
(10) Cases in which a juvenile is charged with juvenile delinquency for committing an act which would be a misdemeanor or a felony if committed by an adult;
(11) Cases under Titles 36 and 37 of the Tennessee Code Annotated involving allegations against parents that could result in finding a child dependent or neglected or in terminating parental rights;
(12) Guardian Ad Litem for the child in cases of reports of abuse or neglect or investigation reports under Tennessee Code Annotated sections 37-1-401 through 37-1-411.
(13) Guardian Ad Litem for the child in proceedings to terminate parental rights.
(14) Cases in which a juvenile is charged in court proceedings to be unruly as defined in Tennessee Code Annotated section 37-1-126(a).
(15) Any other case in which an indigent person is entitled to legal representation under the laws of this state or the federal or state constitution.

(b) The Office shall develop policies and procedures for determining indigence in cases subject to this Rule, and those policies shall be applied uniformly throughout the State. The court shall determine in each case whether a person is indigent and entitled to legal representation, and counsel shall be appointed.

(c) In all cases subject to this Rule, appointment of counsel, determination of compensation, appointment of experts, and use of funds for experts and other services related to legal representation shall be in accordance with rules and procedures adopted by the Office.

(d) The Office shall allocate and disburse funds appropriated for legal representation by appointed counsel and related services for all indigent parties in cases subject to this Rule under rules and procedures established by the Office.

**§ 5. Establishment of Tennessee Commission on Indigent Representation Services.**

The Commission on Tennessee Indigent Representation Services is created within the Office of Indigent Representation Services and shall consist of 9 members. To create an effective working group, assure continuity, and achieve staggered terms, the Commission shall be appointed as provided in this section.

(a) The members of the Commission shall be appointed as follows:

(1) The Chief Justice of the Tennessee Supreme Court shall appoint one member, who shall be an active or former member of the Tennessee judiciary.

(2) The Chief Justice shall appoint one member upon the recommendation of the Speaker of the Senate.

(3) The Chief Justice shall appoint one member upon the recommendation of the Speaker of the House of Representatives.

(4) The Tennessee District Public Defenders Conference shall appoint one member.

(5) The Post Conviction Defender Commission shall appoint one member.

(6) The Tennessee Bar Association shall appoint one member.

(7) The Tennessee Association of Criminal Defense Lawyers shall appoint one member.

(8) The Tennessee Lawyers Association for Women shall appoint one member.

(9) The Tennessee Association of Black Lawyers, or by mutual agreement, the Ben Jones and the Napier-Looby chapters of the National Bar Association shall jointly appoint one member.

(b) The terms of members appointed under subsection (a) of this section shall be as follows:

The initial appointments of the Chief Justice shall be for (3) three years. The initial appointments of the Tennessee Bar Association, the Tennessee District Public Defender's Conference and the Post Conviction Defender Commission shall be for (2) two years. The initial appointments of the Tennessee Association of Criminal Defense Lawyers, Tennessee Lawyers Association of Women and Tennessee Association of Black Lawyers (or the person appointed under Section (a)(9)) shall be for one (1) year.

At the expiration of these initial terms, appointments shall be for three (3) years and shall be made by the appointing authorities designated in subsection (a) of this section. No person shall serve more than two consecutive three-year terms plus any initial term of less than three years.

(c) Persons appointed to the Commission shall have significant experience in the defense of criminal or other cases subject to this Rule or shall have demonstrated a strong commitment to quality representation in indigent defense matters. No active prosecutors or law enforcement officials, or active employees of such persons, may be appointed to or serve on the Commission. No active judicial officials, employees of the District Attorney General's Conference, Attorney General and Reporter or Administrative Office of the Courts, or active employees of such persons, may be appointed to or serve on the Commission, except as provided in subsection (a)(1) of this section. No employees of the Office of the Executive Director of the Tennessee District Public Defenders Conference, Post Conviction Defenders Office, or other active employees of the Office of Indigent Representation Services may be appointed to or serve on the Commission. In making appointments the appointing authority shall do so with the conscious intention of selecting a body which reflects a diverse mixture with regard to geography, race, and gender.

(d) All members of the Commission are entitled to vote on any matters coming before the Commission unless otherwise provided by rules adopted by the Commission concerning voting on matters in which a member has, or appears to have, a financial or other personal interest.

(e) Each member of the Commission shall serve until a successor in office has been appointed. Vacancies shall be filled by appointment by the appointing

authority for the unexpired term. Removal of Commission members shall be in accordance with policies and procedures adopted by the Commission.

(f) A quorum for purposes of conducting Commission business shall be a majority of the members of the Commission.

(g) The Commission shall elect a Commission chair from the members of the Commission for a term of two years.

(h) The Director shall attend all Commission meetings except those relating to removal or reappointment of the Director or allegations of misconduct by the Director. The Director shall not vote on any matter decided by the Commission.

(i) Commission members shall not receive compensation but are entitled to reimbursement in accordance with the comprehensive travel regulations.

**§ 6. Responsibilities of Commission.**

(a)The Commission shall have as its principal purpose the development and improvement of programs by which the Office of Tennessee Indigent Representation Services provides legal representation and related services to indigent persons.

(b) The Commission shall appoint the Director who shall be chosen on the basis of training, experience, and other qualifications. The Commission shall consult with the Chief Justice and Director of the Administrative Office of the Courts in selecting a Director, but shall have final authority in making the appointment.

(c) The Commission shall develop standards governing the provision of services under this Rule. The standards shall include:

(1) Standards prescribing minimum experience, training, and other qualifications for appointed counsel;

(2) Standards for appointed counsel caseloads;

(3) Standards for the performance of appointed counsel;

(4) Standards for the independent, competent, and efficient representation of clients whose cases present conflicts of interest, in both the trial and appellate courts;

(5) Standards for providing and compensating experts and others who provide services related to legal representation;

(6) Standards for qualifications and performance in capital cases; and

(7) Standards for determining indigence and for assessing and collecting the costs of legal representation and related services.

In setting these standards the commission shall consider and mindful of the ABA Standards for Criminal Justice: Providing Defense Services; ABA Standards for Criminal Justice: Defense Function; ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases and any other recognized standards.

(d) The Commission shall determine the methods for delivering legal representation under this Rule other than the provision of counsel by a public defender. The Commission shall establish in each judicial district or combination of districts a system of appointed counsel, contract counsel, other methods for delivering counsel services, or any combination of these services.

(e) In determining the method of services to be provided in a particular judicial district, the Director shall consult with the bar association(s) and judges of the district under consideration. The Commission shall adopt procedures ensuring that affected local bars have the opportunity to be significantly involved in determining the method or methods for delivering services in their districts. The Commission shall solicit written comments from the affected local bar and the presiding judge.

(f) The Commission shall establish policies and procedures with respect to the distribution of funds appropriated under this Rule, including schedules of allowable expenses, appointment and compensation of expert witnesses, investigators, interpreters, and other support services and procedures for applying for and receiving compensation.

(g) From time to time the Commission shall evaluate, study and make recommendations about the rates of compensation for appointed counsel, including

the impact of rates on the availability of counsel both in terms of numbers and in terms of quality.

(h) The Commission shall approve and recommend to the General Assembly a budget for the Office.

(i) The Commission shall adopt such other rules and procedures as it deems necessary for the conduct of business by the Commission and the Office.

**§7. Director of Tennessee Indigent Representation Services.**
(a)The Director of Tennessee Indigent Representation Services shall be appointed by the Commission for a term of four years. The Director may be removed during this term in the discretion of the Commission by a vote of two-thirds of all of the Commission members. The Director shall be an attorney licensed and eligible to practice in the courts of this State at the time of appointment and at all times during service as the Director.

(b) The Director shall:

(1) Prepare and submit to the Commission a proposed budget for the Office, an annual report containing pertinent data on the operations, costs, and needs of the Office, and such other information as the Commission may require;

(2) Assist the Commission in developing rules and standards for the delivery of services under this Rule;

(3) Administer and coordinate the operations of the Office and supervise compliance with standards adopted by the Commission;

(4) Subject to policies and procedures established by the Commission, hire such professional, technical, and support personnel as deemed reasonably necessary for the efficient operation of the Office;

(5) Keep and maintain proper financial records for use in calculating the costs of the operations of the Office;

(6) Apply for and accept on behalf of the Office any funds that may become available from government grants, private gifts, donations, or bequests from any source;

(7) Coordinate the services of the Office of Indigent Representation Services with any federal, county, or private programs established to provide assistance to indigent persons in cases subject to this Rule and consult with professional bodies concerning improving the administration of indigent services;

(8) Conduct training programs and assist in development of and promotion of continuing legal education programs for attorneys and others involved in the legal representation of persons subject to this Rule; and

(9) Perform other duties as the Commission may assign.

**§8. Procedure for Appointment.**

(a) Whenever a party to any case in Section 4(a) requests the appointment of counsel, the party, except in the case of a juvenile, shall be required to complete and submit to the court an Affidavit of Indigence Form provided by the Office.

(b) Upon inquiry, the court shall make a finding as to the indigence of the party pursuant to the provisions of Tennessee Code Annotated section 40-14-202, which finding shall be evidenced by a court order.

(c) If the court finds the party indigent, the court shall appoint the public defender subject to TCA section 8-14-201 et seq. If the public defender can not represent the party because of unavailability, conflict or otherwise, the court shall appoint counsel in accord with the plan established by the Office under Section 6.

(d) The appointment of the guardian ad litem under Section 4(a)(12) shall be made upon the filing of the petition or upon the court's own motion, based upon knowledge or reasonable belief that the child may have been abused or neglected. The child who is or may be the subject of a report or investigation of abuse or neglect shall not be required to request appointment of counsel. A single guardian ad litem shall be appointed to represent an entire sibling group unless the court finds that conflicting interests require the appointment of more than one guardian.

(e) The child who is or may be the subject of proceedings to terminate parental rights under Section 4(a)(13) shall not be required to request appointment of

counsel. A single guardian ad litem shall be appointed to represent an entire sibling group unless the court finds that conflicting interests require the appointment of more than one guardian.

## §9. Procedure for Application for Related Services.

- If the court finds a party indigent under Section 8(b), counsel may request reimbursement for services related to representation.
- Such request shall be in a form and with such specificity as may be prescribed by the Office.
- The request shall be made addressed to the Director who shall determine whether the request shall be granted.
  The Commission shall by rule or regulation establish the standards for granting requests and rules for appeals from such determinations, which shall include appeal of the director's decision to the full commission.
- The request for reimbursement, the decision of the director and the decision of the commission shall be filed under seal with the court in which the proceeding is being heard and shall become part of the record upon application for new trial or appeal.
- Confidentiality. All requests for services, approvals of services, requests for payments of services, and payments for services provided pursuant to this Rule are deemed to be non-public records. All such information shall be kept and remain confidential and privileged unless and until, it becomes pertinent to a disciplinary or malpractice proceeding.

## § 10 Rates and Maximum Amounts of Compensation for Legal Representation.

The following shall be the rates of compensation and maximum compensation to be allowed for legal representation.

(a) The hourly rate for appointed counsel in non-capital cases is fifty dollars ($50) per hour for time reasonably spent.

(b) The maximum compensation allowed shall be determined by the original charge or allegations in the case. The compensation allowed appointed counsel for services rendered in a non-capital case shall not exceed the following amounts:

(1) Five hundred dollars ($500) for:

(A) Cases in which an adult or a juvenile is charged with a misdemeanor and is in jeopardy of incarceration;

(B) Dependent or neglected child cases, from the filing of the dependency petition through the dispositional hearing, including the preliminary hearing, ratification of the
initial permanency plan, adjudicatory and dispositional hearings;
(C) Contempt of court cases where an adult or juvenile is in jeopardy of incarceration;
(D) Guardian ad litem representation in accordance with section 1(d)(2)(C) for a child or sibling group who is or may be the subject of a report of abuse or neglect or an investigation report under Tennessee Code Annotated sections 37-1-401 through 37-1-411, from the filing of the dependency petition through the dispositional hearing, including the preliminary hearing, ratification of the initial permanency plan,
adjudicatory and dispositional hearings;
(E) Parole revocation proceedings pursuant to the authority of state and/or federal law;
(F) Judicial proceedings under Tennessee Code Annotated, Title 33, Chapters 3 through 8, Mental Health Law;
(G) Cases in which a superintendent of a mental health facility files a petition under the guardianship law, Tennessee Code Annotated, Title 34;
(H) Cases under Tennessee Code Annotated section 37-10-304 and Tennessee Supreme Court Rule 24, relative to petitions for waiver of parental consent for abortions by minors;
(I) Cases in which a juvenile is charged upon three (3) or more court proceedings to be unruly as defined in Tennessee Code Annotated section 37-1-126(a);
(J) Counsel appointed pursuant to Tennessee Supreme Court Rule 40(e)(2) and in accordance with section 1(d)(2)(C) for a child or sibling group who is or may be the subject of a report of abuse or neglect or an investigation report under Tennessee
Code Annotated sections 37-1-401 through 37-1-411, from the filing of the dependency petition through the dispositional hearing, including the preliminary hearing, ratification of the initial permanency plan, adjudicatory and dispositional hearings;

(2) Seven hundred fifty dollars ($750) for:

(A) Dependent or neglected child cases, for all post-dispositional proceedings, including foster care review board hearings, post-dispositional court reviews and permanency hearings;

(B) Guardian ad litem representation in accordance with section 1(d)(2)(C) for a child or sibling group who is or may be the subject of a report of abuse or neglect or an investigation report under Tennessee Code Annotated sections 37-1-401 through 37-1-411, for all post-dispositional proceedings, including foster care review board hearings, post-dispositional court reviews, and permanency hearings;

(C) Counsel appointed pursuant to Tennessee Supreme Court Rule 40(e)(2) and in accordance with section 1(d)(2)(C) for a child or sibling group who is or may be the subject of a report of abuse or neglect or an investigation report under Tennessee Code Annotated sections 37-1-401 through 37-1-411, for all post-dispositional proceedings, including foster care review board hearings, post-dispositional court reviews, and permanency hearings.

(3) One thousand dollars ($1,000) for:

(A) Preliminary hearings in general sessions and municipal courts in which an adult is charged with a felony;
(B) Cases in trial courts in which the defendant is charged with a felony;
(C) Direct and interlocutory appeals;
(D) Cases in which a defendant is applying for early release from incarceration or a suspended sentence;
(E) Non-capital post-conviction and *habeas corpus* proceedings;
(F) Probation revocation proceedings;
(G) Cases in which a juvenile is charged with a non-capital felony;
(H) Proceedings against parents in which allegations against the parents could result in termination of parental rights;
(I) Guardian ad litem representation in termination of parental rights cases in accordance with section 1(d)(2)(D);
(J) Counsel appointed pursuant to Tennessee Supreme Court Rule 40(e)(2) and in accordance with section 1(d)(2)(C) for a child or sibling group in termination of parental rights cases;
(K) All other non-capital cases in which the indigent party has a statutory or constitutional right to be represented by counsel.

(c) (1) An amount in excess of the maximum, may be sought by filing a

request with the Office . The request shall include specific factual allegations demonstrating that the case is complex or extended in accordance with Tennessee Code Annotated section 40-14-207(a)

(2) The Office shall enter a decision which evidences the action taken on the request. The following, while neither controlling nor exclusive, indicate the character of reasons that may support a complex or extended certification:

(A) the case involved complex scientific evidence and/or expert testimony;

(B) the case involved multiple defendants and/or numerous witness;

(C) the case involved multiple protracted hearings;

(D) the case involved novel and complex legal issues.

(3) Upon approval of the complex or extended claim the following maximum amounts apply:

(A) One thousand dollars ($1,000) in those categories of cases where the maximum compensation is otherwise five hundred dollars ($500);

(B) One thousand five hundred dollars ($1,500) in those categories of cases where the maximum compensation is otherwise seven hundred fifty dollars ($750),

(C) Except as provided in section (2)(e)(3)(C), two thousand dollars ($2,000) in those categories of cases where the maximum compensation is otherwise one thousand dollars ($1,000);

(D) Three thousand dollars ($3,000) in cases in trial courts in which the defendant is charged with a felony.

(E) The Office may waive the three thousand dollar ($3,000) maximum if the request demonstrates that extraordinary circumstances exist and failure to waive the maximum would result in undue hardship.

(d) Appointed counsel in capital cases, other than public defenders, shall be entitled to reasonable compensation as determined by the Office subject to the limitations of this rule, which limitations are declared to be reasonable. Compensation shall be limited to the two attorneys actually appointed in the case. Appointed counsel in a capital case shall submit to the Office interim claims for compensation. Interim claims shall include services rendered within the previous 180-day period. Compensation requests shall be deemed waived and shall not be paid if the request includes claims for services rendered more than 180 days prior to the date on which the services were rendered.

(e) Hourly rates for appointed counsel in capital cases shall be as follows :

(1) Lead counsel--one hundred dollars ($100);

(2) Co-counsel--eighty dollars ($80);

(3) Post-conviction counsel--eighty dollars ($80).

**Exhibit B - Section 7. Pilot Program of Contracts for Representation in Certain Proceedings**

Section 7. Contracts for Indigent Representation

(a) In addition and as an alternative to the procedures for appointment and compensation of court-appointed counsel for services described in subsection (b) below, the Administrative Director is authorized to enter into contracts for such services. Such contracts may establish a fixed fee for representation in a specified number and type of cases;

(b) The matters which may be contracted under this pilot include those enumerated in Section 1(d)(F) relative to judicial proceedings under TCA Title 33, Chapters 3 through 8 and cases under Section 1(d)(B) when the proceeding for contempt involves the non-payment of child support.

(c) Any such contract for indigent representation shall be awarded pursuant to the solicitation of proposals for professional services from interested parties and shall not be awarded solely on the basis of cost. Each proposal shall be evaluated to determine the quality of representation to be provided, including the ability of the attorney(s) who would provide services under the contract to exercise independent judgment on behalf of each client and the ability of the attorney(s) to maintain workload rates that would allow the attorney(s) to devote adequate time, talent and resources to each client covered by such contract.

(d) Attorneys providing legal services under any contract entered into pursuant to this Section shall be given first priority for appointment to any enumerated case in which the litigant is otherwise entitled to the appointment

of counsel pursuant to this rule.

(e) In developing the standards for professional representation and mechanisms for establishing and monitoring the adequacy of services provided under such contracts, the Director of the AOC shall appoint an advisory panel made up of no fewer that nine (9) lawyers who regularly practice in the types of cases to be contracted and no fewer than three (3) non-lawyers including mental health professionals, with knowledge and interest in the issues to be addressed.

(f) This Section 7 of TSC Rule 13 shall be effective October 1, 2011 and expire on September 30, 2013 unless and until renewed by this Court.

Adele Anderson
Tennessee Board of Law Examiners
401 Church Street Suite 2200
Nashville TN 37243

Ursula Bailey
William Henry Hastie Chapter - National Bar As
706 Walnut St
Knoxville TN 37902

Beckman
Lincoln Memorial University Duncan School of l
601 West Summit Hill Dr.
Knoxville TN 37902

Barri Bernstein
Tennessee Bar Foundation
618 Church St Suite 120
Nashville TN 37219

Rebecca Blair
Tennessee Lawyers Assn for Women
5214 Maryland Way Ste 207
Brentwood TN 37027

Doug Blaze
University of Tennessee College of Law
1505 W. Cumberland Ave Rm 278
Knoxville TN 37996

Lucie Brackin
Association for Women Attorneys
65 Union Ave. 9th Floor Cotton Exchange Bldg
Memphis TN 38103

Beth Brooks
East Shelby County Bar Assn
2299 Union Ave
Memphis TN 38104

Jack Burgin
Tennessee Commission CLE
PO Box 629
800 South Gay St Suite 2500
Knoxville TN 37901

Tonya Cammon
Federal Bar Assn Chattanooga Chapter
633 Chestnut St. Suite 900
Chattanooga TN 37450

John Cannon
Memphis Bar Association
22 N. Front Street Suite 850
Memphis TN 38013

Hewitt Chatman
Ballard-Taylor Bar Association
511 Algie Neely Rd
Denmark TN 38391

Erik Cole
Tennessee Alliance for Legal Services
50 Vantage Way Suite 250
Nashville TN 37228

Isaac Conner
Tennessee Alliance for Black Lawyers
1223 5th Ave. N.
Nashville TN 37208

Walter Crouch
Federal Bar Assn-Nashville Chapter
P O Box 198966
511 Union St Suite 2700
Nashville TN 37219

Karen Crutchfield
ETLAW
180 Market Place Blvd.
Knoxville TN 37922

Barbara Deans
Ben Jones Chapter - National Bar Association
365 Marianna Cove
Memphis TN 38111

Laura Dykes
TN Assn of Criminal Defense Lawyers
404 James Robertson Pky #2022
Nashville TN 37219

Anne Fritz
Memphis Bar Association
80 Monroe Suite 220
Memphis TN 38103

Gabel
Federal Bar Assn - Memphis Chapter
1000 Ridgeway Loop Rd #600
Memphis TN 38120

Melanie Gober
Lawyers Association for Women
P O Box 190583
Nashville TN 37219

Chris Guthrie
Vanderbilt University School of Law
131 21st Ave. South Room 108
Nashville TN 37203

Lela Hollabaugh
Board of Professional Responsibility
1600 Division St. Suite 700
Nashville TN 37203

Lynda Hood
Chattanooga Bar Association
801 Broad St Suite 420 Pioneer Bldg
Chattanooga TN 37402

Nicole James
Napier-Looby Bar Assn
211 Commerce Street Ste 800
Nashville TN 37201

Nancy Jones
Board of Professional Responsibility
10 Cadillac Drive SUite 220
Brentwood TN 37027

Suzanne Keith
Tennessee Association for Justice
1903 Division St
Nashville TN 37203

Kaz Kikkawa
Tennessee Asian Pacific American Bar Assoc
c/o Branstetter, Stranch & Jennings, PLLC
One Park Plaza 1-4-E
Nashville TN 37203

Michael King
Knoxville Bar Association
PO Box 900
900 S. Gay St. Suite 900
Knoxville TN 37901

Jeff Kinsler
Belmont University College of Law
1900 Belmont Blvd
Nashville TN 37212

Ira Long
Chattanooga Bar Association
1205 Tallan Building Two Union Square
Chattanooga TN 37402

Ira Long
Chattanooga Bar Association
1205 Tallan Building Two Union Square
Chattanooga TN 37402

Joe Loser
Nashville School of Law
4013 Armory Oaks Drive
600 Linden Square
Nashville TN 37204

Marty McAfee
Lawyers Fund for Client Protection
246 Adams Ave
Memphis TN 38103

Judy McKissack
Tennessee Commission CLE
221 Fourth Avenue North SUite 300
Nashville TN 37219

Bob Mendes
Nashville Bar Association
2525 West End Ave Suite 1475
Nashville TN 37203

Jimmie Miller
Tennessee Board of Law Examiners
P O Box 3740
1212 N Eastman Rd
Kingsport TN 37664

Phillip Miller
Tennessee Association for Justice
631 Woodland St
Nashville TN 37206

Mario Ramos
TN Assn of Spanish Speaking Attnys
611 Commerce St Suite 3119
Nashville TN 37203

Allan Ramsaur
Tennessee Bar Association
221 4th Ave N Suite 400
Nashville TN 37219

Cnantelle Roberson
S.L. Hutchins Chapter - National Bar Assn.
1 Cameron Hill Circle
Chattanooga TN 37402

Donna Roberts
Lawyers Assn for Women
Marion Griffin Rep
401 Commerce Street Ste 800
Nashville TN 37219

Amanda Rogers
SETLAW
P.O. Box 151
1110 Market St. Suite 500
Chattanooga TN 37401

Barbara Short
TN Assn of Criminal Defense Lawyers
121 21st Ave. N. Ste 311
Nashville TN 37203

Kevin Smith
Cecil C. Humphreys School of Law
1 North Front St.
Memphis TN 38103

Tessa Smith
Tennessee Lawyers Assn for Women
P. O. Box 331214
Nashville TN 37203

Melanie Stewart
Tennessee Defense Lawyers Assn
9040 Garden Arbor Dr Ste 101
Germantown TN 38138

William Stover
Napier- Looby Bar Foundation
500 Church St Ste 450
Nashville TN 37219

Libby Sykes
Administrative Offices of the Courts
511 Union St Suite 600
Nashville TN 37219

Brack Terry
Federal Bar Association NE TN Chapter
PO Box 724
918 W First North St
Morristown TN 37815

Marsha Wilson
Knoxville Bar Association
P O Box 2027
505 Main St Suite 50
Knoxville TN 37901

Gigi Woodruff
Nashville Bar Association
315 Union Street Suite 800
Nashville TN 37201

Hardin County Bar Assn

Kristie Anderson
Campbell County Bar Assn
PO Box 196
523 Main Street
Jacksboro TN 37757

Beth Belew
Paris-Henry County Bar Assn
200 N Poplar St
Paris TN 38242

Mark Blakley
Scott County Bar Assn
P O Box 240
Huntsville TN 37756

Ben Boston
Lawrence County Bar Assn
P O Box 357
235 Waterloo St
Lawrenceburg TN 38464

Lee Bowles
Marshall County Bar Assn
520 N Ellington Pkwy
Lewisburg TN 37091

Christopher Brown
Jefferson County Bar Assn
PO Box 1750
1240 Gay Street 2nd Floor
Dandridge TN 37725

Jeff Cherry
Fifteenth Judical District Bar Assn
150 Public Square
Lebanon TN 37087

William Cockett
Johnson County Bar Assn
PO Box 108
Mountain City TN 37683

Daryl Colson
Overton County Bar Assn
211 N Church St
Livingston TN 38570

Bratten Cook
Dekalb County Bar Assn
104 N 3rd St
Smithville TN 37166

Mark Cowan
Hamblen County Bar Assn
717 W Main St Ste 100
717 West Main Street Suite 100
Morristown TN 37814

Terri Crider
Gibson County Bar Assn
P.O. Box 160
1302 Main Street
Humboldt TN 38343

Ricky Curtis
Bristol Bar Assn
3229 Highway 126
Blountville TN 37617

Robert Curtis
Giles County Bar Assn
P.O. Box 517
Pulaski TN 38478

Creed Daniel
Grainger County Bar Assn
P O Box 6
Courthouse Sq 115 Marshall Ave
Rutledge TN 37861

Melanie Davis
Blount County Bar Assn
329 Cates St
Maryville TN 37801

Michael Davis
Morgan County Bar Assn
PO Box 925
Wartburg TN 37887

William Douglas
Lauderdale County Bar Assn
P O Box 489
109 N Main St
Ripley TN 38063

Joseph Ford
Franklin County Bar Assn
17 S College St
Winchester TN 37398

Andrew Frazier
Benton County Bar Assn
P O Box 208
116 E Main
Camden TN 38320

Garrison
Sumner County Bar Assn
103 Bluegrass Commons Blvd.
Hendersonville TN 37075

Stephen Greer
Twelfth Judicial District Bar Assn
PO Box 758
10b N Rankin Ave
Dunlap TN 37327

Lindsay Gross
Putnam County Bar Assn
100 South Jefferson Ave
Cookeville TN 38501

Scott Hall
Sevier County Bar Assn
105 Bruce St
Sevierville TN 37862

Kim Helper
Williamson County Bar Assn
PO Box 937
21st Judicial Dist
Franklin TN 37065

Jason Holly
Carter County Bar Assn
420 Railroad Street
Elizabethton TN 37643

Carmon Hooper
Haywood County Bar Assn
P O Box 55
10 S Court Square
Brownsville TN 38012

Carmon Hooper
Haywood County Bar Assn
P O Box 55
10 S Court Square
Brownsville TN 38012

Carmon Hooper
Haywood County Bar Assn
P O Box 55
10 S Court Square
Brownsville TN 38012

Douglas Jenkins
Hawkins County Bar Assn
107 E Main St Ste 321
Rogersville TN 37857

Christopher Keeton
Coffee County Bar Assn
401 MURFREESBORO HWY
MANCHESTER TN 37355

Ed Lancaster
Maury County Bar Assn
PO Box 998
147 Bear Creek Pike
Columbia TN 38402

Gregory Leffew
Roane County Bar Assn
PO Box 63
109 North Front Avenue
Rockwood TN 37854

Matt Maddox
Carroll County Bar Assn
P O Box 827
19695 E Main St
Huntingdon TN 38344

Tony Maness
Obion County Bar Assn
PO Box 2041
201 W. Washington Ave
Union City TN 38281

William Mitchell
White County Bar Assn
112 South Main Street
112 south main street
Sparta TN 38583

David Myers
Union County Bar Assn
P O Box 13
105 Monroe St
Maynardville TN 37807

Janet Mynatt
Anderson County Bar Assn
PO Box 5209
Oak Ridge TN 37831

Timothy Naifeh
Lake County Bar Assn
227 Church St
Tiptonville TN 38079

Julia North
Montgomery County Bar Assn
PO Box 361
120 S. 2nd Street
Clarksville TN 37041

Beau Pemberton
Weakley County Bar Assn
PO Box 789
Dresden TN 38225

Jody Pickens
Jackson-Madison County Bar Assn
PO Box 2825
Jackson TN 38302

Tim Potter
Dickson County Bar Assn
210 E. College St.
Dickson TN 37055

Stevie Roller
Warren County Bar Assn
111 W Court Sq Ste 1
McMinnville TN 37110

Curt Rose
Kingsport Bar Assn
PO Box 1404
537 E Center St
Kingsport TN 37662

Walter Rose
Cumberland County Bar Assn
28W. Fifth St.
Crossville TN 38555

Dora Salinas
Cheatham County Bar Assn
104 Frey St
104 Frey St
Ashland City TN 37015

Tommy Santel
Rutherford-Cannon County Bar Assn
P.O. Box 884
16 Public Square N
Murfreesboro TN 37130

Randall Self
Lincoln County Bar Assn
P O Box 501
131A E Market St
Fayetteville TN 37334

Amber Shaw
Tipton County Bar Assn
114 W. Liberty Avenue Suite 300
Covington TN 38019

Todd Shelton
Greene County Bar Assn
100 S Main St
Greeneville TN 37743

Stephanie Sherwood
Washington County Bar Assn
2203 McKinley Rd. Ste 137
Johnson City TN 37604

Ashley Shudan
Loudon County Bar Assn
PO Box 905
Loudon TN 37774

Lois Shults-Davis
Unicoi County Bar Assn
PO Box 129
111 Gay Street
Erwin TN 37650

David Stanifer
Claiborne County Bar Assn
PO Box 217
1735 Main St
Tazewell TN 37879

James Taylor
Rhea County Bar Assn
1374 Railroad St Ste 400
Dayton TN 37321

Dwaine Thomas
Monroe County Bar Assn
PO Box 99
102 College St
Madisonville TN 37354

Harriet Thompson
Hardeman County Bar Assn
P O Box 600
205 East Market St.
Bolivar TN 38008

Robert Thompson
Bradley County Bar Assn
P O Box 191
30 2nd St NW
Cleveland TN 37364

Billy Townsend
Decatur,Lewis,
Perry,Wayne Counties Bar Assn
26 West Linden Ave
26 West Linden Ave
Hohenwald TN 38462

John White
Bedford County Bar Assn
P O Box 169
111 North Spring St Ste 202
Shelbyville TN 37162

Derreck Whitson
Cocke County Bar Assn
P.O. Box 1230
311 East Broadway
Newport TN 37822

Jennifer Williams
Robertson County Bar Assn
109 Fifth Avenue West
109 Fifth Avenue West
Springfield TN 37172

John Lee Williams
Humphreys County Bar Assn
102 S Court Square
102 South Court Square
Waverly TN 37185

Matthew Willis
Dyer County Bar Assn
PO Box H
322 Church Ave. N.
Dyersburg TN 38025

Tish Wilsdorf
Hickman County Bar Assn
820 Hwy 100
121 Cabin Dr.
Centerville TN 37033

Donald Winder
McMinn-Meigs County Bar Assn
PO Box 628
10 W Madison Ave
Athens TN 37371



LAW OFFICE OF
FRIZZELL & FRIZZELL, PLLC

Debrah K. Frizzell, Esquire
Rule 31 Mediator
Terry S. Frizzell, Esquire
Samantha K. Grosland, Esquire

131 Maple Row Blvd
Building C, Suite 301
Hendersonville, TN 37075

Phone (615) 824-7163
Fax (615) 826-4014

August 30, 2011

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

**RE: Docket #M2011-01411-SC-RL2-RL**

Mr. Clerk,

I write in response to the Court's solicitation of comments regarding proposed changes to **Section 7, of Tenn. Sup. C. R. 13.**

1. I submit to the Court that the proposal, as written should **not** be approved.

2. At present, when the District Public Defender has a conflict, or lacks personnel to represent a client, any qualified member of the bar may be selected to be appointed by the Court.

3. With the proposed change, what will be the cure when the Public Defender **and** the contract defense service **both** have a conflict?

4. We all know that this proposed change is solely a means in which to lower costs for indigent client representation. Do the indigent of Tennessee **not at least** deserve attorneys paid at $40.00 per hour?

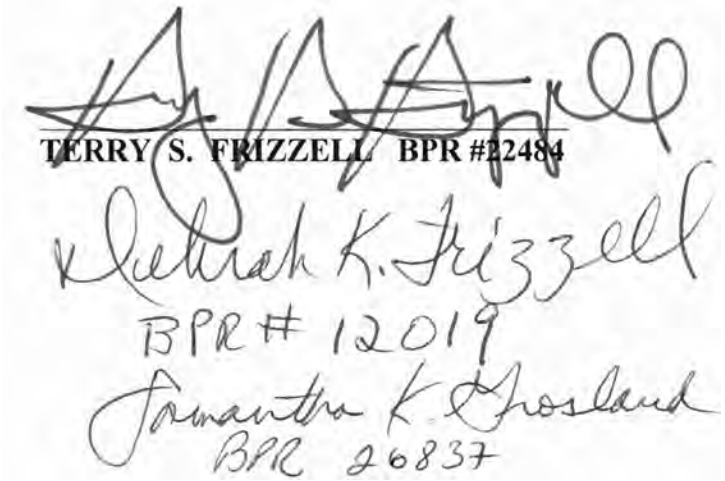
5. Those of us who make ourselves available to represent indigent clients at the trial and appellate level are allowed to bill at $40.00 and $50.00 per hour. However, **in reality,** according to the actual hours and travel that we provide to our clients, **very often we are actually paid $10.00, $15.00, or $20.00 per hour(s) worked.**

6. Today, we have a system in place where each attorney's moral truthfulness, and our local Judges oversee our billing in indigent cases. To change this system to a "bureaucratic group" in Nashville attempting to oversee (95) county contracts, to provide indigent services, how can such **lessen** the cost of such services? **How many more fulltime, with full benefit state employees will be required to manage this proposed change?**

**7. Finally, the indigent of Tennessee "get what the State is willing to pay for." At what hourly rate of representation, do our indigent Constitutionally deserve?**

Most Respectfully,

**FRIZZELL & FRIZZELL, PLLC**




TSF/ab

**Kelly T. Keisling**
State Representative

Home:
1042 Cordell Hull Memorial Dr.
Byrdstown, TN 38549

Legislative Office:
108 War Memorial Building
Nashville, Tennessee 37243
(615) 741-6852

House of Representatives
State of Tennessee

NASHVILLE



Member of Committees

Agriculture

Transportation

rep.kelly.keisling@captiol.tn.gov

1-800-449-8366 EXT 1-6852

August 31, 2011

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

Dear Sir,

After my research into Docket No. M2011-01411-SC-RL2-RL, the pending Amendment to Supreme Court Rule 13, I have come to the decision that I am in support of the ratification of this amendment.

It is my hope that the Administrative Office of the Courts (AOC) would seek to work with the Legislature to create written policies such as those proposed by Rep. Eric Watson. Such policies would include:

- An annual report to the Legislature
- Yearly meeting with the Legislature to work towards reducing the indigent fund
- Discussion with the Legislature for planning and procedures in order to be more effective
- Discussion with the Legislature regarding use, approval and payment of expert services under Rule 13

I, too, would like guidelines to be created that clearly define the procedures for attorneys to access indigent representation funds. Some proposed guidelines include:

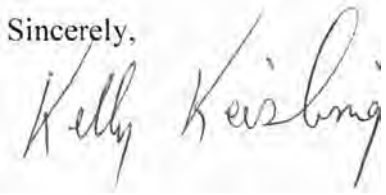
- Attorneys must be thorough and swift with representation
- If representation is ineffective, the attorney may not be compensated or must pay money back to the fund for work that was not done effectively
- Attorneys may not be allowed to bill the indigent fund again for a period of time based on constitutionally deficient representation

(continued)

I am of the belief that the Legislature should be involved in efforts to reform the indigent representation system in our state. I would ask that that the Supreme Court adopt the proposed amendment to Rule 13, and that the Legislature be allowed a greater level of oversight of the indigent representation system.

Thank you for accepting my comments on this very important matter.

Sincerely,



Rep. Kelly T. Keisling

**38th District**
Pickett Scott Clay Jackson Anderson
Counties

Susie Piper McGowan
Attorney at Law
P.O. Box 6
Nunnelly, TN 37137



August 31, 2011

Michael W. Catalano, Clerk
TENNESSEE SUPREME COUT
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219

IN RE: Proposed Amendment to Supreme Court Rule 13, Section 7, M2011-01411-SC-RL2-RL

Dear Mr. Catalano:

I am writing this letter to voice my opposition, and concern, to the proposed amendment. As an attorney who practices Juvenile law in four different counties, I know the dedication required to represent children in dependent/neglect/abuse cases. As such, my disagreement to the amendment is from the viewpoint of a guardian ad Litem.

To begin with, as the court-appointed guardian ad Litem (GAL), I am meeting the children, as well as their parents/custodians, during the worst time of their lives. In addition to being neglected by not having their basic needs met, many these children have been sexually or physically abused. I have represented children who have been stabbed, shot and scalded. I have represented children who have been diagnosed with cancer and for whatever reason, the custodian cannot address their medical needs. Countless hours have been spent at Vanderbilt Children's Hospital conferring with the doctors, nurses and social workers who provide medical attention or social services to the victims. I have been the advocate for children who have been exposed to methamphetamine manufacturing, drug usage and domestic violence. I have had to make decisions to allow children to receive electro-shock therapy and have been in the undesirable position of making life-ending decisions in a court hearing when there is no chance of recovery for the child. There are not any hard and fast rules as to what course of action is best for these traumatized children; it takes time and experience to gain the requisite knowledge. Will the attorneys of the contracted agency have the determination to develop the skills required to represent these children?

Additionally, those of us who serve as a GAL do not have a typical Monday through Friday, 8:00 a.m. to 5:00 p.m. schedule. Our calendars are constantly adjusting to accommodate the needs of DCS personnel to attend meetings, the scheduling of doctor's depositions after hours and meeting with foster parents or parents after their job ends. It requires working nights and weekends. Many times, it is exhausting, both emotionally and physically. Are the contracted attorneys going to have the ability or desire to put in the time required?

**Lastly, some of these cases continue for years.** Even though there is an adjudication and disposition within a short time period, the post-disposition period can carry on for another year or two before the children are able to return home or the parents' rights are terminated. It is conceivable that a contracted agency would have a financial incentive to resolve the cases when there are still issues to be settled.

My representation of these children is not heroic or unusual. I daresay that my colleagues who receive appointments do the same thing. These children are not a petition number or case number to me. I am their voice in court, and am charged with making decisions that are in their best interest. How can we be sure that the attorneys of the contracted agency will do the same?

While I understand the Administrative Office of the Courts is seeking ways to decrease the costs of the indigent defense fund, to implement this amendment would hurt the most vulnerable of Tennessee citizens, which are the children.

Sincerely,

Susie Piper McGowan

BPR # 19,854

STEVE SOUTHERLAND
DEPUTY SPEAKER

10 Legislative Plaza
Nashville, TN 37243-0201
(800) 449-8366, ext. 13851
FAX: (615) 741-9349

4648 Harbor Drive
Morristown, TN 37814
(423) 587-6167

# Senate Chamber
# State of Tennessee

NASHVILLE

Chairman
Energy and Environment

Vice-Chairman
Transportation

Member
Commerce, Labor & Agriculture

August 31, 2011


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

RE: Proposed Amendment to Supreme Court Rule 13

Dear Mr. Catalano:

Please consider this my formal comment to the proposed amendment to Supreme Court Rule 13 which will provide an alternative system for providing indigent defense. While I understand that the current system is extremely costly, in my opinion, the proposed alternative that allows for the removal of local control is not the solution. Further, this proposed amendment could become even more costly to the state than what is practiced presently.

Additionally, proper representation of indigents is of the utmost importance. In my district, I believe the local judges are better equipped to appoint attorneys to these cases because of the judges' knowledge of their expertise and the judge's familiarity with the indigent cases handled routinely in their courts.

Thank you for the opportunity to comment on this amendment.

Sincerely,

Steve Southerland

Steve Southerland

JSS/jcn

sen.steve.southerland@capitol.tn.gov


September 1, 2011

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

**RE: M2011-01411-SC-RL2-RL**
**PROPOSED AMENDMENT RULE 13, § 7**

Honorable Members of the Court,

The first goal of Rule 13 should be to ensure that indigent parties receive competent and zealous representation. Rule 13 should ensure that the poor are not abused or mistreated due to their inability to retain private counsel.

Twenty-one years ago, I started working as a social worker at a non-profit contract defender in Seattle, Washington: the Society of Counsel Representing Accused Persons (SCRAP). Today, SCRAP provides contract legal services for some 13,000 indigent clients per year, with a staff of ninety lawyers, paralegals, social workers and support staff. Some of the finest lawyers I have ever known work for SCRAP. SCRAP attorneys are akin to our public defenders--able to competently carry caseloads many, many times greater than solo practitioners can handle.[1]

Thus, I have had a very positive experience with an alternative method of providing indigent representation. Sadly, Washington State is also home of Wenatchee, Washington and the infamous satanic sex crimes witch hunt, which was only possible through the services of a radically incompetent contract attorney. Clearly, poorly written contracts which stress cost savings over competency, can lead to terrible results.

However, objectively, indigent legal services provided by public defender type organizations prove superior to those provided by individual appointed lawyers. I imagine you have already reviewed Thomas Cohen's article: "Who's better at defending

---

[1] For further information their website is http://societyofcounsel.org. Other contract defenders in Seattle include: Northwest Defender Association, Associated Counsel for the Accused and the Seattle-King County Defender Association.

criminals?"[2] Mr. Cohen, a statistician for the U.S. Bureau of Justice Statistics, U.S. Department of Justice, concluded: "Defendants with assigned counsel...receive less favorable outcomes compared to their counterparts with public defenders." He further concluded that public defenders have results equivalent to those of privately retained lawyers. I realize that some appointed solo practitioners provide fantastic legal representation that is better than that provided by many members of the privately retained bar. Nonetheless, anyone who has spent a decade or more in our criminal courtrooms has, at least on occasion, observed grossly substandard representation, and a sizable portion of the substandard representation has been provided by appointed attorneys. No doubt, there are also incompetent retained lawyers and public defenders--but retained lawyers who routinely do a poor job tend not to get hired, and incompetent public defenders tend to get fired.

Law groups, such as SCRAP or the Metro Public Defender, have enormous institutional strengths that enable superior representation. Young lawyers are surrounded by experience, and provided with in-house training (both formal or more importantly informal). Support staff enables lawyers to focus on being lawyers--instead of wasting time (and billing the AOC) on administrative tasks. Senior attorneys with great experience are available to handle the very complex and difficult cases, and to guide and assist the new attorneys. It is these institutional strengths--not some moral superiority--that enables SCRAP and the Metro Public Defender to provide a higher level of service to their indigent clients.

Thus, as a career contrarian, I must humbly differ with the overwhelming majority of my colleagues. I think that an amendment to Rule 13, § 7 could be beneficial--IF the rule were to also add clauses that required that contracts only be awarded to firms, organizations or groups that:

(1) Have significant experience and proven competency in handling the legal matters contracted for,

(2) Submit a written plan to the AOC, detailing how caseloads will be managed, how competent representation will be assured, and how new attorneys will be trained and supervised,

(3) Submit annual progress reports to the AOC, detailing how many cases have been handled and results thereof--as is appropriate for the type of representation contracted for, and

(4) Are subject to regular review by the AOC, where they must demonstrate competent handling of the matters contracted for.

The above language is a quick, two-minute concoction, and clearly can be revised to be clearer. Nonetheless, I think an amendment to Rule 13 that stresses quality, as well as fiscal efficiency, could lead to superior representation for indigent defendants.

I have no doubt, having spent thirteen years as a public defender, that groups of attorneys can and do provide astoundingly more cost-effective representation than soloists. Our Metro Public Defender can handle a General Sessions caseload many times greater than the appointed bar, with a staff many times smaller than the appointed bar, while providing exemplary representation. I say that, having formerly been the team leader for

---

[2] Electronic copy may be found at http://ssrn.com/abstract=1876474

the Metro Public Defender's General Sessions Team and having trained young public defenders to do their job effectively and zealously. Similarly, in criminal court it is common to observe three public defenders accepting 90% of all new cases, while a half-dozen attorneys are appointed to the other 10%.

I must make three necessary points. (1) I am speaking individually, and not on behalf of *Bell, Tennent & Frogge* (where at least one partner strongly disagrees with me) (2) I have long thought about trying to create something like SCRAP here in Nashville (*i.e.* if the rule were revised, and if I could persuade my partners, I might submit a contract proposal), and (3) I have the greatest of respect for the vast majority of court appointed attorneys--some of the finest attorneys I know make a major portion of their income from such work.

In conclusion, I take the contrarian position that Rule 13, § 7 could be revised to assure more competent representation, while also stressing fiscal efficiency. HOWEVER, I would join my colleagues in opposing the amendment as it presently stands, as it does not include any competency or quality considerations. The first goal of Rule 13 should be to provide indigent defendants with effective, competent and zealous representation. A secondary concern should be fiscal efficiency.

Most respectfully,

Richard Tennent
**Certified Criminal Trial Specialist**
*Bell, Tennent & Frogge, pllc*[3]
414 Union Street, Suite 904
Nashville, Tennessee 37219
(615) 244-1110/fax 244-1114
Richard@BTFLaw.com

[3] This comment does not reflect the views of anyone else at *Bell, Tennent & Frogge* and is not endorsed by the other partners; all opinions are solely my own.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

---

The Fifteenth Judicial District Bar Association submits this Comment in response to the Supreme Court's invitation to members of the bar to comment on the Court's proposed change to the Tennessee Supreme Court Rule 13, §7, authorizing the Administrative Office of the Courts (AOC) to contract with attorneys, law firms or an association of lawyers to provide legal services to indigent persons for a fixed fee.

The Fifteenth Judicial District Bar Association submits that the Proposed Rule be rejected by the Supreme Court for numerous reasons briefly set out herein.

First, this Association notes that the adoption of a contract system has produced negative experiences in other jurisdictions. Contract systems have typically been associated with questionable quality of services, increases in post-conviction litigation and constitutional challenges. Serious ethical concerns further exist in the adoption of a contract system on any level including potential issues with Rules 1.1, 1.2, 1.3, 1.5, and 1.7 of the Rules of Professional Conduct.

Secondly, there is substantial confusion as to the specific intent of this proposed rule and the problems the same seeks to address. Publicly, judicial commitments and child support contempts have been the primary indigent matters targeted by the amendment. However, the amendment specifically references public defenders whose duties are not charged with handling the primary areas claimed to be the target of the amendment. Additionally, as noted in recent studies, the public defender system in Tennessee is grossly understaffed and under funded at present, which causes further concerns about the adoption and implementation of the proposed amendment.

Additionally, this Association is greatly concerned with the implementation of a contract system as it applies indigent criminal defense. There is no language in the proposed rule that would limit application to exclude indigent criminal defense. In fact, as stated above, the use of the term public defender would tend to indicate the potential expansion of the proposed amendment beyond judicial commitments and child support contempt. Potential application of this proposed rule to indigent criminal defense would merit further intricate study and this Association would echo the comments of the Tennessee Association of Criminal Defense Lawyers (TACDL), which also recommends rejection of the amendment and comments in further detail as to the ramifications of applying the same to indigent criminal defense.

Lastly, this Association further recognizes that the proposed amendment fails to provide sufficient clarification as to appropriate fees and rates to ensure this potential contract system does not result in a low bidder system. The same also does not provide sufficient clarity as to appellate services and responsibilities of a private attorney at the appellate level.

Other Bar Associations, including the Tennessee Bar Association Access to Justice Committee, have identified concerns similar to those stated within this comment. Overall this amendment lacks sufficient clarity and bears serious ethical considerations, and yet fails to address the issues recently outlined by the AOC recently to the legislature regarding the greatest use of indigent for funding was defending dependent/neglect and parental right terminations. This Association would submit that further study and thoughtful clarification is warranted to correctly address the issues sought and that, while unpopular, an increase in indigent funding is likely necessary.

As a result, this Association submits the Supreme Court reject the proposed amendment.

Respectfully submitted this 1st day of September, 2011, by:

G. JEFF CHERRY (BPR#:021421)
President, Tennessee 15th Judicial District Bar Association
Lowery, Lowery, & Cherry, PLLC
150 Public Square
Lebanon, TN 37087
(615) 444-7222
FAX: (615) 444-7296

**From:** "Douglas K. Dennis" <doug@dougdennislaw.com>
**To:** <janice.rawls@tncourts.gov>
**Date:** 09/01/2011 4:01 PM
**Subject:** TN Courts: Submit Comment on Proposed Rules


Submitted on Thursday, September 1, 2011 - 4:01pm
Submitted by anonymous user: [74.42.26.130]
Submitted values are:

Your Name: Douglas K. Dennis
Your email address: doug@dougdennislaw.com
Rule Change: Supreme Court Rule 13 - Appointment of Counsel for Indigent Defendants
Docket number: No. M2011-01411-SC-RL2-RL
Your public comments:
Please forgive the haphazard manner in which this comment is being posted, but my office has been preparing for a Rape trial set for two weeks from today, a double homicide post-conviction case and a first degree murder case in Putnam County, Tennessee. Today, I was in Juvenile Court representing children accused of delinquent acts, and parents charged by DCS with child neglect.

All of these cases were Court-appointed, none of them were sought-after by me and all will be greatly underfunded by the State. I often find that I am the only person in a Criminal or Juvenile courtroom, besides my client, who is not getting paid to be there. I frequently waive my fee claim in order to cut the costs my client will be assessed, and am asked to perform pro bono representation for those cases where the client is indigent but does not fall into a category entitling him/her to appointed counsel.

The State of Tennessee has its hands in my pockets every day and, if I ask it to give me a break and let me actually try to make a living, its Judges relentlessly appeal to my sense of duty and beg me to take that "special" case they just cannot find a match for.

The Judges in my District spend each and every day sizing up the talent pool. It is irresponsible and naive to think that everyone with a law degree can represent a client charged with homicide or rape of a child simply because they passed the Bar exam. The serious felony cases go to the experienced attorneys who care about their work. If this was not the case, then the Supreme Court for the State of Tennessee would have to open a special branch just to deal with all of the Ineffective Assistance of Counsel claims. The same basic idea holds true for complicated DCS cases where severe child abuse is alleged, or children are thought to have been sexually abused.

This work is already being done at grossly inadequate prices by dedicated, experienced and competent attorneys. The Court currently considers an amendment allowing for contract indigent representation with an eye towards reducing those payments even further. Anyone who has ever run a business of any size can tell you that price is the determining factor when requesting bids. In our business, a bidder cannot be properly evaluated at arms length. Just because a lawyer may have practiced law for five or six years does not automatically prove that they are any good at it. All it proves is that they have managed to not get disbarred. How does one determine how to award contracts in our line of work if not by the proposed bid amount?

I am a Criminal Defense Attorney, of the private Bar, and I am certainly not alone. I take my job very seriously, and am constantly Ordered to represent Tennessee's indigent citizens for less money than it takes to keep my office lights on. Still, I do the work because I am good at it, and I believe that my duty is to follow the Rules as expressed in the ABA Ethics Guidelines.

Yes, I believe the Guidelines are Rules to follow in my practice, and not just suggestions. The majority of my colleagues strive to perform in accordance with the Guidelines, and not, fortunately, pursuant to the performance guidelines as divined through Court rulings and decisions. The standards are drastically different, in my opinion, and we would all be chased out of town if we represented our clients in a manner approved by such nonsense as Strickland and progeny. Still, this Honorable Court must believe that it can obtain ABA performance for Strickland prices, or it would be violating its duty to secure and protect the Constitutional rights of its citizens by even proposing such a shortsighted bidding proposal.

I refuse to believe that, out of all of the expenditures controlled by this Court, representation of the poor and powerless is the line item that needs to be curtailed. If the Court would wield its considerable resources and influence to ascertain what is really happening in courtrooms across Tennessee, on a daily basis, our State would be better served. Everyday, citizens are overcharged with offenses they did not commit, so as to intimidate them into taking a guilty plea for what they actually have done. Or, at least that is the overall plan. In reality, the criminal defendant will eventually plea to the more serious charge, which he/she has not committed, if the attorney appointed to represent him/her is not willing to put in the time and effort to investigate the case. Surprisingly, this happens all the time. This Court may not be aware of this rather common scenario, because poor people cannot ordinarily afford to launch appeals. I cannot tell this Honorable Court how many dozens of citizens have told me that they never really understood what they were doing when they made the guilty plea, and felt like they were being forced into the plea by their court-appointed lawyer.

This happens every day, and in many variations. We cannot put contract attorneys in positions of such great responsibility if we expect them to be thorough and effective. Every study submitted to this Court thus far has strongly resisted the idea of contract representation; including the AOC's own report.

If the interest of the Court is to provide a more efficient method of providing representation for indigent citizens, without sacrificing basic Constitutional rights, then it needs to speak with those of us who actually do the work, and not accountants, District Attorney Generals or compliance officers. We are acutely aware of the everyday problems with our criminal justice system, and we are not the enemy.

Our local Public Defender's offices, especially in rural districts, suffer from generational drift. Generational drift occurs when an entire generation or age group involved in criminal activity begins to engage in criminal activity against each other. There comes a time when the Public Defender is forced to conflict out of an extremely large amount of cases. There is no way around this drift, and it only becomes more complicated when cases of multiple co-defendants come before the bench. The private Bar is having a tough enough time keeping up with the demand for court-appointed

representation as it is. The idea that a contract attorney office will be able to carry the load is not based on any kind of real world practicality. Again, the private attorneys who conduct this work are not the problem. We are the road to a solution, yet we are not being consulted in a meaningful way.

This Court cannot find one reputable resource to support the formation of contract representation.

We are all aware of the Petition to raise the rates for private practitioners performing indigent defense work that was submitted by TACDL last year. Immediately thereafter, the AOC made the announcement that it was hiring a "compliance officer" to audit our indigent defense claims filed as the natural result of being ORDERED by our local courts to represent the indigent. Soon after that, extended and complex claims filed were being held up and denied outright, with no explanation and no appeal. These are shots across the bow of this Court's traditional allies. We have been spoken to as if we were criminals ourselves, and everyone seems to forget that, many times, we are the only members of the justice system in the courtroom who are not getting paid to be there.

It is dishonorable to attack the credibility and integrity of people who do so much for so little. We are treated, and paid, like indentured servants, yet we keep coming back for more. We do not receive State pensions, health insurance, life insurance subsidies or any other benefits. We have to pay for our CLE training, Westlaw and Lexis subscriptions and books and employ our own office staff. We even have to pay the State of Tennessee a privilege tax for the privilege of being ORDERED to represent its indigent citizens. Oh, and we are the only participants in this justice system equation who have not receive a raise in our compensation rates since 1994. This history, and the character of our daily work, is proof positive that we are, on the whole, an honorable lot.

Noone cares more about the indigent we represent more than us, and we are the only group that has consistently paid for this service. It is my firm belief that a contract system, for ANY type of indigent representation, can only lead to much greater expenditure down the road. The general axiom is that you cannot substitute quantity for quality. It becomes more true when dealing with constitutionally guaranteed rights that affect our families, freedoms and livelihoods. This is a terrible, terrible idea.

Respectfully submitted,
Douglas K. Dennis
Attorney at Law
9 South Jefferson Ave. Ste, 101
Cookeville, TN 38501
BPR# 25348

The results of this submission may be viewed at:
http://www.tncourts.gov/node/602760/submission/704

**KAREN D. CAMPER**
STATE REPRESENTATIVE
LEGISLATIVE DISTRICT 87

**LOCAL ADDRESS:**
1184 OLD HICKORY ROAD
MEMPHIS, TENNESSEE 38116-4334

**LEGISLATIVE OFFICE:**
24 LEGISLATIVE PLAZA
NASHVILLE, TENNESSEE 37243-0192
Telephone: (615) 741-1898
Fax: (615) 253-0211

**E-mail:**
**rep.karen.camper@capitol.tn.gov**

# House of Representatives
# State of Tennessee

**NASHVILLE**

## KAREN D. CAMPER

**CHAIR**
WOMEN'S LEGISLATIVE CAUCUS

**SECRETARY**
SHELBY COUNTY DELEGATION

**COMMITTEES**
TRANSPORTATION
JUDICIARY
ETHICS
GENERAL JUDICIARY SUBCOMMITTEE

**MEMBER**
TN BLACK CAUCUS OF STATE
LEGISLATORS

September 1, 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,

It is with great concern that I write in opposition to the proposed Amendment to Supreme Court Rule 13. Since learning of this proposal, I have heard the concerns of many constituents, individuals, organizations, and community groups, and have found no one who believes that this concept is good for our justice system.

I am writing you today not only as a member of the Tennessee General Assembly, but also as a member of the House Judiciary Committee. Having studied our justice system as it relates to indigent persons from many different viewpoints, I must humbly request that this proposed Amendment not be adopted for the following reasons:

1. The proposed Amendment will likely result in the denial of rights as guaranteed in Article I Section 9 of the Constitution of the State of Tennessee and the Sixth Amendment to the United States Constitution.

2. I do not believe the proposed Amendment is in line with the findings and recommendations of the study committee charged with review of this policy as stated in the findings presented to the 107th General Assembly titled "Tennessee's Indigent Defense Fund: A Report to the 107th General Assembly", dated January 15, 2011.

3. It is highly likely that adoption of the proposed Amendment will increase the overall costs associated with the Constitutionally mandated assistance provided to indigent persons, and would ultimately cost the taxpayers of Tennessee more than the current system.
4. I do not believe the proposed Amendment is in the best interest of the people of Tennessee.

As for my first reason stated above, it is my duty to uphold and defend the Constitution of the United States and the Constitution of the State of Tennessee as well as my constituents' rights as guaranteed by them. It is my belief that should this proposed Amendment be adopted we shall run afoul of the mandates contained in our founding documents, and my constituents run a very high risk of being denied the right to effective assistance of counsel. Like Dr. Martin Luther King, Jr. said in his letter from the Birmingham Jail, April 16, 1963: "Injustice anywhere is a threat to justice everywhere". The denial of these fundamental guaranteed rights is an injustice to us all.

As to my second issue with this proposed amendment, the report submitted to the 107th General Assembly by the AOC stated that the system we have is a good system and it works for Tennessee. This report was authored by a diverse group of interested individuals, and further found that contracting out these Constitutionally mandated services would have a detrimental impact on justice in Tennessee. This causes me a great amount of concern. I know that the AOC spokesperson has said the rule would be applied narrowly. However, as drafted it is broad and will have an impact on all aspects of the Indigent Defense Council Program.

Regarding the alleged potential cost savings which, according to the AOC, is the main idea behind the proposed amendment, these potential short term savings will likely lead to a heavy burden on our state, in the form of both cost and the taxing of other valuable resources in our justice system. The contract system will prioritize cost containment before quality, resulting in lawyers with fewer qualifications and perhaps less training doing a greater percentage of the work. This will most definitely lead to numerous allegations of inadequate representation, and the burden will ultimately be greater on the State. Surely other methods of cost control can and should be considered before opening the floodgates to what may be legitimate court challenges to convictions that we as a state cannot afford the time or money to try twice.

For the reasons stated above this amendment is quite clearly not in the public interest. Adoption of the proposed amendment will have the effect of removing the authority and discretion of local judges, who know their local attorneys better than anyone in a centralized system could, thereby prohibiting the matching of attorney skill sets with case types on an individual basis. As it exists now, the system provides the necessary tools to allow local judges to ensure proper delivery of representation based upon the complexity of individual cases.

The indigent defense costs have grown substantially over the past decade. The AOC and the Justices of our State Supreme Court should be complimented 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 possible short term cost savings. At the same time we would be running the risk of reducing the quality of mandated services provided to the most vulnerable members of our 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 no on adoption of the pending Amendment to Supreme Court Rule 13.

Thank you for your service to the State of Tennessee, and your unwavering commitment to justice in our time.

Respectfully,

The Honorable Karen D. Camper
87th District, Tennessee House of Representatives

# J. A. Hall

*Attorney At Law*

776 East McMurry Boulevard • Hartsville, Tennessee 37074
615-374-9886 • Fax: 615-374-9885 • jeanannhall@bellsouth.net




August 31, 2011

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

Re: IN RE: Rule 13, Section 7
No. M-2011-01411-SC-RL2-RI.

Dear Sir:

It is with great dismay and discouragement that I read the amendment to Tenn. Sup. Ct R 13, §7. I have worked diligently to build a multi-county practice primarily representing parents and children in dependent and neglect actions. As those of us who practice extensively in this arena realize, these cases many times can lead to the death penalty (termination of parental rights) for the affected families. Local judges are more properly suited to ascertain the willingness, experience, and diligence of attorneys practicing in their Court. Further, the local Judges know first hand which attorneys have invested time and due diligence to represent particular styles of cases and allegations. The allegations contained in the State's Petitions reflect a vast array of issues such as physical abuse, emotional abuse, environmental concerns, alcohol and drug issues, sexual abuse, medical neglect, and educational neglect. Many times these Judges use their knowledge of the available attorneys to choose those most knowledgeable of a particular issue.

As Tennesseans and Americans we owe our indigent citizenry access to competent, and concerned counsel. A government may contract for the lowest bidder on a roads project because the specifications are one size fits all. Dependent and Neglect cases are not a one sizes fits all bid package. These families come with varying issues that no person in Nashville can ever begin to guess at. These are no cookie cutter cases. Mental illness, drug addictions, domestic violence, and sexually traumatized children will never fit in a "one size fits all mold". One parent may attack completion of their tasks on a Permanency Plan, while another languishes until they are prodded, encouraged, and assisted by their counsel. Representing these families require attendance at Child and Family Team Meetings, Foster Care Review Board Hearings, multiple court appearances, and visits to children's homes, schools, medical providers, and counselors.

Additionally, I, as well as, many other attorneys that handle these difficult cases, have all represented a parent or child in a case where my full and competent representation far exceeds the allowable remunerations for extended and complex cases. We have all swallowed losses in the thousands because we honored our ethical duties to zealously represent and protect our clients rights. I doubt that the lowest bidder, will be overly concerned with bearing this type of loss in representing these most difficult and time consuming cases.

Many severe abuse cases require extensive research and expert depositions on complex medical issues. The time spent on depositions many times exceeds the allowable billable amounts before you ever set foot in the court for the Adjudication. Child and Family Team Meetings and depositions are scheduled at the convenience of families and medical personnel. Many times they are set for after 5:00 P.M.. It would appear that the only benefit to the amendment is to further financially burden those attorneys most concerned with protecting the rights of Tennessee's poorest families.

It is discouraging to see Tennessee wave a white flag and surrender its poorest citizens' constitutional rights to competent legal representation. Perhaps Tennessee will once again become, the butt of Jay Leno's monologue when he compares our legal system to that of "Road Kill Lawyers". In that, Tennessee is willing to scrape the lowest bidder up off the side of the road and serve it to their most indigent citizenry.

Therefore, I implore those who are considering this ill advised amendment to reject it and work to preserve the Constitutional rights of all Tennessee families to equal justice.

Thank you for allowing me the opportunity to express my opinion.

Yours Truly,

Jean Ann Hall

Jean Ann Hall

THE LAW OFFICES OF

HICKMAN & PLLC
ATTORNEYS AT LAW

James R. Hickman Jr. Ross B. Gray Michael J. Green

Via: Facsimile: 615-532-8757, 615-741-6285

September 1, 2011

RECEIVED BY FAX
DATE: 9-1-11

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,

As an attorney who regularly works with indigent clients, I have followed the proposed issues related to Rule 13 with interest and hope that I may be of assistance. I am not particularly opposed to the proposed amendment to Rule 13, in part because I think that the proposed amendment is attempting to deal with symptoms of a much larger issue. However, I did want to offer some constructive suggestions based on my experience. Over the last several years of my practice I have noted several ways that private pay clients receive more economic efficiency and suggest that the AOC consider the following changes to cut its costs.

1) APPOINT FIRMS NOT JUST ATTORNEYS

Allow multiple attorneys within a firm to bill to one appointment file but do not allow two attorneys to bill at the same time. Put simply, most good lawyers have pleas and announcements worked out before the day of hearing, by appointing firms rather than individual attorneys this can lead to savings for the AOC and increased productivity for the law firm. The mechanics are simple, a firm with multiple lawyers and multiple appointments could have one attorney appear for announcements, simple pleas, and resets then prorate their billing to the appropriate files.

In a firm such as mine (3 attorneys) this could cut AOC cost by two thirds. A typical general sessions day has each attorney with 1 to 5 appointments and with the firm having about 12 cases total on the docket. Generally we have worked out our pleas, dismissals, and resets days prior to the hearing date and are only present to submit our previous agreements with the District Attorney's office, for our clients to reaffirm their agreements

under oath, and to submit said agreements for Court review and approval. If one attorney were permitted to handle standard pleas and announcements rather than insisting all three make appearances the AOC would cut my firm's billing for that day by two thirds. The State would save money and my firm would be more productive because I could have two attorneys at my office working rather than waiting, sometimes hours for announcements.

This policy should not just apply to announcements but also to investigations and research. Our jail has only one attorney's booth, so once an attorney gets the booth he or she will attempt to work every case requiring jail visitation to improve efficiency. On private pay cases one attorney might interview incarcerated clients and witnesses for every attorney in the firm and then forward electronic notes for the lead attorneys' review. Under current AOC rules this process actually costs my firm money as I am paying an attorney for interview time I can not bill through to the AOC. The AOC loses any potential savings based on economy of scale, which is often a selling point of a law firm over a solo practice.

2) ALLOW PARALEGALS AND INHOUSE INVESTIGATORS TO BE BILLED TO THE AOC.

I am not suggesting any form of fee splitting with non-attorneys but rather allow us to bill our employees' work to the AOC the same way we would a private pay client. If the AOC set appropriate rates twenty dollars an hour for example, lawyers could assign competent paralegals and research assistants to draft motions and briefs that are the approved by licensed attorneys. Private pay clients would never accept a fully licensed attorney, especially a lead counsel, billing for hours of case law research that might be necessary but could more easily and inexpressively be performed by a second year law student.

This policy should even be expanded beyond research and drafting and include in investigation. Currently the AOC allows two types of investigators, court appointed private detectives and the appointed attorneys themselves. With private detectives the AOC is paying fifty dollars per hour for work that in private pay cases is typically performed by an employee of the firm at far less costs. If you will investigate, you will find that even small firms often have a former police officer or social worker on staff that conducts witness interviews. This is just a simple way to cut cost and actually improves the firm's work product for their client by utilizing expertise of trained investigators at a lower cost than hiring independent contractors. This strategy would not only save money on investigation costs but would help protect court appointed attorneys from recusals or malpractice when witnesses change their stories or become unavailable.

Example: my partner, James Hickman, often acts as a Guardian ad litem for the courts in juvenile cases. When a witness materially changes his statement of events from an interview to "under oath" testimony my partner is ethically bound to bring this to the court's attention. This may require Mr. Hickman to be removed from the case because he

may be called later to testify and impeach. As attorneys cannot testify in cases where they represent a party, this generally causes a mistrial, a new appointment of counsel, and great additional expense to the State, not to mention harming the speed of justice.

Allowing us to use our normal in-house investigators at a reasonable fee would save the AOC and improve the cause of justice in Tennessee courts. These employees should be prequalified by the AOC and should be required to show specialized knowledge or experience which would improve the overall product produced by the appointed attorney.

3) USE A GRADUATED FEE SYSTEM

As it stands now the AOC pays the same fee per hour for a first year attorney or a twenty year veteran, the fee is so low that only the lowest end (costwise) attorneys can make a profit under the fee structure. Many of your largest billing attorneys are working from their kitchen tables to keep low overhead or are using cash flow from private pay clients to subsidize their state appointment work. Use the savings plan set out above and restructure your pay scale to force firms to use the above strategies to improve efficiencies; our private clients did this to our industry years ago. Use the savings to make cases more attractive to experienced attorneys by using a pay scale based on years experience and number of previous state billed hours. Attorneys starting out should be required to have a state mentor or be apart of an experienced firm. I would suggest requiring first year attorneys only be allowed to work misdemeanor and juvenile criminal cases for their first 500 hours. Pay on these case could be set at the AOC's current rate or even slightly lower. This would set a bottom of the scale that would encourage attorneys to continue to accept appointments as they build their practices and allow the AOC to actually reap the efficiency benefits that it paid for by enabling the AOC to hire more experienced and efficient attorneys. Put bluntly, a green attorney will spend many more hours billing to achieve the same result as a veteran because he or she does not have the years of experience needed to readily identify the key issues of a case or the reputation to resolve a case without hearings and extensive discovery.

Pay on non-capital case should top out at about $125 per hour for an attorney with 10 years experience and 2000 hours of pervious state billing but to do so said attorney must prove that he or she is using less expensive attorneys and employees for work that does not require high end trial experience or other specialized expertise.

4) PUNISH THOSE PARTIES THAT FALSELY CLAIM INDIGENCE

Over the last several years I have watched our system become more and more abused by the groups the court appointment system was created to help. If a Defendant can make a ten thousand dollar ($10,000) bond he or she can make a thousand dollar retainer. I am

certain that other attorneys have registered their own complaints but I would like to bring to your attention a subgroup in which abuse is rampant. In the IV-D courts of most counties I regularly see alleged "dead beat" parents receive court appointed attorneys, receive resets to prepare their cases, and then be found guilty of civil contempt for willfully failing to pay child support when they have the financial ability to do so. Give the very low cost of private counsel for such representation, it would be reasonable to assess the AOC fees as court costs and cap them a $750.00. I'm not arguing that attorneys should not be paid, but if defendants were made to understand that financial penalties existed for filing understated income in requests for indigent counsel, they might be more willing to pay said fees to private counsel and not risk the sanction and embarrassment. I do anticipate someone reading this letter might point out that a false affidavit is perjury, but unfortunately, I have never seen someone prosecuted for this and do not believe it is a real concern when individuals are requesting appointed counsel.

If I may be of any assistance, please let me know,

Sincerely,

R. Gray

Ross B. Gray

With Review and Agreement From

James Hickman

CC: Pam Hancock and Libby Sykes

*From the Desk of*
*Robert L. Foster, Esq.*
*119 E. Depot Street*
*Greeneville, TN 37743*
*P:423-639-0091 F:423-639-0454 Cell: 423-620-3290*
*robert@billablehoursinc.com*

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,

Please enter this upon the Court's record and present it to the Honorable Justices of the Court.

## My Plea to the Court

My interests have been called into question, and I expected that; but rest assured, although I must make a living just like the warriors of justice BHI supports, my true passion is American Freedom, American Liberty, and helping in any way I can to ensure that the small business owner who wields the industrial sword and the economic shield is firmly protected and promoted, for they are the hooded knights ordained with the responsibility to save our country from certain financial collapse; they are the ones that did not take an extended vacation to Mexico and who have not been overtaken by the Chinese. The warriors of justice and champions of freedom discussed below are small businesses as well, and small businesses that so desperately need the assistance of the Court and the legislature, for the wheels of justice must keep turning, no matter the cost to run the mill. Without the mill wheel of justice, the well laid plans of our Founding Fathers will be missing a scope and the wonderful concept and idea of American Liberty will simply run off its track.

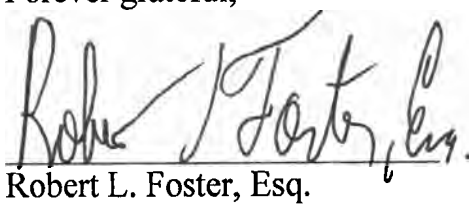
The Court has before it comments from much more influential people than me and legal arguments presented by much more brilliant legal minds than mine. I certainly hope that the Court will strongly consider the comments and arguments presented. Justices, you are the Court, the highest Court in the State, and just as I have written in my

commentary, I am not in position to tell you how to run Your Court either. You were appointed by brilliant leaders and they picked the people most qualified. The people have placed their trust and faith in you to be the ultimate protector of freedom, the ultimate protector of the Constitution, the highest generals of Justice. So I humbly ask the Court to unsheathe its mighty sword and impale the heart of injustice, cover the most vulnerable with the warmth of the Constitutional blanket and protect us all with the shield of freedom that is American Liberty.

Although the Court is the ultimate protector of freedom, the generals of justice, I humbly ask the Court to strongly consider the warriors in the trenches, who wield their swords and engage in the daily delivery of constitutional competency providing their valuable services to the State of Tennessee and its citizenry by raising their shields in the name of American Freedom. After all, it comes down to the foundational statement "with Liberty, Freedom, and Justice for all". The constitutional warriors in the trenches are the ones who toil daily to protect and promote that most famous and powerful collection of words that so accurately describe America. Please, Justices, I implore you, help them!

Thanking the Honorable Justices for the consideration of my commentary, for their service to the State, and for cloaking us all in the Constitutional blanket that is American Liberty, I remain,

Forever grateful,



Robert L. Foster, Esq.
119 E. Depot St.
Greeneville, TN 37743
Office: 423-639-0091
Fax: 423-639-0454
Cell: 423-620-3290
BPR#: 021189

*From the Desk of*
*Robert L. Foster, Esq.*
*119 E. Depot Street*
*Greeneville, TN 37743*
*P:423-639-0091 F:423-639-0454 Cell: 423-620-3290*
*robert@billablehoursinc.com*

SEP 1 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,

Please enter this upon the Court's record and present it to the Honorable Justices of the Court for their consideration.

## Good Ole Mountain Common Sense

It was June of 2007, Judges and attorneys from all over the State had descended upon Gatlinburg for some required CLE credits, socializing, networking, and some relaxation that was needed by all who arrived. Hard working attorneys and judges had come to the event, as they do each year, and were ready to relax, eat, drink, and learn. I was present as a representative of BHI as it was an exhibitor at the convention as it had been the prior year and every year thereafter. I will never forget that particular evening, as it was the event that followed such a profound victory, a victory that saved many jobs, ensured the ability to assist so many attorneys in Tennessee and began the journey that brought me to the keyboard that I am pecked to draft this comment.

The food was great and the company even better when the Gatlinburg Aquarium hosted the TBA convention bench bar party. The music was enjoyable and the conversation was engaging, thoughtful and insightful. Out of all the events I had been to, this one was the best. Just about midway through the evening I saw a local that, although I had never met, I recognized immediately. Tall, handsome, silver mained, briskly walking in my direction with a swagger of confidence and purpose, the man could never be mistaken.

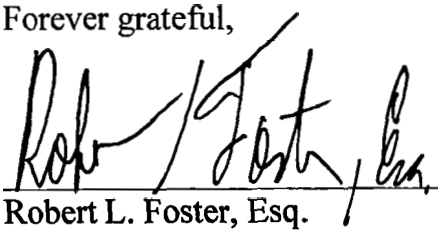
The local, an astute businessman, attorney and a respected and powerful jurist, stopped to talk with me upon approach. Although the local did not recognize me upon sight, when I introduced myself to him, my blood began to stir, my body clenched, and my heart pounded profusely when he recognized my name. As my hand extended, hoping my palms were not laden with sweat from the nervousness of the encounter, the local took my hand. We both gave each other that standard political male sturdy shake. As I withdrew my hand from the sturdy political grasp, the local asked me where I was from. Giving my stock answer, "awe, I'm just a mountain lawyer from the hills of Greene County, Tennessee," I chuckled." To my amazement, the local chuckled as well and went on to say something to the affect of, well I'm just a mountain lawyer myself, nothing wrong with that, I think it's a good thing. To my further amazement, the local went on an said something to the effect of, I should have known you were mountain folk, I read your Petition, and it sure seems to me that you just applied some "good ole mountain common sense". It's nice to have met you, I wish you well and good luck.

The conversation exchange of that evening and the mountain words of wisdom that were so articulately spoken have resided within me to this day, and will be an honor I will never forget. I took the idea of "good ole mountain common sense" to heart. The man who conveyed to me that idea of the application of "good old mountain common sense" will hopefully read my commentary. If you do read the commentary, you will know I am speaking to you and respectfully and humbly asking you, if you agree with any of the courses of actions suggested therein, I implore you to use your influence. Apply some "good ole mountain common sense" and convince the Court to vote not to adopt this pending Amendment. This pending Amendment, although well intentioned, is not an application of "good ole mountain common sense" to the issues facing indigent representation in Tennessee.

When the roof of your house needs replacing, your windows are not airtight, your faucet is leaking, the paint is peeling off the siding, and your garbage disposal is in a complete state of disrepair, you don't add an addition to your home, you repair the house you have. Doing otherwise would be working outside the framework of "good ole mountain common sense", especially if you are on a tight budget. That is the situation that exists in the house of indigent representation. There are many issues that need to be addressed, tweaked, painted, and/or repaired and we are working on a tight budget. Those issues are perfectly capable of being addressed in the confines of what is "ultimately the best system for its purposes". So I humbly and respectfully ask the Honorable Justices of the Supreme Court to apply "good ole mountain common sense" to the house of indigent representation and repair the house as it exists now and refrain from adding an addition to it.

Thanking the Honorable Justices for the consideration of my commentary, for their service to the State, and for cloaking us all in the Constitutional blanket that is American Liberty, I remain,

Forever grateful,



Robert L. Foster, Esq.
119 E. Depot St.
Greeneville, TN 37743
Office: 423-639-0091
Fax: 423-639-0454
Cell: 423-620-3290
BPR#: 021189

*From the Desk of*
*Robert L. Foster, Esq.*
*119 E. Depot Street*
*Greeneville, TN 37743*
*P:423-639-0091 F:423-639-0454 Cell: 423-620-3290*
*robert@billablehoursinc.com*

SEP 1 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,

Please enter this upon the Court's record and present it to the Honorable Justices of the Court. This is an excerpt from Billable Hours, Inc. Comment that I thought might be appropriate.

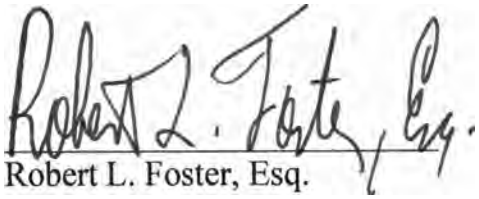
## The Dance

Foster was reminded of a dance he had shared at another TBA bench bar party just a few short weeks before, fittingly hosted by another Aquarium in Chattanooga, Tennessee. His mind wondered for a moment as he heard "Stand by Me" playing in the background, and he thought about those few moments he spent engaged in a dance with one of the most powerful women in Tennessee, maybe the most powerful . The two twirled around the dance floor like they had known each other for years completely comfortable with one another as they shuffled together in unison as if they had danced together before. A few moments in time that Foster would never forget. Looking back on those memorable moments Foster thought, was that omen? Would the two engage in a dance in the non-traditional sense of the word, he certainly hoped not, or was "Stand by

Me" the true message delivered from the higher power in control? He was not sure which it was, but he was confident in the coming months the prophecy contained those most memorable moments would most certainly be revealed.

Thanking the Honorable Justices for the consideration of my commentary, for their service to the State, and for cloaking us all in the Constitutional blanket that is American Liberty, I remain,

Forever grateful,



Robert L. Foster, Esq.
119 E. Depot St.
Greeneville, TN 37743
Office: 423-639-0091
Fax: 423-639-0454
Cell: 423-620-3290
BPR#: 021189

*From the Desk of*
*Robert L. Foster, Esq.*
*119 E. Depot Street*
*Greeneville, TN 37743*
*P:423-639-0091 F:423-639-0454 Cell: 423-620-3290*
*robert@billablehoursinc.com*



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,

Please enter this upon the Court's record and present it to the Honorable Justices of the Court. The following is a small piece of legal fiction, just thought the Court might enjoy it and it is slice of the comment filed by Billable Hours, Inc. I truly hope that something like the fiction that follows does not befall the state of Tennessee, the backstory, which is based upon reality, is contained in Billable Hours, Inc.'s comment as well.

**A silver bullet wrapped up inside a crystal ball**

The tall dark suited attorney had just left his meeting with the C.E.O. of "Be Fit, Inc" having enjoyed his multiple martinis and more importantly the hours he had just billed, and entered the back seat of his long black limousine. Maximus Stradler, Max as his friends called him, what few he had, was a "shark swimming in the dirty water". He cared nothing for the people he penetrated with his pensive pen only about the hours he billed and the money he made putting the screws to the pesky plaintiff that engaged in the stupidity of miscalculated digestion of his client's magic horse pills. Max was the litigator's litigator; tall, dark hair, pensive stair, boisterous personality, handsome with a flowery voice of legal analysis all wrapped in a package suited in a 2000 dollar Armani suit armored and ready for war.

As Max was chauffeured towards his high rise apartment in the sky, he was calculating the hours he had just billed, called his assistant at 12:00a.m., which was not uncharacteristic of him, glanced at his watch and shouted "3 hours of strategic planning,

5 martinis". Send Mr. Taylor a bill ... Let's see, that should be $1,650.00 and get it out tonight, due by Friday." Immediately pushing the button on his Bluetooth, not even allowing for a hello or goodbye, have a nice evening, or any pleasantries, Max was rude crude and cared for no one. He was Maximus Stradler, litigation extraordinaire, single, no children, a workaholic, and he was a force to be reckoned with.

Max had graduated law school from Vanderbilt University. Top of his class, smarter than everyone there, a real pompous arrogant type, but he knew how to turn on that southern charm. As pompous and arrogant as he was, he during his law school days went and a few months thereafter, went through what he would later in his life term as a momentary lapse of reason. Having grown up poor, Max had to scrap and fight for everything he had ever gotten. Max was top of his class in high school, quarterback of his high school football team, scholarship to the University of Tennessee, Sigma Chi President, and a full ride to Vanderbilt Law School, where he was the moot court chief judge and editor in chief of the law review and President of his student bar. Max although poor had a silver tongue and work ethic like nobody else he had ever come in contact with, and he was off the chart's brilliant, and he knew it. Max fought and scraped his way through his early years, his intelligence, silver tongue and work ethic was put to use every minute, every hour of every day, alert to everything going on around him Max even worked, plotted, planned, prepared, and strategized in his dreams. Max, later in his life, would keep a billing sheet beside his bed and every morning when he woke, there would be at least one entry, strategic planning 2 hours, if not several more.

When Max graduated law school, and passed the bar with ease, he opened up his shop in a little sleepy small town in West Tennessee. Max, silver tongue in hand, immediately started pressing the flesh with the local judiciary. Max knew that although he had a fine legal education, he knew nothing at that point about the practice of law. Max immediately remedied this like so many other young lawyers did by approaching the bench and convincing the local judges to begin handing him court appointed cases. Max, having grown up poor himself had a deep rooted desire to help the most vulnerable of his home state. Early on in his career Max quickly became a champion of freedom, a warrior of justice proudly unsheathing his sword and impaling the heart of injustice, and covering all he represented, and all those he didn't, with the shield of American Liberty. Max felt as though he was giving back to those who lived in the impoverished world from which he came, and he enjoyed, even with his grand legal education and accolades, holding the hand of a child, working with her parents to get them on track so the child could be returned to her rightful place, sitting at the dinner table engaged in conversation about the days events with her parents. Max enjoyed representing the accused as well, and engaged each case criminal, juvenile, or otherwise, he was appointed to as if it were his last and as if CNN had its camera pointed directly at him every time he walked to the podium and said, "Good Morning, Your Honor. I am Maximus Stradler, and I represent_____, if it please the court."

During his early years Max represented each accused with the fury and might that only a true warrior of constitutional freedom could exact. The general public of his sleepy little town did not care for him much, as they saw him as that joke of a lawyer that got all those criminals off. Max knew better and gave their piercing, ill advised, and uneducated remarks no mind. Max knew the truth. Max knew that the Founding Fathers penned the rights of the American people such that they would work in unison to create what they called America, "with liberty, freedom, and justice for all". Max, like so many others just like the founding fathers, understood the importance of the protection of each and every one of those rights and the need to protect them with a fury aimed at solidifying the 10 sided wall of the fortress that enclosed America. Max knew the chain was only as strong as its weakest link, and he was going to do his his part to ensure The Sixth was not the weakest link in the chain. Max, on the other hand, did not blame the general public of his small sleepy little town, or the politicians that had the same attitude. Max knew they just did not engage in the out of the box thinking that the founding Fathers engaged in that provided them with the wisdom to pen the Bill of Rights. Max had concluded that America had become complacent and had put way too much faith in its leaders. Max knew the American public had fallen asleep and forgotten that the power rested in the people and the people needed protection, he was their protector.

About 2 years into practice, Max's law firm relied solely on indigent representation to fuel its engines of justice and to provide the polish for the armor the warrior wore daily as he marched into the front lines of the battle of constitutional protections. Unfortunately Max began the feel the ever sucking pain of the Elephant bureaucracy's trunk vacuuming up his hard earned dollars. He had heard the stories from the local bar of how so many young, passionate, protectors of freedom had been pushed out of the indigent representation system by the force of the elephant's trunk. Max's performance and quality of representation was beginning to suffer, bills were piling up, student loans for college, not law school as he had a gotten a full ride, various other obligations and the inability to meet them clouded his judgment as he questioned witnesses, met with clients, and prepared documents. The ever increasing concentration piercing financial worries were beginning to take hold.

Max was sitting at the front of his small office with no assistant, as he could not afford one, reviewing the bills laying on his desk and placing torn pieces of paper in his hat. Phone Company one read, the other, mortgage payment, the other, West Law bill, and various others. Just as Max was about to reach into his hat to pull from it a torn piece of paper that would provide the instruction for which bill he was going pay that week, Mr. Taylor walked through his door. "Hello Maximus, My name is Johnston Taylor, C.E.O. of "Be, Fit Inc." Taylor extended his hand toward Max, and Max reached out to clasp it. Max had never before met Mr. Taylor, but he knew the man he had read several articles about his company's wonderful new weight loss pills and the legal furies they

were creating. "Nice to meet you, Mr. Taylor. What can I do for you? And please call me Max."

As the gentlemen sat down at Max's hand-me-down conference table with mismatched chairs scattered about it, Max immediately realized in about 5 short minutes that fate, destiny, or whatever you wanted to call it, had just walked through his front door and he was going to have some difficult decisions to make. "Max, I read about your recent victory on that burglary charge, full blown jury trial; a beautifully crafted closing argument. In my opinion that was a showcase of legal talent of the likes of which I have never seen. They should just call you Mr. Mason."; Taylor complimented Max, knowing that bolstering a young lawyer's ego was exactly what needed to be done as it would allow the corporate giant to manipulate the young man and mold him into the henchman he was there to recruit. "Well, thank you", said Max with confidence; I was just doing my job." Max replied. Having studied Max's history thoroughly Taylor knew exactly what words to use Taylor, although not an attorney, was quite the silver tongued devil himself. Taylor was well aware of Max's passion, but he had also studied the system that paid him, and Taylor, just like Max, when Max entered the courtroom, was waging his war, corporate war. Taylor was prepared to do battle. Today's battle for Taylor was to recruit the soldier, the warrior, the most talented legal mind he could find; a workaholic lawyer that he would pay handsomely to wage war protecting his secrets, defending his company, and most importantly, shielding its profits. Not believing one word that was about to come out of his mouth, Taylor began his chess game by moving the pawn situated in front of the King out one space so his Queen was ready to launch its attack. "Max, most folks look at you as someone that protects criminals, and gets them off. Even worse, they see you as the guy riding the coat tails of the taxpayers to keep criminals out of jail. Not me, I get the big picture. You are a true champion of justice a protector of the constitution and you should be paid for your toiling work. I know that it is guys like you that shield us all from the governmental intrusions into our lives, a true protector of American freedom and liberty. I am honored to finally meet you. I have been planning on coming by to introduce myself for some time now", Taylor said, knowing exactly the manipulative effect such a statement from an icon like him would have on a young hot shot lawyer trying to cut his teeth and starving to death doing it. It was Max's response that informed Taylor that he had him hooked at the handshake. "Wow, Johnston, may I call you Johnston?" Max said. "Sure, you can call me Johnston son. As you might imagine, I have been called a lot worse", Taylor said with carefully planned words aimed at penetrating Max's soul, gaining control of it, and putting his skills to use representing the true criminal, "Be Fit, Inc.", and more importantly protecting its mastermind, yours truly, Johnston Taylor. "Oh, surely not, you are just a business man, employer, a megalithic giant. Johnston, thank you for your kind words. I surely wish more people understood the plights we young lawyers face. It is nice to know somebody of your stature actually understands and cares and sees us for who we are", Max said with a sense of pride in his voice. "Well, I do care, and I think I have a proposition for you that might help you further your goal", Taylor said with the slick tongue of a lying devil.

"What, might that be?" Max asked trying not to show the excitement on his face as Max knew where this was headed. It was the turn card, the chips were about to be placed upon the table and he knew at that moment Taylor was all in, but was he? "Be Fit, Inc." has some pending litigation and some new products launching in next few years that will probably generate more litigation, and we need somebody with exceptional legal talent and a work ethic to take over our litigation. See, our current litigation man is just about to retire. He has sucked us dry, and I want to make sure we get everything out of him we can. I know you have not done much work in the civil arena, spent most of your time representing the innocent, but I did a little studying on you and I am confident that if you will come on board with us, our attorney could train you. Now before you say anything or respond further, this is covered by confidentiality, right, this conversation, I don't want anything said here to get out; don't want our lawyer to know I am seeking you to replace him", Taylor said, knowing that he had just delivered a statement worthy of edit by Mark Twain himself. "Absolutely", Max said, "Lips are sealed." Max, holding the excitement and anticipating what was coming next, said with a solid sense of security in his voice.

"Well ok. You see, I made a mistake, and although our current lawyer has done a good job, we have had him for years. He came from one of those big firms, in the high rise. He never really appreciated what we did for him as he was already making the big bucks. More importantly I recognized the folly of not finding the passionate your protector of justice, talented legal mind. Had I done that I am sure we would have been better off. See, "Be Fit, Inc." is a protector as well, just in a different world. We are doing the best we can to protect folks, help them with their health problems. We do great work and spend our money on great beneficial things. We want to help the public and the people, just like you. Our current lawyer never had that passion; but Max, you do and you are the man. One year working with Sam, our current attorney and you will be ready to help us champion our cause. I am sure of it. I know you may need some time to think about it, and whatever you do, do not ever tell Sam you are his replacement. You need to just follow his lead, and act as if you are his grunt. He will retire next year, and he has done a good job. I don't want him to ever think that I believe for one second that you will outshine him and quickly. You have all that it takes, passion, work ethic, exceptional legal talent, and a strong desire to help people, and that is exactly what we need at "Be Fit, Inc." Taylor said knowing he had just sealed the deal. "Yes, I will need some time. What are the particulars of the offer? You know I really enjoy what I do now. I grew up poor and I like giving back, but it is awfully hard to make a living in the world of indigent representation", Max said, still holding his cards and waiting for Taylor to place the chips on the table. "Well, I need to know first, if the package is right, will you come on board? I can tell you this, I saw that hat on your desk. I remember when I used to pull the name out of the hat. Needless to say, I don't do that anymore, and if you come on board with us, neither will you. Taylor said, knowing that he had Max exactly where he wanted him. His soul was just about to fall prey to the hands of "Be Fit, Inc". "Ok that sounds good. Here is my card; call me Thursday and we will talk", Max said extending his flimsy card printed on the ink jet printer in his office. "No need for the card, no

offense, but I'll be back Thursday morning, say 9:00a.m?", Taylor said, intending on making Max believe that he was the one that was over-excited about the prospect of Maximus Stradler and "Be Fit, Inc.". Taylor was setting Max up for the kill, Taylor, by allowing Max to believe he was the over-excited one would allow him to negotiation from a position of strength, even though he knew Max would believe he was negotiating from a position of weakness, the standard Taylor set up, when he was moving in for the kill. "Ok", Max said, "but I am busy until 2:00p.m. Would that work better? Could you just come by then?" "Let me check my schedule, and I will call you. Most likely that will work. I may have to move a few things around, but I will try", Taylor said as he walked toward the door, knowing that he had just reeled his target in with a fervours quickness and Max had no idea. The standard Taylor trick, Max had now invited him back to his house, and a vampire can only enter your home when he is invited in, Taylor chuckled to himself as he exited the small office in sleepy little West Tennessee. Turning back as he walked out the door, to finish his prey off, Taylor said "Oh, and by the way; after a few years with "Be Fit", you will be able to pursue your passions and give back to the impoverished folks that live in the world from whence you came. I grew up poor myself ya know. I understand, and in a few years I look forward to helping you give back myself." The door to Max's office closed and Taylor knew he had just secured his corporate warrior that would protect him, his company, his secrets. A protector of freedom a protector of the constitution, Taylor thought to himself as he contemplated Max thinking of himself as one who championed the cause of liberty fighting for the innocent when he represented the accused criminal on a shoe string budget. My, oh my, Taylor thought. Maximus Stradler is about to find out that it is all about the Benjamins and the sword he will unsheathe in the future will be used to impale the heart of the vulnerable, aimed at protecting his company's profits. No honor in that, only money. Maximus Stradler was about to begin his lifelong stent of defending a true criminal, "Be Fit, Inc."

Thursday came and the two gentlemen struck their deal. The warrior of justice and champion of freedom had been so easily seduced by the thought of actually being able to pay his bills and being appreciated for the work he did. Yes, the constitutional champion sheathed his sword, laid down his shield, kissed the Bill of Rights goodbye, and left the indigent representation system of Tennessee that so badly needed his legal talents.

Many years had passed since Johnston Taylor had entered Max's office that fateful day, a day Max thought about often. Max's office was much nicer now. Situated atop a high rise in downtown Memphis, Tennessee, Max's office was quite a site. Adorned with all the trappings of a litigator's litigator, it was the command center for "Be Fit Inc.", Max's primary client. Max had a few other corporate clients that had hired him to be their warrior and protector of profits, but "Be Fit" was still the main client. Max's office was fully decked out, a litigator's dream. Monitors everywhere, large screen TV's on the wall shuffling stock quotes, news, always watching for anything that would have to do

with one of his clients so he could bill some extra time, media review or some colorful billing language he had become so articulate at crafting. Billing, billing billing. Max sat in his office, all alone, no children, no family. He had been seduced by the corporate devil Johnston Taylor, and he knew it.

It was the summer of 2011 and Max was sitting at his desk, having just successfully secured the settlement of one of those pesky miscalculations of his client's horse pill was attempting, unsuccessfully, to relax. Thinking back to that fateful day so many years ago when he had first met Johnston Taylor, he allowed his mind to travel back to his law schools days, third year as President of the Bar, and thought about all the wonderful things he had planned to do with his life.

As Max day dreamed he thought about the first few years of practice in that small town situated not too far from where he was sitting. Max reminisced about his days as a true warrior, a protector of liberty. He smiled as he thought about his days as a wielder of the shield of American liberty. He missed those days and oftentimes wished he had not taken the path he did, but he could not go back now. He owed his soul to the devil, "Be Fit Inc." Thinking back to the time when the elephant bureaucracy's trunk was situated squarely around his neck sucking the hard earned dollars from his wallet, he wished that the system would have compensated him enough to survive, pay his bills, and have hired an assistant. The corporate world was great; plenty of money, a private limousine and driver, all the amenities a "shark swimming in the dirty water" could desire, but he missed small town Tennessee. Max missed unsheathing his sword and impaling the heart of injustice as he had been reduced to using the same powerful sword to slit the throats of the plaintiffs who so stupidly miscalculated their ingestion of "Be Fit Inc.'s" horse pills. Max never let another soul know about his longing desires to be back in that office in sleepy little small town Tennessee. No he never talked with anyone about how he missed that office with the hand me down conference table. Max actually missed the flimsy business card that was printed on his ink jet printer in the office. He preferred it to the over priced, two sided slick business card, Maximus Sadler, Corporate Litigation; what a joke he thought. As he sipped his martini he thought my, oh my, how intentions change, not necessarily by design or desire but oftentimes out of circumstance or necessity. Never would Max ever let anyone see his depression over the idea that he was a protector of profits having been seduced to become such by the silver tongued corporate devil he had met so many years ago. No, Maximus Sadler showed no weakness. He was always in control.

Lost in thought of the days past and the glories of being a true warrior, the phone buzzed, startling Max. He screamed "what?" "Maximus, you have a call, it's someone named Bailey, that is all he told me," His assistant said, not anticipating any response, as Max was not into pleasantries. Max clicked the button to quickly cut his assistant off and thought about the name, Bailey, Bailey, wonder if that is … it has to be. "Hello this is

Maximus Stradler. Is this Bailey from law school?" Max spouted off with his typical sense of confidence. "It sure is, it has been awhile," Bailey said. After a short exchange of pleasantries, the kind Max was not accustomed to and disliked as they did not accomplish anything, unless, of course, they were used to further some strategic plan laid out by he and his corporate vampire, Johnston. Max said, "What can I do for you?"

Max and Bailey had not only gone to law school together, but they had practiced together in that small sleepy West Tennessee town. Yes, Max and Bailey had been in the trenches together. Immediately Max remembered that last beer they had shared together the night he had packed up his office for the move to Memphis. Bailey had chastised him that night a sell out and told him that he would live to regret it. Although Bailey was right, Max would never let him know it. "Max, can I send you something? Get your thoughts on it? Maybe some advice? I know you are well connected now and maybe you could help," Bailey inquired. "Sure Bailey anything for you. Just email it to me, I will take a look at it and we will talk," Max replied. The gentlemen spent the next half hour or so talking, much more time than Max would give most, simply because it was not billable. But today Max had already been reminiscing, and he wanted to continue doing so. The two talked about their days in the small town courts, helping children, defending alleged criminals, protecting the innocent, and being good stewards of the educations and licenses they had been given, something Max was very far removed from doing now.

It was late the afternoon of August 31st, 2011 when Max finally got around to reading the email that he had promised his friend he would review. Max was far too busy at this point to worry about whatever it was that was troubling a small town Tennessee lawyer, but Bailey had been his friend years ago. They cut their teeth together, and Max thought he probably owed it to him to at least review what Bailey had sent him. "Forward that email to me from Bailey," he spouted across the speaker to his assistant. "You know the one about some Rule change or something whatever it was that had him so upset I know he has called you several times. I think I am going to take a look at it for him." Click, the receiver went back to its base in Max's typical style.

There it was ***RE: Supreme Court seeks to Amend Rule 13.*** Max did not even know what Rule 13 was, and cared even less. He was just looking at this thing because his old friend had asked him to. Then it came to him, Rule 13, Rule 13, it sounded familiar to him, as if he had dealt with it in the past; and then it hit him like a ton of bricks. I know Rule 13, Max said to himself as he remembered that sucking sound of the Elephant's bureaucratic trunk. Rule 13 was the rule that got me paid when I was in the trenches, he thought, or rather the Rule that kept me from getting paid, he chuckled as he thought to himself.

As he read the proposed Rule, he became concerned. Max had supervised several contract programs for young puppy lawyers for several of his corporate clients, each of which had failed. Max thought to himself, no way I would work for a contract price; hourly billing that is what gets the job done; that is the only way to ensure quality, proper interests and competency! This was going to be a mistake of monumental proportions Max thought as he perused the vague and ambiguous proposed Rule change. Then he became more concerned when he thought of Johnston and began to foresee a profiteering giant like that getting his hands on something like this. Max envisioned unprofessional exploitations of grand proportions, the likes of which the Court had probably not even considered. Max asked himself, will websites be developed and promoted through the media channels, on facebook, twitter, tv and print? Immediately he thought about downloadable affidavits of indigency forms promoted by the very firm or association that received a contract. To a profiteer that would be appealing but to a warrior of justice it would be appalling! His mind raced, scared of what this might bring, and thought immediately about educational sites promoted by the lowest bidder that explained just exactly how to ensure one was considered indigent so that the firm that had the contract got the job. Then he thought about the ever so popular bathroom stall advertisement and envisioned, "Indigents-R-Us", if you can't pay, call today!, visit freelawyers.com before you drive home!" Max quickly thought to himself, if I dreamed it up, I am confident a profit centered organization that does not have the interest or passion that the constitutional warriors in the trenches have will too.

A profit centered flat fee for minimal service organization will not only dream up such marketing efforts; they will make them a reality, Max thought to himself as he hit print on the screen, and especially if they are ever controlled by a man like Johnston Taylor. Something has to be done about this and immediately. The Court is about to make a mistake of grandeur, he thought. He quickly thought about a gentlemen he had recently met at a TBA convention or something, remembered talking to him and remembered his unique counsel and quickly wrote on his white pad, P's.

Max was too late, and he was displeased he had not taken the time to read his friend's email in time to do anything about it. Max knew a few people in some high places at this point in his career, and he was saddened that he was not capable of using his position as corporate warrior and sword wielding slitter of the throats of the vulnerable to the advantage of the very ones his blade had injured. The time for comment had passed so phone calls pressing, etc. would not do much good, and he knew what a hard sell indigent defense was anyway. He thought back to the reputation he had when he was in that small sleepy West Tennessee town realizing that the public did not appreciate the services of the warrior of justice. He thought to himself, as he shuffled through the research he had done over the last few days on the subject, he pulled out his white paid and wrote "systematic reform litigation." He knew exactly what this meant and exactly how to pull it off. Although it been a long time since he had been on the Plaintiff's side of the table,

he was confident his years as a defender of corporate profits would pay off, he saw dollar signs and an opportunity to take a shot at the elephant whose very trunk pushed him out of the system he had so loved and was so passionate about all those years ago. Yes, this was the option, this is what he had been looking for it was the elephant that created, or at minimum, made him vulnerable to the corporate devils silver tongue, and he was ready for revenge.

Max thought how much fun it would have been to champion this cause from the street, but he knew that would have never worked. It took dollars, man power, equipment, and many other things to pull off this type of litigation. Good thing he had all of those things at his disposal. Max thought back to that day when Johnston first came into his office and made all those promises, which he knew now, were all lies. In particular he remembered the promise of giving back. "Johnston, this is Max. We need to talk, immediately. Can you come to my office?" Max said. By this time Max had figured out that when you wanted the corporate vampire's help, you had to invite him to your house, and that is exactly what he did. For years Max had snapped to attention whenever Johnston shouted a command, but things had changed. Max had done such a good job slitting the throats of the vulnerable with his sword of injustice, thereby protecting Johnston and his profits, Max had gained the upper hand, and he now controlled Johnston, albeit at the mercy of Johnston's checkbook.

The two men met at Max's office and on the board of the command center in 10 inch letters appeared two statements: Proper Prior Planning Prevents Piss Poor Presentation and directly appearing thereunder was the phrase "Systematic Reform Litigation." The two gentlemen entered into their discussions. Max made his demands, reminding Johnston of that conversation the two had so many years ago sitting around that hand-me-down conference table with mismatched chairs scattered about, and secured the funding he needed for the organization that was going to engage the state of Tennessee, and as much of it as he required.

Max immediately called Bailey and several other lawyers he knew in Memphis. Max had been planning on hiring an associate or taking on a partner because he had been a one man show. Max was going to take this cause on, and if he was going to properly engage the rule of P's, he needed someone to handle his corporate affairs, at least to do so under his supervision. Thankfully, Max had already interviewed the star and he called him in, hired him on the spot, with immediate instructions to report to Johnston. Johnston was well aware of the star young lawyer as he had carefully picked him, in much the same manner as he had hooked Max, at the handshake. Max made multiple calls to attorneys across the State, invited them to Memphis for a weekend roundtable rented out the entirety of the floor below his office, which was luckily available due to the economic downturn, and went to work.

"Bailey, Max here," Max spouted across the line. "Yeah, what's up Max?" Bailey replied. "I know we have discussed this before, but withdraw from your cases, pack your bags and get to Memphis, ASAP. You're hired and we have a lot of work to do." Bailey, divorced with an older child that he saw only on the weekends, had a small apartment in sleepy town West Memphis so it was no big deal for him to pack up and move. Plus Memphis was less than an hour and half away, but Bailey needed to be in Memphis, and he knew it. The following Monday, Bailey met with all his local judges, made all the appropriate arrangements, called his clients and explained the move, withdrew from his cases, packed his Suburban and headed to Memphis. Unlike Max, when Bailey left sleepy little small town West Tennessee, he did not sheath his sword nor lay down his shield. Not quite. Just before he got onto I-40 West he sharpened his blade and shined his shield. He was moving to the management level to help command a battle that would reform the indigent representation system of Tennessee and work to ensure the citizenry was shielded by the warmth of the constitutional blanket that is American Liberty. "Liberty, and Justice for All, Bailey thought. He had just been promoted from a warrior in the trenches to a General in battle to protect American Freedom, he was moving on up, like a Jefferson, to that deluxe apartment in the sky.

The floor below Max's office had been completely furnished, a command center set up, a jury room was in place to bring in mock juries, complete with a podium and a bench. It was Saturday morning in the Fall of 2011; the Court had passed the Amendment and was preparing to launch its first set of requests for proposal so Max knew that it would only be a year, maybe longer, before the first pieces of litigation would be filed in the Federal Court of the Western District of Tennessee. As he looked around the newly adorned floor, sipping his coffee and waiting on the attorneys from all across the state that he had met for drinks at the Peabody last evening to arrive, he thought to himself, its really amazing what good big corporate dollars earned on the backs of the vulnerable can do when put to the proper use.

As Max began to think back on the years of his life since he left that small sleepy town something caught his attention. How ironic, he thought. The very elephant that pushed me out of the system, away from my passions, and into the arms of the corporate devil put me in the very position to be able to make sure that so many other young lawyers just like me back then will not suffer the same fate. Wow, he thought. Ultimately the same elephant that pushed me out sucked me back in. It only pushed me out long enough to fill my war chest for the battle that lay ahead. Max further studied this thought and realized that maybe intentions don't change; maybe the journey to reach the goal of intentions simply gets blurred along the way. Then he thought back to another gentlemen he had met so many years ago and thought, huh, maybe I am not in control; maybe there is a higher power. Max made a commitment at that moment to himself, no more cocky, confident liquor drinking corporate lawyer, no Max was headed back to his roots, back to his passion, only this time he was well funded, suited, armed

and ready for battle. Max chuckled as he said to himself, yep, this can't be my doing, but I will act as if I am in control, but from this point forward, I will recognize that I am not; a higher power must have laid these plans.

As the attorneys, many of them, began to fill the conference room of Max's newly constructed corporately funded war room, the men and women in the room took their seats, flipped open their laptops to review the agenda that had been emailed to them earlier in the week and prepared to begin engaging the State of Tennessee. Max took the floor, looked over at Bailey sitting to his right. He thought to himself, this is why I went to law school; this was my calling. As Max began to speak to the attorneys so intently focused on the man leading the charge, he felt a sense of pride in his profession, of being a Tennessean, and most certainly of being an American. Before he uttered the first word he thought to himself, this is what American Liberty is all about, men and women joined together for a cause, ready to go into the world and speak their mind, armed with knowledge, education, their pens and voices; this was protected political speech. The time had come for attorneys across the State of Tennessee to stand up, make their voices heard, and become yet again, true champions of justice. So proud to be a part of what was about to happen, and even more proud to be leading the charge, Max began to speak to the crowd of intelligent, driven and dedicated attorneys sitting before him. Appearing behind him on the dry erase board that spanned the entire wall were the ever so appropriate words "Proper Prior Preparation Prevents Piss Poor Presentation" and directly under them appeared the words "Systematic Reform Litigation". "Thank you all for coming today. We have a tremendous job ahead of us all, but we are well funded and ready for battle. I commend each of you on stepping up, and win or lose we shall engage the State and it is our job to ensure the mill wheels of justice keep on turning, no matter the cost to run the mill. It is our job to ensure the well laid plans of our Founding Fathers are not missing a scope and do not run off the tracks."

As the day went on you could smell the cigar smoke, hear the clanging of the ice cubes in the tumbler, smell that easily identifiable scent of the freshly brewed coffee and hear the banging of the keyboards and the conversational planning of the systematic pens of litigation aimed squarely at the State of Tennessee at its taxpayers' pockets. All emanating from that back room, inside that tall building, where Max and his team were planning what to do with the large fee resulting from the class action suits they were drafting. The only thing missing from the suits they were preparing were the names of the Plaintiffs, but they would soon be there; women, men, parents, children, and yes, criminals, but they were all going to be Tennesseans. If one listened ever more intently, one could hear the choking laughter rising from deep within the bellies of the lawyers in the room as they loaded their litigation arsenal with the silver bullet that was the AOC's written report to the legislature in January of that year.

Max had been working as the others chatted and banged at their laptops. He had prepared something for the group to practice before the meeting concluded. Max called their attention as he stepped to the podium. The suited for war litigator took a deep breath, paused for a moment, unsheathed his sword prepared to impale the heart of injustice, raised his shield high as he had not done in so long, and he, himself, felt the warmth of the constitutional blanket that was American Liberty. He thought to himself before he spoke to the room, "with Liberty, Justice, and Freedom for all", this is America. The tall dark suited attorney traded in his two thousand dollar suit that day for the battle scared and dented shining armor he had worn so long ago, and began to address the crowd, "Attorneys of the State, here we go. Join with me, hand in hand, as we wage our constitutional battle. It will be long, it will be hard, it will be costly, it will make history, and it will end just like this.

"Ladies and gentleman of this fine jury, today is the day; the time is now, and you have all that you need. You have listened to the testimony of the attorneys and heard the testimony of the defendants, parents, and children, and most importantly, you have read the report of the AOC. You must ask yourself as you analyze the testimony and evidence, the AOC reported to the State that a contracting system would result in a dilution of quality of representation, and that it would provide an incentive for attorneys to work against the interest of their clients, but the State of Tennessee implemented such a system anyway. You have heard the attorneys readily admit under oath, before God, before this great honorable court, and before you that the contract system forced them to act against the interest of their clients. Even more importantly, you have heard the testimony of the clients that were impacted by this improper action. Most of all, you read the report that clearly shows the AOC and the State of Tennessee knew that all of these things would occur. Now I ask you to imagine, what if you were one of these defendants? What if it was your child that is now in State's custody? All of these horrible indifferences and violations of these people's constitutional rights could have been avoided if the AOC would have simply followed its own advice.

Ladies and gentlemen of the jury, it is one thing for injustices to occur when unforeseen consequences or mistakes happen, and those injustices should be remedied as well. It is entirely a different matter however, when a governmental body peered into a crystal ball and foresaw the future; a future filled with injustice, improper interests, and constitutional violations of monumental proportions, and that very governmental body took the exact path it knew would result in those very injustices and violations. The AOC charted the course that brought us before this Honorable Court today, to the end of our journey, so the question remains – will you wield the power the Founding Fathers of this great country bestowed upon you and bring the journey of injustice in Tennessee to a screeching halt or will you join with our government, continue peering into the crystal ball of injustice and participate in the systematic destruction of all of our constitutional rights? A great man, Dr. Martin Luther King, Jr., a champion of freedom, a champion of

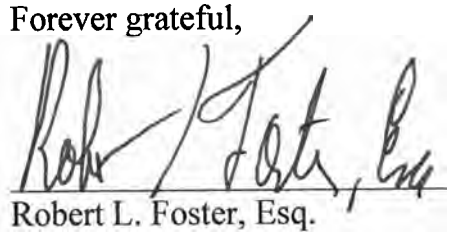
justice, a man who changed our world once said that "a threat to justice anywhere is a threat to justice everywhere". Ladies and gentleman of the Jury, I ask you to join with the late great Dr. Martin Luther King, Jr. and be a champion of freedom, a champion of justice, and let your names go down in the history books of the great State of Tennessee as honorable men and women who championed freedom and championed justice. Today is your day; let's us together make history and end the journey of injustice that was prophesized by that crystal ball the AOC filed with the state legislature in January of 2011."

Justices, is there any truth to the above story? I hope we never know, but as with all legal fiction, the question remains, is it possible, and the answer is a resounding, absolutely! The Court can most certainly make sure it is not, and my offer still stands. Please consider a marriage between the bird perched atop the ivory tower and the eagle in the street. As BHI and I extend the olive branch, please imagine what wonderful offspring the two could create.

I would like to thank the Justices of the Court for considering the story. Again I implore the Court, help the warriors of justice, the protectors of our liberty, the champions of freedom. They need Your help, and you may very well be their last hope!

Thanking the Honorable Justices for the consideration of my commentary, for their service to the State, and for cloaking us all in the Constitutional blanket that is American Liberty, I remain,

Forever grateful,



Robert L. Foster, Esq.
119 E. Depot St.
Greeneville, TN 37743
Office: 423-639-0091
Fax: 423-639-0454
Cell: 423-620-3290
BPR#: 021189

*From the Desk of*
*Robert L. Foster, Esq.*
*President and C.E.O,, Billable Hours, Inc.*
*119 E. Depot Street*
*Greeneville, TN 37743*
*P:423-639-0091 F:423-639-0454 Cell: 423-620-3290*
*robert@billablehoursinc.com*



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,

Please accept this as the official Comment of BHI, and please ask that the Justices of the Honorable Court read it in its entirety. I recognize it is long, and a bit unorthodox, but I truly hope the Justices will find it enjoyable, moving, and may place them in the shoes of so many the decision they make on this Amendment will affect.

Before I begin, I would simply like to state that I am more proud to be a Tennessean now than ever before, and even more proud to be an American. The last two months have been some of the most enlightening and memorable of my life. So much has happened in the last several weeks; it is hard for me to comprehend, and really hard to determine where it all will lead, where it all will go. I will go forward from here knowing, win or lose on this issue, I am lucky to be a Tennessean, and you may not now realize it, but if you live in Memphis, Mountain City or anywhere in between, you are too.

My interests have been called into question, and I expected that; but rest assured, although I must make a living just like the warriors of justice BHI supports, my true passion is American Freedom, American Liberty, and helping in any way I can to ensure that the small business owner who wields the industrial sword and the economic shield is firmly protected and promoted, for they are the hooded knights ordained with the responsibility to save our country from certain financial collapse; they are the ones that did not take an extended vacation to Mexico and who have not been overtaken by the Chinese. The warriors of justice and champions of freedom discussed below are small

businesses as well, and small businesses that so desperately need the assistance of the Court and the legislature, for the wheels of justice must keep turning, no matter the cost to run the mill. Without the mill wheel of justice, the well laid plans of our Founding Fathers will be missing a scope and the wonderful concept and idea of American Liberty will simply run off its track.

The Court has before it comments from much more influential people than me and legal arguments presented by much more brilliant legal minds than mine. I certainly hope that the Court will strongly consider the comments and arguments presented. Justices, you are the Court, the highest Court in the State, and just as I have written below, I am not in position to tell you how to run Your Court either. You were appointed by brilliant leaders and they picked the people most qualified. The people have placed their trust and faith in you to be the ultimate protector of freedom, the ultimate protector of the Constitution, the highest generals of Justice. So I humbly ask the Court to unsheathe its mighty sword and impale the heart of injustice, cover the most vulnerable with the warmth of the Constitutional blanket and protect us all with the shield of freedom that is American Liberty.

Although the Court is the ultimate protector of freedom, the generals of justice, I humbly ask the Court to strongly consider the warriors in the trenches, who wield their swords and engage in the daily delivery of constitutional competency providing their valuable services to the State of Tennessee and its citizenry by raising their shields in the name of American Freedom. After all, it comes down to the foundational statement "with Liberty, Freedom, and Justice for all". The constitutional warriors in the trenches are the ones who toil daily to protect and promote that most famous and powerful collection of words that so accurately describe America. Please, Justices, I implore you, help them!

I often dream of the day when the rest of the State will understand the importance of the soldiers of justice, and the general public will finally come to the realization that the warrior in court defending the alleged criminal fights not for the guilty, but rather for the innocent. The champion of freedom unsheathes its sword and impales the heart of injustice so the victor's shield can cloak us all in the Constitutional blanket that is American Liberty. Indigent representation attorneys all across the State are the ones in the trenches on the front lines protecting the most vulnerable, cloaking them with the much needed warmth of the Constitutional blanket, so the rest of the citizenry can be protected by the shield of liberty. Many of these warriors of justice and champions of freedom are BHI client attorneys. I have been proud to serve them as has the staff of the company. In fact, it is this Honor and this Honor alone that has kept me going all these years. If you have chosen, or choose, to judge me, or call my interests into question, understandably so, I must admit, I ask you to follow the wise advice of a man who walked the earth many years ago, walk a mile in my shoes first. My mile, and the mile of many others, is contained below. I invite you to take that journey with us.

The journey of a mile that is contained below may be harsh at times, but the truth is the truth and there is a story that should be told. Many members of the AOC are quoted, and/or their discussions paraphrased simply because I could not remember the exact words that were spoken, but only the conversation generally. However, the truth is the truth and if anything herein is misquoted, I invite the members of the AOC to contact me and if I agree that it is such, I will redact it, but rest assured if it is inaccurate, it was not my intention as the story spans the course of 6 years.

Yes, the story below contains some dramatization, but that is for the ease of reading and in an attempt to place the reader into the story. The reader, at least any of them that were involved will see that I did my best to point out my own flaws and laugh at myself. Hopefully those governmental characters contained in the story will be capable of laughing at themselves as well. Maybe you will enjoy the story, maybe you won't; I just hope you will take the time to read it, at least if you did or do judge. Maybe a harsh thought, but a truthful one, if you can't handle the truth, as a government employee, I suggest you rent some Tom Cruise movies, and remember the people run their government. It is the people who wield the power to control those who govern them and I certainly hope that Tennesseans and Americans at all levels of government and all levels of the populous will begin to remember; at least I hope those that have forgotten will. Our Founding Fathers placed the power in the hands of the people for a reason; hopefully the people will begin to wield it again, and soon.

BHI made a promise to so many attorneys across this State as they came on board with the company. That promise was simple; if you joined with BHI and there is ever an occasion where your livelihood was at stake, BHI would be there with its resources and its numbers to champion the cause. Upon filing this comment, I can enjoy the ride home to the mountains of East Tennessee on I40, a road I have come to know so well. Upon my arrival I will be more than capable of looking myself in the mirror as I brush my teeth, kiss my children who have missed their father, crawl into bed with my lovely wife who has been so neglected over the last few weeks, and fall off to sleep with a clear conscious knowing that I did absolutely everything I could do to deliver on that promise. I certainly hope that the true warriors of justice will know that we raised our shield of liberty and unsheathed our sword in the name of the indigent representation attorneys of Tennessee. Most of all, win or lose, I pray you will believe that we served you well, or at least we served you with all we had. If you do, you are invited to become associated with TACCIR; its effective date is September 1, 2011. Tennessee Association of Competent and Compensated Indigent Representation is its name, and I must thank that grey headed very intelligent individual who helped me name it. Initially it was indigent defense, but attorneys of this State need to educate their leaders on the indigent defense fund and explain to them that it is more than just criminal work; it includes parents, children, mentally ill and others' not just alleged criminals. Therefore, the more fitting name was, and should always be, indigent representation.

The association will be solely dedicated to the issues that face indigent representation in Tennessee. It will include lobbying efforts, educational efforts, and will address issues facing indigent representation. TACCIR will have tunnel vision. Indigent representation will be its only interest, with the primary concern aimed at ensuring the warriors of justice and champions of freedom that are the indigent representation attorneys of this State are properly compensated for the work they do shielding the citizenry with the warmth of the Constitutional blanket that is American Liberty.

The last few weeks have delivered to me more good times, memories, and hopefully some lifelong friends and allies than I could have possibly imagined. I had more fun and enjoyment drafting the story below, which was written in its entirety over the course of six days, edited as best we could under time constraint, and made ready for filing, than any other document I have ever created. Never before had I written anything in story telling style so in a tribute to the teachings of Ann Short at a TACDL convention I attended earlier this month, I gave it a shot. Ann, I hope I followed your teaching well and thank you for your instruction.

It is bold and audacious and will either be laughed out of Court or go down in history; I am not sure which. However some very insightful people throughout history provided me with some guiding principles as I embarked upon my journey to deliver upon promises made and oppose the pending Amendment. It was once said by Dorothy Deluzy that perseverance and audacity generally win. Queen Elizabeth advised that cowards falter, but danger is often overcome by those who nobly dare. Titus Livius opined that in difficult and desperate cases, the boldest counsels are the safest. The undersigned's hero, Dale Carnegie lived by the code that people rarely succeed unless they have fun in what they are doing. All of these historical figures could not have all been wrong, so in the name of audacity and perseverance, I come before the Honorable Court and nobly dare, providing in this desperate case the boldest of counsel, and ask the Justices of the Court to join with me, have some fun, and with our opposing viewpoints but common goals, maybe together we can be successful for the entirety of Tennessee. Before we begin, I ask the Court to consider the following:

The street eagle stood below the ivory tower of the Court's administrative arm. It gazed upon the beautiful bird perched so powerfully atop the point of the tower. The eagle, with the precision of an icon, bent to one knee, peered upon that beautiful bird in the sky, looked her squarely in the eye, and asked will you marry me? The eagle thought to himself, what wonderful offspring we could create, as he offered up his olive branch.

**Please read on and you will understand what that means.**

***In the indigent representation system of Tennessee there are champions of freedom and warriors of justice and there is a company that helps them sharpen their swords and shine their shields, this is their story.***

The cover of night came just as it had many nights before, but he was unaware of it; he knew not the time and had not yet realized the sun had even set over the beautiful smoky mountains. The sidewalks of the sleepy little town where his home and office were located had been rolled up several hours before, but he did not realize the bricks had been removed or that doors had all been locked. No, alone at his desk sat Mr. Foster, a young small town mountain lawyer cutting his teeth representing indigent folks using each case he was given as an advertisement; an opportunity to showcase his abilities and hone his skills and gaining as much experience as he possibly could. Just as the day before, and the day before that, and just about every day of the last 3 years of his life as a glamorous small town mountain lawyer trying his best to keep the lights on, the bills paid, student loans up to date, and food on his table, the clock struck the fourteenth hour since his day had begun. With fourteen hours in, his body and mind exhausted, the mental stress mounting to the point of explosion, Mr. Foster laid down his pen, placed some cubes of ice in a tumbler poured a small glass of rum and coke, sat back in his chair and tried, unsuccessfully as usual, to relax.

President of his student bar in law school, Mr. Foster had dreamed of becoming the five hundred dollar an hour lawyer, the two thousand dollar suited for war attorney that was the brunt of every joke. Having graduated from Cecil C. Humphrey's School of Law in Memphis, Tennessee, Mr. Foster believed upon the receipt of his law degree that he would become a "shark swimming in the dirty water." Mr. Foster just knew he would be the confident cocky attorney sipping high dollar liquor purchased by his big corporate client while they sat half heartedly planning how to put the screws to the pesky plaintiff that just happened to have a heart attack because he swallowed one to many of his client's magic weight loss horse pills. All the while billing, billing, billing as the C.E.O. and Mr. Foster drank and laughed, accomplishing not much of anything more than a mounting legal bill. Yes, those were Mr. Foster's intentions. My, oh my, how intentions change; not necessarily by desire, but oftentimes simply by circumstance or necessity.

Peering across his desk the day's frustrations mounted as they typically did about this time every night because this was the time Mr. Foster had to use to properly prepare his claims for submission to the Administrative Office of the Courts, AOC as the Supreme Court of Tennessee's administrative arm is commonly referred to by the attorneys of Tennessee. This process had always frustrated Mr. Foster because after 12-14 hours engaged in intense concentration, meetings, home visits, child and family team meetings, witness interviews, research, driving, thinking, talking, strategizing, arguing in Court, questions, questions, questions, drafting motions, pleadings, petitions, complaints, reviewing evidence, meeting with district attorneys, drafting letters, chambers meetings with judges, moving from court to court to handle multiple cases all going on at the same time in different rooms in the same building, he was exhausted. Unfortunately, just like so many other young lawyers in Tennessee, he did not have the option of enjoying the high dollar liquor with his big corporate client. He had to expend tremendous time

documenting his time, drafting extended and complex motions and orders, and ensuring every "t" was crossed and "i" was dotted to bill 40 to 50 an hour for the day's work that he was probably not going to be paid in full for and preparing the documents for delivery to the proper courts and the proper clerks the next day. The complexities and hassles of billing for this work quickly took hold. How many copies do I need for the General Sessions Court in Greene County, and I don't have an order of appointment in my file for the Johnson case; oh, wait, that judge wants me to submit a drafted order of appointment with my triplicate set of claims, Mr. Foster thought. As the first sip of the rum and coke crossed his lips, what used to cause a grunt until he had accepted his place in the world of law now caused a chuckle.

The rum, tasty of course, was not Mr. Foster's first choice. Captain Morgan was his desired poison, but on a small mountain town indigent representation lawyer's budget, he was lucky to afford Admiral Nelson. Yes, the plastic bottle without the fancy slogan and the coke, an off brand cheap knock off from the local grocery store. For a moment the thoughts of how far off base he was from the course he had charted for himself so many years ago entered his mind. For a second or two he concentrated on what he thought would be, but the thoughts were quickly replaced by the passion he had obtained from the knowledge of how many people in need he had helped. After all, he had gone to law school so he could help people. Now he was truly helping people and people who really needed it. A far cry from helping a corporate giant settle a case for pennies due to a miscalculated digestion of a horse pill, Mr. Foster sat back in his chair, took another sip of his cheap rum and knock off coke, smiled and thought to himself, I am glad my charted course changed and that my intentions were altered.

At this point, Mr. Foster had gone from hand jamming the claims that needed to be completed and filed with the precision of the surgeon's scalpel to an excel spreadsheet that had been coded to calculate all the right calculations and check all the right boxes. Mr. Foster entered his time from the notes taken on the backside of his folder, on sticky notes, inside folders on paper, on his calendar and the napkin in his pocket. He thought to himself, what a haphazard way to track time, but haphazard out of necessity.

Mr. Foster, an organization freak, to the extent he had taken what he was taught by a John Day CLE course concerning the benefits of bindertech to a new level. Each case type Mr. Foster regularly involved himself in had its own meticulously pre-arranged, color and size coded set of binders. Each having its own set of tabs including informational packs, particularized retainer agreements for the private clients he was beginning to obtain, information gathering checksheets, and a multitude of standard statutes, cases, questions, and research. All sitting on the shelf just waiting to be pulled down and put to use handling the next client's case and recycled for future use after the client's matter was concluded. A master at organization, skilled and experienced in process, Mr. Foster was further frustrated by the disorganization of his time tracking.

Although his time tracking was accurate, it was substantially inefficient. Mr. Foster thought for a moment, what can be done to eliminate this problem, the difficultness involved in keeping up with your time when you are running from court room to court room, meeting with witnesses, so intently engaged in representing your clients that you almost run on automatic pilot made it almost impossible. Intently thinking about this very problem, Mr. Foster stepped outside of his small office, lit up a cigarette, took another sip of his cheap drink, chuckled again, and began to think.

As the frustrations began to dissipate from the application of the relaxing beverage Mr. Foster had all but finished, clarity of mind and intentional, purposeful, strategic thought took control of his consciousness. Mr. Foster, a business man first, lawyer second, had a thought. What if I did this, certainly that would solve the problem. Maybe another tumbler would help me completely remove the frustrations and give me a second wind; I am on my 15th hour now, he thought. As the ice cubes clanged in the bottom of the glass, Mr. Foster looked at his desk and just as he was sure the daily frustrations were finally mulled, he realized, that upon his desk sat many files, many claims ready to be submitted, but something, something was missing, what was it? Checks, checks, checks, he thought. No checks are on my desk and I haven't seen a check from the AOC for months; no wonder I am drinking this cheap liquor and knock off coke. The business man in Mr. Foster moved the lawyer over for a moment and said, what's missing here is cash flow. His blood began to boil as he thought to himself, I spent four years of college, three years in law school studied for and passed the bar, mounted up a pile of debt gaining this grand education, and I am a protector of the constitution; something has got to give.

Mr. Foster, having put the ice in the glass but not having poured the drink took the tumbler to the sink, poured out the ice and brewed a pot of coffee. Luckily, Mr. Foster had no meetings or court scheduled for the next morning and zero tasks to complete that could not wait a few extra hours. Foster worked around the clock so he was able to finish anything in the evenings, if necessary, that did not have a time deadline of that business day. The next ten hours or so were squarely dedicated to fixing the problem of his billing inefficiencies and cash flow problems. Foster knew that if he could streamline his billing make it more efficient, and substantially decrease the time it actually took for him to get paid, that he would actually be able to transform his law office into what it truly was, a small business. Foster thought to himself, how much more attention could I give to my clients' cases if the administrative side of my practice ran like a business and my mind was not clouded with the thoughts of not being able to meet my own financial obligations. He knew right then, at that very moment, that what he was about to put in motion, if he could actually pull it off, would result in the delivery of a higher quality of legal service to his indigent clients and would allow him to maybe buy a bottle of Captain Morgan and a six pack of real coke every once in a while.

Feverously, Foster spent the next 10 to 12 hours drafting template motions for extended and complex, check list sheets and questionnaire sheets to use for drafting the same, pulled a binder off the shelf, ripped out the numbered tabs and replaced them with a set of alphabet tabs he pulled from a previously completed and filed away case. Foster then prepared specific case type billing sheets, complete with intake information, and all the billing information each case type required. Being an organization and process freak, Foster was already well versed in the different requirements and case type billing phases. A check box for each and a spot for the proper billing of time and expenses was generated in excel and printed out for use.

By the time the sun came up over Greeneville, Tennessee the next morning, Foster had successfully developed an efficient billing binder accompanied by all the policies and procedures required to take an appointed case from intake to check. Little did Foster know the last few hours would define the remainder of his life and the remainder of his career for it was that night that Billable Hours, Inc. was born, and Foster was its first client. Foster had no idea that the ideas he had for his own practice would be appealing to anyone else, and certainly had no idea that the last few hours of his life would bring upon him the entirety of the might of the Supreme Court of Tennessee, and jettison him into a political system that would forever define his destiny. Had he known, he would have simply thrown the binder away, gone back to enjoying his cheap drink, and laid down for some much needed rest.

It was not long before other young small town mountain lawyers cutting their teeth in the world of indigent representation were discussing their frustrations with billing for the work they completed. As lawyers do, they were all giving their opinions on what should be done to fix the problems. One could just imagine what solutions were offered during these discussions and many such discussions going on around the state. Lawyers, of course talk and love to provide solutions. This of course is a good thing as provision of solutions was the first step to actually solving a problem. Taking this first step requires publically offering solutions, which no one, even back then, was doing. Foster should have known that there was a reason no public solutions were being offered, but he paid it no attention because he never thought twice about offering a public solution regardless of who liked it or not. This is America; constitutional law had taught him that political speech was the most protected speech, and he worked diligently daily to protect the constitutional rights of those he represented, and in doing so, those of us all. He was most certainly going to exercise his own at will, whenever and wherever he desired.

The discussions that emanated from the halls of justice all across the great state of Tennessee probably sounded something like this.

The way to fix the billing problem is to just flat fee everything that would eliminate all this paperwork and administrative hassle.

Sure, just flat fee everything based upon the run of the mill case so that when a complicated case comes along we will be working for free.

Yep, that is definitely the solution. I don't think so! I will keep my billing and deal with the frustrations because I want to be paid for my time; and at least if I know I am getting paid for that hour of work, I will get it done for my client, especially when I can go on to the next client and be paid for my hour of work on his or her case as well. Doesn't that happen now when you reach the cap?

Well, sure it does, and the caps do need to be raised; but placing a flat fee on everything would simply result in less payment for more work. Who wants to work for free. If I can't bill another hour of time, why would I spend my time. Flat fee attorneys and they will just end up doing the least amount of work possible so as to maximize their hourly rate. I mean it is human nature to try to do the least amount for the biggest buck. Ha, no wonder we are the brunt of every joke. In the end, the most likely agreement was that the system as it exists now, is likely the best; billing by the hour and being paid for the work.

As Mr. Foster continued to speak with other attorneys and listened intently to the solutions being offered, a common theme became evident. Each of the solutions offered were something the government should do to fix it. Mr. Foster explained how he was now handling his AOC affairs to at least one of the attorneys and asked if they would want him to handle their billing affairs, and the answer was, to Foster's amazement, an excitedly uttered "absolutely." After developing a contract Mr. Foster approached his brother in law, Brandon Hammer, a non-lawyer, and asked if he would be interested in helping him with this "side business" he had come up with. Little did Foster know that this "side business" was just around the corner from consuming his life, his pocket book, and most likely his soul. Mr. Hammer and Mr. Foster agreed that the organization should be incorporated and some test attorneys should be sought. Shortly thereafter, Billable Hours, Inc.(BHI) was officially born.

Fairly quickly BHI signed on about 7 attorneys as test lawyers. Hammer and Foster wanted to make sure the business could deliver its service in an efficient cost effective and profitable manner. It became readily apparent that the service itself, although simple from the receiving perspective, involved very complicated processes, procedures, guidelines, standards, and financial relationships to deliver. However, the two men were capable of putting all of these items together. After a year and half of preparing, administering, processing, issuing payment to its test attorneys and receiving payments from the AOC, Hammer and Foster decided it was time to launch state wide. Having dredged through all the complications, and in anticipation of growth Hammer and Foster, hired two employees for BHI, obtained more appropriate financing, signed their

financial lives away and followed the advice of a true Tennessee Icon, Davy Crocket, and that advice was, know you are right and then forge ahead.

The mission began and Hammer and Foster via BHI set out to assist attorneys in Tennessee with their court appointed billing affairs. Foster, having used the service himself, was well aware that the removal of the administrative burdens via an efficient time tracking system and cash flow mechanism not only provided him with more time to devote to assisting his clients, but more quality time as his mind and thoughts were no longer overshadowed by the ever present looming thoughts of an inability to meet his financial obligations. Foster was even more certain that the BHI service that had been thought up by him and developed by Mr. Hammer and he would work to increase the quality of representation provided to indigent clients in Tennessee. Foster knew that because that is what the test attorneys had all reported to BHI had occurred for them.

Immediately following the Tennessee Bar Association event that was the official launch of BHI, attorneys began coming out of the woodwork and signing up with BHI. Claims were coming in the door, being placed through the process, attorneys were being paid. BHI was apparently doing such a good job, many of its initial attorney clients were in a state of disbelief. Continually, the phone calls would come, is Foster in? Sure, let me get him for you. On the other end of the line would be a surprisingly satisfied voice emanating a tone of complete satisfaction stating something to the effect of Mr. Foster, I truly had my doubts about BHI, an acronym that was developed by the Davidson County attorneys that were quickly becoming BHI's number one fans. "I just could not believe that you could do all those things you promised, but you did and I just wanted to call and tell you thanks, and I believe you now" the satisfied voice would say. Oh, and by the way, here is attorney John's number, talked to him today, and he wants to sign up with you guys as soon as possible." The phone calls from the ecstatically satisfied attorneys were received by Foster with much joy and satisfaction. After each such call Foster, second guessing his conclusion each time, and thinking to himself, am I really going to be able to help all these attorneys deliver a better quality of service and help them with their practices??? The second guessing began to stop after BHI had signed its forty third attorney and Foster finally accepted his thoughts without a second guess; yes, you are going to be a help, push forward, and do everything you can do to assist your client attorneys deliver better legal services to the indigent people of this state, Foster peacefully thought.

Foster had been traveling the state for the last few months, meeting with attorneys all over Tennessee. Initially Foster had not planned to do the direct sales for BHI. He had developed the sales system and was training a gentleman, Brian Redmon, to be the sales representative for the company. During the first few sales meetings, Foster accompanied Redmon. It became immediately clear that Foster was a member of the club and Redmon was not. It was that realization that truly began the complete

consumption of Mr. Foster's life by BHI. Restructure was required immediately and Mr. Redmon was redirected to operations, as he had been involved in the operations side before. Foster took off across the state, as attorneys were much more likely to sign on to a company such as BHI if they met the attorney who ran it.

With the birth of his first child immediately on the horizon, Foster set his sights on reaching a goal, 50 BHI attorneys and he would take a break from the road, engage in some needed analysis of the company's operations and spend some much needed time with his wife. Foster's daughter, Eleanor Ann-Marie Foster, was due to be born in mid-October of 2007.

It was early September and BHI had 43 contracts signed with attorneys all across the state. Things were moving much faster than anticipated by Foster and he was facing some very difficult decisions. Over the last few months Foster had limited his practice to about a quarter of what it was, representing indigent folks and just a handful of private cases. Foster recognized that if he truly wanted to help people he had, maybe the largest opportunity to help the greatest number of people by continuing his efforts with BHI he would ever have staring him directly in the face. It was time to dig in reach the finish line of the first set goal of BHI, well at least the first potentially accurate goal. Foster, Mr. Redmon and Hammer had anticipated that for the first six months they would be lucky to sign four attorneys per month. The first two months following the statewide launch made it crystal clear their predictions had been way off. With seven more attorneys to go, some additional restructure, focus and direction was just around the bend.

A light drizzle fell upon Mr. Foster's face as he walked the few short steps from his vehicle to the back office door of his Depot Street Law Firm and the home of BHI. Foster entered the door, turned on the coffee pot and set out to schedule the last remaining sales calls. Foster was confident BHI was on the verge of reaching its preliminary goal. Foster found much comfort in the belief that very soon he would be able to relax for a moment, be at peace with the business Mr. Hammer and he had successfully built; engage in planning the next fifty contracts and how to handle them. Most importantly he looked forward to spending much needed time with his wife during the last days of her pregnancy.

It was September 14, 2007, a day Mr. Foster will never forget. It was four days before his third wedding anniversary and just a few short weeks until he would meet his daughter. Enjoying his coffee in preparation of the day, for once Foster allowed himself to actually daydream. He thought about how rewarding it was going to be to sign that 50$^{th}$ attorney go to about half pace and actually take some time off. BHI was really doing well at this point, and Foster felt comfortable, for once in his life, with the thought of actually not working 18 hours a day for a few months. Foster was looking forward to the time with his wife and more importantly the time he knew he would have to spend

with her and his first child during the first month or so following the birth of their daughter. Satisfied that he had found his place in the world, a place where he could put two of his true passions to work, helping others via the legal profession and operating, managing, and marketing a successful business. Albeit, Foster was on his way out of the daily practice of law, he was still required to utilize his legal skills on a daily basis right alongside his business, marketing, process and software development passions, and he was actually going to be able to put all those things together to help other members of his profession. A true credit to his profession, not necessarily in the courtroom or in the trenches, but as benefit to those who ere, Foster smiled as he considered his circumstances. It was a great feeling, a true feeling of success, not monetary success because although BHI was beginning to pay the bills it was just getting started; there were no big salaries in the immediate future, but Foster was happy; he could still afford his Admiral Nelson and knock off coke and he was helping others, just what he had gone to law school to do.

There was one passion that BHI did not provide an outlet for Foster to engage in, at least not yet, and that passion was politics. Foster had been the Vice-Chair of the Greene County Republican Party for four years, and was into the second year of his Chairmanship of the Party. Typically, a Chairman held the position for two consecutive two year terms, but with the coming birth of his daughter and the growth of BHI, Foster had resolved himself to leave the political world behind for a while, not seek the Chairmanship for a second term and spend the extra time the lack of political involvement would provide him with his family. After all, he had spent the last several years working 18 hour days, mostly 7 days a week. Between practicing law, working with candidates on elections, running a campaign or two, and the general involvement with local party politics and BHI, Foster had run himself ragged and it was time for a break. But hey, it was the life of the small mountain town indigent representation lawyer; it was the life he chose.

The morning of September 14th progressed on like any other normal day, except that Foster was, for once, enjoying a relaxing morning sipping hot coffee, engrossed in the thought of what the next few months would bring. That pesky buzzing of the telephone that typically irritated Foster because it normally interrupted intense concentration blasted out. This was the normal modus opernadi because if Foster was at his desk and not on the phone. He was always engaged in intense concentration, focused on the business at hand. From the loud speaker on the phone a very concerned, nervous, trembling voice exclaimed "Robert, you need to come to my office immediately." After a momentary regrouping session aimed at coming back to reality after a morning of coffee and daydreaming, Foster yelled back, “why, what's up Hammer?” “It's important and it’s not good, you better get in here ASAP, you need to read this”, Hammer nervously reported to Foster. Foster advanced. “Just get up here ASAP and read this thing, I hope you will know what to do about it.” “Ok, I'll be there in a minute; calm down, it can't be

that bad, Foster said." "You're gonna eat those words in about five minutes, Robert; unfortunatee it", Hammer stutteringly spouted back. Foster stepped from his desk with slight concern and walked upstairs to Hammer's office where the remainder of his life was going to be forever altered by the words he was about to read.

"Hammer, what the heck man?" Foster said as he sat his coffee cup on the desk and sat down to read whatever this thing was that had Mr. Hammer so nervous and upset. "Here, look at this thing!" Hammer exclaimed as he handed a one page document to Mr. Foster. Appearing at the top of this ever so important document that had Mr. Hammer in a tizzy was the seal of the Supreme Court of Tennessee. "Wow, that's great, what does the Supreme Court want with us? Foster said. Just read it, you will see. Apparently we've done something the Supreme Court Justices or the AOC doesn't like. My reading of that document says BHI is out of business, but you're the lawyer; you tell me, Hammer said with a nervous twitch as he lit up a cigarette. Normally I don't smoke in here, but I can't drink on the job, I don't have a prescription for valium, and I need to calm myself down before I have a heart attack, so I hope you don't mind; and, if you do, Robert, you're just going to have to get over it. It was almost surreal, the clicking of the lighter, the lighting of the cigarette, watching his good friend, brother in law, and business partner falling apart before his eyes. Foster finally became concerned; here, let me have one of those, Foster said as he took a sip of his coffee, spilling some on the floor as his hands were shaking at this point just from the dramatic reaction he had just witnessed, not having even read the document yet.

As Foster's eyes moved across the document the level of concern heightened. Foster's stomach clinched, his fists tightened and he began to experience an emotional lightning bolt of anger, the likes of which he had never before encountered. As the emotions swelled, the anger turned to fear and concern, and as he finished the his initial perusal, certainly not his last, of the document, Foster paused for a moment to regain his composure. Foster knew there needed to be at least one level head in the room. Claims were coming across the fax, the phones were ringing with questions from current attorneys and new potential attorneys were calling to schedule appointments, employees were typing claims, banks were involved and fairly heavily, leases on copiers were in force, BHI had hundreds of thousands of dollars on the line out to attorneys in exchange for their assigned claims. Foster's first child was about to be born, and the words Mr. Foster had just read, appearing under the seal of the Tennessee Supreme Court, spelled immediate financial disaster, ruin, and bankruptcy. During that brief pause all of these things flashed through Foster's mind. Taking a deep breath and somehow mustering every single bit of emotional control he had in the fiber of his being, Foster exhaled and said, "Hammer, I am now eating my words, this is serious, and you are right; for now, it means BHI is out of business. I need to think and figure out what we need to. First we need to figure out what to tell the employees; how do we explain to them that the Supreme Court just fired them? I need to determine what to tell the bank, and Hammer, I

am just not certain what to do next." "That's just great; you always have a plan, you always know what to do, and we are facing complete and disastrous financial ruin and you do not know what to do!!!" Hammer nervously mumbled." "Hammer, calm down. this is bad, but we will figure it out. You are not a lawyer, but you know the Court can't just shut us down like this and there has to be something, a hearing an opportunity to be heard, something can be done about it. I will figure it out; I always do, don't I? Just don't worry about it; I will handle it. Just don't tell the employees until I can figure something out. I don't want them to worry." Foster said as he exited Mr. Hammer's office just shy of losing his breakfast on Mr. Hammer's desk.

Wow, how intentions can change!! Foster, just 15 minutes prior had been sitting at his desk, actually beginning to enjoy some of the fruits of his toiling labor, proud of the entrepreneurial sprits he and Mr. Hammer had latched on to with such a rigid grip. Proud of the jobs the two had created, yes just a few moments prior, he was pondering the joys of the next few months, much needed time with his wife, the excitement of spending time at home with his soon to be born first child and daughter, and reveling in the idea that he was finally going to be able to peacefully take a break from the stressful life of the small town mountain indigent representation lawyer, constitutional protector and now small businessman. As Mr. Foster reached for the phone, he thought to himself with much displeasure and disdain for the words that appeared below the seal of the Supreme Court of Tennessee continually scrambling through his brain like a shockwave of unrelenting electronic impulses aimed at its epicenter. Life is all about tradeoffs and changed intentions. Just moments before Foster was placing the phone in his hand, pecking the numbers from memory, he intended on hanging his political hat in the closet to gather dust, but faced with the utter financial devastation just prior to the birth of his first child, he knew without a doubt his hat was going to gather no dust, but be further blotted with worn torn battle scars. The Supreme Court has given me no choice, he thought. The Court had released the political animal from its cage, just moments before the door on it was locked. They have given me no other option but to return from that whence I came, the political arena. The time had come for Mr. Foster to call upon so many of those that had called upon him in the past, "Congressman, this is Robert Foster, how are you today?" Mr. Foster spoke into the phone with the confident political voice he had so often used in his past.

So it all began, the beginning of the end or the end of the beginning, Foster was not yet sure, but he knew what lay ahead; a long hard battle of political ideologies, at test of his will, his dedication, and resolve; yes, Foster knew that this time the political platform was built upon absolute survival necessity, not just passionate desire. Placing the phone in his hand, Foster dialed the number that appeared just below the seal of the Supreme Court of Tennessee, and asked for Director Sykes. The negotiations began, or at least Mr. Foster's attempt at prodding the AOC into telling him what they were going to DO as he later discovered had begun. The conversation led Mr. Foster to the

conclusion that the document that caused his heart to stop, had not yet been issued to the attorneys or judges in the state. At this point is was merely an unpublished Directive of the Administrative Office of the Courts, Mrs. Elizabeth Sykes; it could be stopped; yes, there might be a chance; the brilliant, insightful, constitutional protector Foster could stop it, after all Foster read the memo and its affect as a cease and desist order, and he, nor Mr. Hammer or BHI, had been given any opportunity to be heard before their business interest, hard work, investments of time and substantial dollars were ripped from them with the unilateral stroke of a pen. This is the Supreme Court of the great state of Tennessee and its administrative arm, of all arms of the government, surely this would be viewed as a due process violation, Foster intently thought as he began formulating his plea to the AOC. Foster fell as if there was nothing to worry about, he had done all the research and knew what BHI was doing was completely legal and ethical. The only difference between BHI and companies that had done business in Tennessee for years was that BHI actually provided an administrative service Foster thought. Considering the lack of ethical violations and the legalities of what BHI was engaged in, surely the Supreme Court of Tennessee would not allow its administrative arm to engage in the utter financial ruin of an attorney and a business that was now assisting 43 attorneys, Foster thought as he confidently asked, "Well since this Directive has not been mailed, would you give me a day or two to formulate a response, provide you with the law on the matter before you take my life away from me?" A quick, "yes, we will consider; no promises, but we will consider." We are mailing the Directive on the 18th. Wonderful, Mr. Foster thought. The 18th, my anniversary, Bridgette is going to love this. Happy anniversary darling, by the way, we are now broke, we owe the bank our soul, I used our first born as collateral, and we are going to lose everything we have worked so hard for. Even better, I have no unemployment options because I am the employer, wonder how we apply for food stamps and government assistance for the raising of our soon to be born daughter? Oh, and how was your day? Mr. Foster imagined the conversation over a bologna sandwich as opposed to the nice dinner outing he had planned for their anniversary. No dinner plans because no money to buy the dinner, Foster thought as he distastefully mulled the up and coming evening over in his mind.

Foster, keyboard in hand began to write. The result was a document that exists in only three places that he is aware of, and he would later wish it did not exist anywhere. Somewhere deep within the bowels of the AOC the document is probably filed away, in a file in an attorney's office in East Tennessee, and the Greene County dump. Looking back on the document's creation, Foster oftentimes wishes he would have read the following quote of Kelvin Throop, III, a fictional character and collective pseudonym dreamed up by from the mind of R.A.J. Phillips. "To get the attention of a large animal, be it an elephant or a bureaucracy, it helps to know what part of it feels pain. Be very sure, though, that you want its full attention." Although spoken by a fictional character, truer words had never been uttered.

Foster, with that youthful arrogance that sometimes befalls a young lawyer, thought to himself, with a gleam in his eye and flawed sense of prideful swelling, after the AOC and the Court reads that a wonderful piece of work I delivered to them, certainly everything will be just fine; BHI would continue serving its client attorneys, a relationship could be formed with the AOC, and he could finally get the break he had been dreaming about just a few short days ago. Mr. Foster could have not been more wrong, and Foster quickly realized that lessons learned the hard way are typically the ones that formulate your character as a man and help mold you into the person you are destined to become.

Foster picked up the phone, quite impressed with himself, and dialed the number appearing just below the intimidating seal of the Supreme Court of Tennessee. With an air of confidence and peace in his voice he said to the receptionist, this is attorney Robert Foster, may I please speak with David Haines? "Mr. Foster……., Haines exclaimed. How are you today?" "I am fine, Foster replied, hope you are." Many things were discussed and several people were on the other line, the Director, other staff, the top brass of the administrative arm of the Supreme Court of Tennessee, and Mr. Foster, a small mountain town lawyer, who had certainly gotten the full attention of the elephant bureaucracy, unfortunately he was now not so certain that he wanted it.

Foster asked Haines, have your read my memo? Haines said, "yes I have." Foster then pointed him to the applicable portions of Tennessee's version of the UCC law governing assignments. The law is clear, David, Foster explained, "BHI's assignments are protected by this UCC law, and it clearly states that all arms of government must honor them." In fact, Foster pointed out that the UCC law prohibits any government agency or body for engaging anything that thwarts the requirements that the assignments be honored. Foster went on to argue with certainty that he was right, and the AOC was going to agree, "David, the law is so strong on the issue that the legislature of the great state of Tennessee made it very clear, that it was the only body that could change the application of the UCC to assignments, and in so doing it would be required to specially reference the quoted portion of the UCC and state with clear specificity that the newly passed statute controlled." Foster, happy with himself, prideful in his arguments and positions, arrogantly leaned back in his seat, paused for a moment and anticipated Haines's concurring response. "Mr. Foster, I have read the law on the issue, and you are right." As these words were spoken Foster's lips, moving in an upward motion began to form one of the largest smiles that have ever graced his face. The formation of the smile was terminated with a quickness as Haines continued speaking and Foster heard the words that became forever implanted upon his soul; words that placed an indelible mark upon his faith in the system, the ideologies he had learned in law school about what justice was, the faith he had placed in the constitution and freedoms it guaranteed, words that changed Mr. Foster forever, words that began a journey he is still traveling today, "but we are the Supreme Court and we are going to do whatever we want." Haines finished his concurring opinion on the law and followed it with a directive that was

completely contrary to his concurring legal opinion. The directive was clear, cease and desist all operations, do not process claims, do not assist attorneys with the processing of their claims, Supreme Court Rule 13 does not authorize an attorney to use such a service and BHI is hereby directed to cease and desist all activities related to Supreme Court Rule 13 claims. Shortly thereafter, Foster received another heart pounding document drafted under the seal of the Tennessee Supreme Court. This time a letter containing instructions to comply with the newly formulated directive that was actually mailed to all attorneys, and pursuable to all judges in Tennessee. Funny thing about this document, it was completely different and mentioned nothing about the processing complexities allegedly caused by the involvement of a third party assigned such as BHI as the prior Directive had pointed out. No, this directive merely stated that "However, Rule 13 does not allow an attorney to assign these claims or to delegate any responsibilities for claims submission." The document gave no interpretation that Rule 13 or any other law, case, statue or rule prohibited either. Nevertheless, BHI had received its marching orders, was told what the AOC was going to do, and BHI was out of business.

General conversation with members of the AOC continued on the issue of what could be done. BHI, at this point, had approximately $200,000.00 in outstanding claims. It became clear to BHI that BHI could do absolutely nothing to process its already outstanding claims, could not send them to the AOC and could do nothing to recoup the money it was due for the work it had engaged in assisting attorneys in this great state. The Supreme Court of Tennessee had issued its directive for BHI to cease all involvement with Rule 13 claims. Further conversation revealed that not only was BHI directed to cease and desist, but that the AOC had no intention of paying already processed claims to either the attorney or to BHI. BHI was advised by the AOC to take it up with its attorneys and claim force majeure. Foster was not about to seek payment from BHI's attorneys for this occurrence was not their fault, but neither was it BHI's; everything BHI engaged in was completely legitimate, protected by the UCC laws, and no law, statue, rule, ethical opinion, case or regulation even attempted to prohibit what BHI had been engaged in.

Foster wondered what the other companies that had actively engaged in a similar business for years before BHI came into existence were going to do. He was confident that those companies did not have the passion he had for assisting his fellow bar members or for the indigent representation system as a whole, so the fleeting thoughts of engaging those companies alongside BHI quickly waned. Foster did make one call to another company, simply because it appeared from documentation that the AOC had provided, to BHI that the AOC had sent a copy of the correspondence that BHI had received, with BHI's name on it, to a one of the companies that had offered the financial side of BHI's business model to Tennessee attorney for years, a competitor of BHI, albeit an insignificant one because the company only offered financial service, it was only one piece of the BHI puzzle. The company was located in Alabama. Foster scurried to find

the number and called. A young man answered with the company name and asked how he could help. Foster introduced himself as an attorney in Tennessee and President and C.E.O. of BHI and inquired as to whether the owner was in. The young man explained that he was not, but he would be glad to take a message for him. Foster inquired of the young man as to whether or not they had received this cease and desist directive. The young man responded in an arrogant tone of voice and gave Foster some food for thought. The young man explained that they had received it, but the owner was not worried; he had a friend that was a high level Tennessee State Commissioner, it was no big deal, the owner had already talked to his friend about the matter. Foster thanked the young man for his time and asked that the owner call him.

A high level State Commissioner is a cabinet member appointed by the Governor, who at the time was former Mayor of Davidson County, successful entrepreneur, and an acquaintance of Foster's parents, none other than Democrat Phil Bredesen. Foster had first met Bredesen at an event in Nashville while he was enjoying his tenure as Davidson County Mayor, wherein Foster, unexpectedly ended upon on the nightly news sitting just beside him. The next time Foster met Bredesen was at a fundraiser held in the home of his stepfather and mother. Foster, a Republican, attended the event upon the invitation of his parents. At the time, whether they admitted or not, many Republicans supported Bredesen. Foster true to his party, voted for Congressman Van Hillerary for Governor that year. Needless to say, Foster found the exchange between the young man and he very interesting, another piece of the puzzle. Foster anticipated a return call from the owner, especially considering the recent exchange with his assistant, but much to Foster's dismay, the owner never returned his call.

Something had to be done; at minimum, BHI had to recoup its claims dollars and even with that, without the ability to continue to operate, all the startup capital, costs, leases, investments in technology allocation of time, resources and efforts all aimed as merely helping indigent representation attorneys would be lost. Foster rubbing his temple with concern like he had never before experienced, trying his best to maintain his composure and not vomit on his desk, thought to himself, even if BHI recoups all of its claims, the financial loss from a complete shutdown would ruin everyone involved. Foster's mind moved to his soon to be born daughter, how was he going to welcome her to the world, and how was he going to take care of her once she arrived. Foster, now feeling the full attention of the elephant bureaucracy, was most certainly sure that he did not want that attention. At his desk, in that sleepy little mountain, Foster sat alone, and again began to think.

Remorsefully removing the pen from his pocket, Foster quickly snapped the lid from it and placed it on the opposite side of his standard blue uniball pen. Foster touched the pen to the paper and began to write on a yellow pad, number 1. For the next several hours, Foster wrote down the name of every political person, business leader, community

leader, judge, attorney, and any other person of influence he had come into contact with over the last decade of his life. The list was developed and the phone numbers were tracked down, it was time to dig in and start calling for help. The battle had begun.

A few phone calls from the list led Mr. Foster to Braxton Terry, a fairly young, but well respected and intelligent effective attorney from Morristown, Tennessee, a handsome young chap and the son of an East Tennessee legal icon, Charles Terry. From that call, Foster was led to another fairly young well respected, highly intelligent, direct purposeful and intent lawyer from Dyersburg, TN, W. Lewis Jenkins son of former Congressman and East Tennessee Political icon, Bill Jenkins. The retainer agreements were signed; the fate of BHI and the livelihood of the Foster and Hammer families were placed in the competent hands of Braxton Terry and W. Lewis Jenkins.

"Lewis, something has got to be done about this situation. The Court has just put me out of business, I'm facing bankruptcy and my first child is on the way. BHI wants to keep its doors open and fight this thing tooth and nail", Foster exclaimed while gripping the phone so tightly his hand was becoming numb. "Which federal court will we file the suit in and can we have it filed yesterday", Foster blasted out. "Now hold on just a minute, let's not get ahead of ourselves; this is the Supreme Court we are dealing with", spoke the voice of reason on the other end of the line. "This matter requires intent thought, deliberation, planning and execution. Let Brack and me meet with the AOC before we go off and shoot ourselves in the foot", Said Lewis, "If we can calm everyone down from that nice piece of work you so artfully bombarded the AOC with, maybe, just maybe, reasonable minds will prevail, or at least I hope so." Lewis advised. "You have not made it easy on us, Robert; you certainly have not made any friends at the AOC." Lewis scolded. "Well, Lewis, maybe the federal suit is not in order, at least not yet. We hired you and we will follow your lead." "Well thanks good to hear, and I'll hold you to it; you know representing a lawyer means you have the most difficult client on the planet", Lewis opined, chuckling as he delivered his sound counsel. "Lewis, I don't know if it's possible or if it would do any good, but David Haines, Chief Counsel at the AOC suggested that the proper course of action might be to file a Petition asking the Court to Amend Rule 13." Foster advised. "He did say that we just about had it together with the document I delivered to the AOC, but he counseled that we might need to tone it down about remove some of the scathing accusations, etc. He told me doing so might just make it a little more palatable to the Court." Foster went on to convey. "You think! Tone it down, we need to just bury that thing and hope it never rears its ugly head ever again, if that is all we accomplish, we will have earned our fee", Lewis scolded yet again. "I know, I really messed up with that terrible piece of work; I was just so upset that my livelihood was ripped from me. I was just lashing out", Foster reasoned. "Well, hopefully throughout this process, if you follow our lead like you promised, you will learn from your mistakes. We all make them; let's just try not to repeat them too often." Lewis consoled Foster. "Ok, I will, I trust you and Brack, you come highly recommended, I

know your brother and your father, but I have never met you. Hopefully we can sit down sometime for a cup of coffee", Foster extended his pleasantries. "We will definitely do that. Now down to business; Brack and I are going to schedule a meeting with the AOC. I agree with Mr. Haines on the Petition, you apparently have done a lot of research from this "Memo" I am forced to deal with, so email me your citations and whatever you have and we will get to work. I can't guarantee any results, as this is a big deal. Convincing the Court to amend one its own rules, especially after the Directives that have been issued; oh, and not to mention your beautiful piece of prose, please just let us handle it from here." Lewis intently instructed Foster. "Ok Lewis, thanks for everything, I'll send you what you need, stay out of your hair and let you do your job; just do it well. Thanks", Foster responded. Click, the phones were hung up and the stage had been set for what would consume Mr. Foster for the next several years of his life.

It was October 15, 2007; another day Foster will never forget. The chair was uncomfortable and the television not loud enough, the coffee was cold, and Foster's life was just moments away from being altered forever again. Get the doctor's; she's coming, she is on her way, exclaimed a nurse. Yes, there Foster sat, ready to meet his daughter for the first time, having no idea how he was actually going to provide the life he had planned for her. The most wonderful experience a man could ever have was overshadowed by the pending gloom of the imminent financial ruination of the Foster family, the Hammer family, and the loss of jobs for several others. It was yet another surreal moment for Foster; a moment that would have otherwise been filled with the most joyous overflow of emotional bliss, but the emotional bliss had been muted by the full attention he had received from the elephant bureaucracy.

As he looked into the eyes of the most beautiful thing he had yet laid his eyes on in his 34 years of life, a tear fell from his eye. He reached down and kissed that beautiful face of the newly born daughter he was holding in his arms on the second day of her life. Looking at his wife, holding his angel, princess sunshine in his arms, he reached over to kiss his wife, that surprisingly, after having gone through labor, birthing a daughter, and successfully sobering up from the epidural, looked more beautiful to Foster than ever before. As he kissed his wife, Foster vowed to do whatever was necessary to save the jobs of the people who had relied upon him, prohibit the financial ruination of his step-sister, and the Hammer family who had one child and one on the way. Most importantly he vowed to do whatever was necessary to ensure the little angel, princess, sunshine he was holding in his arms was cared for, loved, and not subject to extreme poverty due to the cease and desist directives he had received just two months earlier.

Withdrawing from the memorable loving exchange between the triangle of himself, his wife and his newly born daughter on the day following her birth, Foster's cell phone rang. Foster knew who it was going to be; and although he did not want to answer the phone, because after all this is the first time he met his daughter, Foster had no

choice, it was Lewis. Lewis, such a kind hearted caring soul always asked about your family. A lot of folks do that but you could always tell Lewis was sincere. He actually cared. What a great person and a great lawyer, definitely not a shark swimming in the dirty water, and not the characterization of the attorney that is the brunt of every joke. "Hey Robert, has Ellie been born yet?" Lewis interrogated. "Yes a little less than 24 hours ago. Thanks for asking; it's amazing." Foster replied. "Well, I know it's an important day, one that you are probably gonna remember for the rest of your life, and I have got some good news. Hated to call today of all days, but I knew you would want to know just as soon as possible. We filed the Petition today. Our request for the Court to amend Supreme Court Rule 13 to expressly authorize BHI's type services has been filed with Mr. Catalano this very day in the name of Billable Hours, Inc. and Robert L. Foster, Esq. We might just make history, Robert; let's hope so." Jenkins reported with an air of delight in his voice. "Great, that's great news. And yes, let's hope we make history. I will most certainly remember this day", Foster responded. "What's next, what is the next move?" Foster inquired. "The next move is for you to go back to your wife and newly born daughter and relax, Brack and I have it under control for now, call me in a couple of days and we will talk." Lewis commanded Foster. "Ok, will do, and hey man, thanks for everything! My family is depending on you, Lewis. I have a hard time depending on someone else, you know that by now. Please, please, don't let us down. I'm sitting here holding my daughter, and I hate to admit it, but I am scared to death. You have done a great job so far, and I believe in you, a much smarter legal mind than I will ever have. Thanks for everything." Foster tearily commended Lewis. "Robert, you are welcome, I have enjoyed it thus far, it has most certainly been interesting, for now, we have done what we can do, it's in the Court's hands now, I suggest you pray." Lewis explained. "Thanks again, talk to you later." Foster said as he clicked the button on his cell phone, turned the power off, put it in his pocket and sat down. Foster nestled his newly born child in his arms, gazed into her eyes and did his best to enjoy the second day of his daughter's life without thinking about the Petition that had just been filed, what it really meant, what was going to happen, and what could he be doing to ensure that it was granted.

Upon arriving home, wife and newly born daughter in tow, Foster settled in helping his wife the best he could considering the mounting pressures laid upon him with the previously filed Petition. Click of a button and the AOC's website appeared on the screen. Wow, there it was, the Order soliciting comment on BHI's Petition! BHI had just been introduced to the entirety of the state bar by none other than the Supreme Court of Tennessee. Foster smiled for a moment because he knew that at the very minimum, the Court was considering granting the proposed Amendment or some form or fashion of it. Foster knew that Lewis and Brack may have put history into motion. Gazing at the screen Foster slipped into deep thought and began to wonder in amazement how in the world a small mountain town lawyer got caught up in this big mess. As he pondered the past few months, and as he had done so many times before, he asked himself, why would it matter to the AOC, the Supreme Court, or anyone else for that matter, whether BHI

prepared a claim or an attorney's assistant prepared a claim. Laughingly as usual he was reminded of the demands that an attorney's assistant was not allowed to prepare these claims either; the lawyer must do it personally. What a joke, he thought. No attorney practicing indigent representation that could actually afford to hire an assistant was filing out these claim forms personally; signing them maybe? But not filling them out and gathering all the documents; nope, the directive was most certainly being ignored all across the state. All Foster had set out to do was help other attorneys who chose to accept his help to more efficiently operate the administrative side of their practice so they could more adequately focus their attentions on providing quality representation to the indigent folks of the state without the concentration piercing worries of the inability to meet their financial obligations. Why, why, why, was that such a bad thing? Foster, to date, has still not figured this one out, and he is confident he never will.

"Lewis, its Mr. Foster", Mr. Jenkins' assistant spoke over the intercom system in that building on the square in Dyersburg, Tennessee. Picking up the phone, in anticipation of a lengthy, excited conversation, Lewis knew exactly why Foster was calling for Mr. Jenkins had engaged in the exact series of clicks Foster had just moments before." "Hello, Robert, how's the wife and daughter?" Jenkins asked with the sincerity of a fire and brimstone Baptist minister. "Lewis there are fine, thanks for asking and your family?" Robert responded. "They are fine. Guess you saw the Order." Lewis allowed. "Yes, I sure did, that's great. Great job, but what exactly does it mean?" Foster questioned. "Well, it means the Court is considering our Petition and considering putting you back in business", Lewis happily counseled. "That is great, Lewis. You and Brack are amazing. I knew we had picked the right guys. What's next?" Foster excitedly uttered. "Well, the Court opened the thing up for comment so we need some positive comments and some targeted positive comments, and hopefully the TBA and TACDL will chime in. They should because your service should be a benefit to the system, or at minimum attorneys should have the option to use it if they want. I have always been a fan of the idea, just amazed at how you put it together", Lewis answered with a commanding instructional tone. "Well, I think I can handle that. We will get the comments; you can bet your bottom dollar on that. Lewis, thank you again, but I have to get to work; I have a bag to pack." Foster exclaimed as he excitedly and with an unintentional rudeness hung up the phone. Foster's mind was spinning, gotta get on the stick he thought to himself. Foster, looked at his wife and said, "I know I promised that I would be here with you following Ellie's birth, but that promise was made before our lives were placed on hold by the full attention of the elephant bureaucracy known as the AOC. Will you please pull a few suits and ties, and pack a bag for a week or so for me? I have to go to the office just now, get busy and when I return I will be leaving for several days", Foster, regretfully and with sadness over what he knew he had to do, asked. "Sure, Robert, I will. I hate this. I was so looking forward to enjoying the first month or so of our daughter's life together. They have taken something from us that can never be returned." Bridgette answered as a tear dropped from each of her perfectly situated eyes. "I love you, I am gonna miss you, but I understand," Bridgette, with more tears falling stated with an un-

refreshing sense of insecurity. "I love you too babe; I have to go save our family. Thank you for understanding", Foster stated with a heartfelt sincerity as he pecked her on the check and walked out the garage door of their home headed for the office and headed for history.

"Alright, Congressman, thank you for your time. I will see you at the waffle house tomorrow morning", Foster allowed as he placed the receiver back on its hook and picked up the yellow pad with so many numbers and names. A database had been developed several weeks prior with all the names, addresses, phone numbers and emails of the folks Foster had worked with or come into contact that could potentially be of assistance for the last decade of his life.

The keyboard began to ring out with that ever present sound that typically emanated from Mr. Foster's office and he was reminded of his mother. Years ago, while still in high school, Foster's mother had recognized that his handwriting was so poor that something would have to be done about it. Having tried for years to engage Foster in workshops, handbooks, and other various fruitless attempts, she had all but given up, assuming that Foster would have to become a doctor or he would never make it. One last ditch effort was put forth, and Foster's mother purchased him his first computer and gave no other option but for him to take typing at his local high school. Foster thinks of her often when he bangs the keyboard away at 100 miles an hour typing faster than any assistant he has ever had, writing code, emails, documents, templates, formulas, motions, orders, letters and various other required documents.

Within a few hours, template letters, emails, comments were all drafted. It was time to execute. BHI had decided it was best to keep its doors open and employees in jobs doing whatever it was they could find for them to do over the last few months. A costly undertaking, but if BHI was successful in its Petition, Foster and Hammer knew that BHI would have to be ready to get back to work day one of any successful Amendment. There was a lot of ground to cover if successful and proper preparations for success were most certainly in order. Foster and Hammer met, then met with the employees, who, of course, were now all aware of the cease and desist Directives and the efforts to secure an Amendment to Rule 13 that would put the company back in business. Foster rattled off the plan, a general overview of the next few months. The comment period closed in December. So much had happened so fast it was a bit overwhelming, but the plan had to be laid out, responsibilities and tasks assigned, and Foster needed to be on I40 by that evening.

Emails were blasted out to clients, informing them of the Court's action, asking them to comment, and providing a standardized written comment. There were, by the end of the day, templates for citizen comments, business leader comments, judicial comments, legislative comments, attorneys who engage in indigent representation

comments and comments for attorneys who did not engage in indigent representation. Foster had in his possession a standard Petition type comment with multiple signature lines and bar number slots. Having plotted his journey, Foster picked out a few judges he believed would agree with his position and file a comment. Foster researched those particular judges and drafted comments that seemed to be from their life experience perspective. Armed with the potential comments, the notice emails and faxes that all flew out the doors of BHI from that small mountain town in the building on Depot Street, the journey across the state began.

The picture that repeated itself time and again was usually something like this: Foster sat in the galley of the courtroom, suited for business, but not yet having walked behind the bar. Although as a member of the state bar, Foster knew he was completely within his constraints to walk and sit down on the other side of the bar, and doing so would most certainly catch the attention of the judge he was there to see, he never did so unless he had been in the judge's Court room before. Foster would quietly sit there reading a file, or folder, something that would most certainly key the bailiff off that he was an attorney. Ultimately, and in the typical fashion, the bailiff would walk over to Mr. Foster and say, can I help you or what are you here for. Foster's typical response would be uttered, "Oh I am just an attorney from East Tennessee, Greeneville, I was in town and had hoped I could see the judge." Invariably, the bailiff would take one of Mr. Foster's cards, walk to the bench and speak softly to the judge. Usually the local judge would say something like Mr. Foster, please step up here. You know you can come behind the bar. "Thank you Your Honor, just wanted to be respectful of Your Honor's Court because I have never appeared here before." "Your Honor, thank you for taking a moment to see me. I have a matter I would like to discuss with you. Would you be kind enough to give me five minutes whenever you take a break?" Foster would say with the most deferential voice he could muster. The typical response, sure Mr. Foster, just have a seat and we will talk in a minute. Nice to have you here with us today, from, where did you say you were from? Greeneville. I am a member of the Greene County Bar. Oh, ok, that's somewhere over past Knoxville, near the race track in Bristol. "Yes, Your Honor that's right all the way on the North Carolina State line."

Chambers' meetings during this time were especially enjoyable to Foster. Each judge had such an individual personality, personal story and unique perspective on the world. These meetings would sometimes last for an hour or more. In the end, Foster always explained his position, what BHI was, discussed the pending Petition and asked the judge if he or she would be willing to issue a comment on the matter. The standard response; sure, I think that BHI thing might be a good idea. Oftentimes, a judge would allow, boy I wish you would have been around when I was practicing; I would have signed up with you in a heartbeat. Then the moment would come. Well, Mr. Foster, thank you for coming by today; it was nice to chat with you. I'll have my assistant draft a comment up and get it out to the Court. Foster would always reply to the effect of thank

you so much for your time, Your Honor. I know how valuable it is, and because of that, I prepared a comment that might suit your position on this issue. Would you mind taking a peak at it. The standard response, well sure, let me see it. The judge, always intently reviewing each word of the comment, with the lucid understanding that the judge could not just sign anything, especially something pre-prepared by a small town mountain lawyer he had never met, either signed the comment and handed it back to Foster or held on to it for review. In either event, each such meeting resulted in a judicial comment being filed with the Court.

Various other business leaders, attorneys, and community leaders engaged in similar meetings with Foster wherein they agreed and issued comment to the Court. In fact, by the time it was over, not one single comment suggested anything other than adopt the pending Amendment. After several months of travel and a multitude of filed comments, the day before the end of the comment period arrived.

Hammer and Foster, as they had planned stepped into Mr. Hammer's truck, with multiple unfiled comments and the standard signature petition bearing multiple attorney signatures. With a prayer in their hearts the two men began the 4 hours drive to Nashville, TN. There the two would spend the evening and most of the next day in a cheap motel making phone calls and pressing for last minute signatures, last minutes calls to the Court and AOC staff. The end of comment had arrived and both were trying to bring this leg of the journey to a close with the unfettered belief that, at this point the two had done everything possible to save their families from financial ruin, save the jobs for the folks at BHI, and ensure their bank would be repaid.

Foster had never set foot into the Supreme Court Building in Nashville so he was a little overwhelmed, nervous and alert when he reached out to open the heavy brass laden door to Tennessee's primary hall of justice. It was December, it was bit cold. Foster, as he entered the monumental stone building that houses the most powerful Court in the state feeling the chill from the door handle, contemplated that pesky plaintiff and the horse pill and how his intentions had changed. For a moment Foster again thought, how in the world did a small town mountain lawyer ever get himself into this mess, and again as usual, he reminded himself of the full attention of the elephant bureaucracy. Mr. Catalano, the Clerk of the Supreme Court, was a very nice gentleman. Foster introduced himself and said "Mr. Catalano, would you please file these comments for consideration by the Court?" Mr. Catalano engaged in the expected pleasantries and filed the multiple documents. It was over; all that could be done had been done and Hammer and Foster climbed back into Mr. Hammer's truck and began their journey home each knowing that it was out of their hands now. A small prayer was offered by the two and they rolled onto I-40 East, each with a sense of a burden lifted and a knowledge that the next few months would be emotionally draining as they waited on the Court to makes its decision. After

all, their entire livelihoods now rested in the hands of 5 Justices. Would the Court return their lives to them, or ensure their demise??

It was February 28, 2008, and Foster was sitting at his computer continually pressing the refresh button the AOC's website as he had done practically every day since Mr. Hammer and he had left Nashville that cold December afternoon. The tip of Foster's finger was almost worn to the bone. He must have clicked refresh a million or so times, waiting in anticipation of what the 5 Honorable Justices of the Tennessee Supreme Court were going to decide about the remainder of his life. For whatever reason, Foster had come home early that February afternoon, and he was sitting at a pub table that a local furniture store owner had given him a few years back as a retainer for some legal work. The air exited his lungs as if the oxygen had been sucked out of him by one of those powerful vacuums at the local car wash when he saw it. A link, right on the front page of the AOC's site, Order Amending Supreme Court Rule 13; his hands were shaking, he could not believe it, Foster had waited with such anticipation for this day, and it had finally arrived. In disbelief Foster stared at the screen, excitement, anticipation, and fear of how the Order would read all welled up inside him simultaneously. Overwhelmed with emotion, and all alone in his home as his wife and daughter were out together somewhere, Foster could not even repeat the clicking motion that he had done so many times in the past. What would it say, what did it mean, would the Amendment specifically state those attorneys could not use BHI type services? Questions, questions, questions and then click and the product that Lewis, Brack, Mr. Hammer, Foster, and so many others had worked so hard to obtain was right there on the screen of his laptop. Immediately upon reading it, he knew what it meant the Order mentioned BHI and Robert L. Foster, Esq., and although it did not contain the clear concise standardizing language offered up by Lewis and Brack, it did contain the magic words, Section (6)(c) attorneys may..... Foster's heart began to race at the realization that BHI was now back in business. Wow, it had all come down to this one piece of paper signed by the Chief Justice of the Supreme Court of Tennessee, Mickey Barker. The Honorable Justices of the Court made things right. They had actually given Mr. Hammer and Mr. Foster their lives back, saved them from utter financial devastation, saved the jobs of several, and made many attorneys very happy. Foster thought to himself, it might not always be easy, but justice is out there, sometimes you just have to have the audacity, will, and determination to find it. Thank you Justices, Foster spoke out loud and to himself, although I was not pleased with your decisions in the beginning, we are lucky to have Honorable men and women like you serving this great state. You made the right call. Foster had a fleeting thought of that old golf analogy, it is not how you drive, but how you arrive. BHI had arrived. Foster knew it would immediately be jettisoned across the state as the Supreme Court of Tennessee had just advertised the company to every attorney and judge in state. All in all, the undertaking cost BHI well in excess of $150,000.00, but Foster still chuckles today with the realization that no better advertising campaign could have been purchased for twice that amount. Whatever damage had been done, had, at that point been remedied. Foster thought to himself, well the Court did not

make us whole, but it certainly provided us with the opportunity to make ourselves whole. Thank you again he thought as he popped open his cell phone for what was assuredly to be multiple hours of celebratory phone calls, issuance of instructions to employees, planning sessions with Mr. Hammer and others. The game had begun.

Foster, always having believed the impossible was possible dispensed with all the negativity that had surrounded him over the last few months. If Foster heard you're dreaming, the Court will never amend the rule, once he had heard it a thousand times. He gave these statements no mind because he always subscribed to the thought that you must will your reality into existence; you must truly first believe before you can achieve. That was Foster's motto. In keeping with his positive mindset, the last couple of months had been spent planning the marketing campaign BHI would undertake immediately following the Court's Amendment of Supreme Court Rule 13 to expressly authorize BHI type services. The brochures were all but complete, lacking only the date on the historical timeline that was to appear beside the tag line indicating the Amendment of the Rule. The brochure also had a blank space where Foster anticipated a small copy of the front page of the Order would appear once it had come down. The website was ready to launch as well missing only the same items as the brochures. The new face had been created, the mission statement written, the easily identifiable silver stopwatch shadowed by the fading grey dollar sign appearing all over each piece of media had lied in wait, anticipating only the date in which the Court ultimately amended the Rule before it was feverously launched across the state in a mass marketing campaign. Instant credibility, "Your Court Appointed Billing Solution" appeared on the right of the, green, silver, white and blue double sided business card. PETITIONER of the TENNESSEE SUPREME COURT to Amend Rule 13 RE: M2007-02331sc-RL1-RL, PETITION GRANTED to expressly authorize BHI type services-Feb. 2008. The much anticipated date had finally found its resting place squarely on the backside of BHI's new business cards, just to the right of the three symbolic Tennessee stars, and just below every lawyer's favorite words, Billable Hours. Tempus Est Pecuniae, Foster screamed to Mr. Hammer, "time equals money, and it is high time we started helping our lawyers get their share of it. Start the presses."

Multiple phone calls traveled across the state, thank you letters and a plethora of other amazingly fast paced engagements followed that February afternoon. Hammer and Foster had eyed the annual TBA convention as an exhibition potential earlier in the year and had prayed for the Court's ruling to come down in BHI's favor in enough time for BHI to book a slot as an exhibitor. Thankfully it had. A full year had passed since BHI launched at the prior year's TBA convention, but it felt more like ten. So many things had happened in the span of just one short year. It was, at times, unbelievable. BHI had climbed the insurmountable mountain thanks to Lewis Jenkins and Braxton Terry and a Court fully adorned with 5 Honorable men and women whom Foster was sure were true upholders of the Constitution.

Mr. Hammer and Foster appeared at the AOC for that much anticipated first meeting after the Order had come down. Hammer and Foster had spent the last two days preparing for it. There were many issues to address, back claims, information flow, and a plethora of other less important but necessary items of business to cover. Hammer and Foster knew this meeting would set the tone for the days to come dealing with the elephant bureaucracy. Foster thought to himself as they entered the lobby of the First Tennessee Building adjacent Legislative Plaza in downtown Music City USA, the full attention of the elephant bureaucracy, well, at least now I am ready for it. The meeting went well, much better than anticipated Foster thought, after it had concluded. BHI offered up its marketing materials for review by the AOC as BHI wanted to allow the AOC the opportunity to edit them before sending them to print in order to alleviate any inaccuracies. This offer was met with much resistance as it was explained to Hammer and Foster that the AOC did not want to hamper our speech, "print what you want to, they are your materials" an AOC attendee chimed out The AOC did not want to see the materials and Foster placed them back in their folder. "However, we have reviewed your website", an attendee exclaimed. The AOC addressed something about it is probably not a good idea for your relationship with the AOC to put things like this on your site, as he read from what appeared to be a print out of some of BHI's website material. "Fine, no problem at all", Foster said, "We will remove it that is why we wanted you to review our materials. It was merely an attempt to alleviate any such statements from BHI's media", Foster continued. At least an hour, maybe two, Foster and Hammer did not get everything they wanted, but some concessions were made; however, it was clear no agreements were made; the AOC simply told Hammer and Foster what the AOC was going to do. A follow up letter of understanding was fired off and was met with no opposition so BHI was sure that it was finally operating within the graces of the AOC, or at least within the confines of what the AOC told Hammer and Foster it was going to do.

It was June of 2008, Judges and attorneys from all over the state had descended upon Gatlinburg for some required CLE credits, socializing, networking, and some relaxation that was needed by all who arrived. Hard working attorneys and judges had come to the event, as they do each year, and were ready to relax, eat, drink, and learn. BHI was an exhibitor at this convention as it had been the prior year and every year thereafter. This particular event and convention will never be forgotten by Foster as it was the event that followed such a profound victory; a victory that saved many jobs, ensured the ability to assist so many attorneys in Tennessee and saved the Foster and Hammer families from utter financial devastation. Life was good, and Foster was pleased to have his wife join him for the few days of exhibition of BHI. Foster anticipated several questions, many new attorneys, judicial introductions, the whole gamut. In anticipation of the event, Foster made sure he was aware of the names of all the judges that BHI was currently working with, their titles, counties and districts. Foster spent further time burning the names of attorneys and their counties, districts etc. in his mind so as to be adequately prepared to speak with the many judges he knew would be in attendance at the event.

The first day of the event was a most memorable occasion because it was this day that Foster's wife, Bridgette, finally gained an understanding of what was really happening with BHI. In all fairness to Mrs. Foster, all she had seen from BHI was a company that drug her family to the edge of the cliff where she had sat and waited for months to be pushed over the edge by the Supreme Court of Tennessee. Needless to say, Mrs. Foster was not quite as engaged in the overwhelmingly positive thought processes that were firing through her husband's brain. She had seen just about all of BHI she cared to see. Notwithstanding her disdain towards the company and what it caused and the non-monetary losses that were not capable of being recouped, she, a mountain girl herself put her big girl pants on, put to the side the thoughts of watching her husband fight for their very livelihood, the time taken from her and their newborn daughter, and the hours and hours laying awake at night worrying when the financial bomb was going to drop, and agreed to accompany Foster to this first exhibition since the Order had come down.

Bridgette drove the couple to the Gatlinburg convention center where the two were to set up BHI's exhibit before noon. Bridgette parked the car, helped her husband unload all the newly printed materials with the much anticipated date appearing all over them, assisted him with setting up the booth and retired to the couple's hotel room to get ready. She already needed a drink; just the thought of BHI turned her stomach, but she knew she needed to be there to support her husband. After all, he had spent the last 9 months of his life battling with everything he could muster to save their family from ruination; at minimum he deserved her to be at his side with a smile on her face even if it was fake, but he would never know it was fake. Neither would anyone else. She was a seasoned pro, smiles, hello, how are you; she could pull this off and Foster would be none the wiser. As hard as he had fought, she could not bear to let him know her true feelings. It might devastate him or cause a big argument. He needed her support and she resolved herself to the fact that she would be there for him and for the family just as he had been there for them all, maybe not physically, but he had carried the torch.

On the first day of the convention, Foster arrived at the booth a little early to tidy up the booth, go over his list of judges and attorneys and ensure he was ready to get everything he could for BHI out of this convention; after all, there was substantial ground to make up and substantial financial losses to recoup. Foster was hanging around the booth, talking to a few of the attendees as they all began shuffling in, registering, engaging the obligatory walk through the vendor area to show support. The vendors pay substantial dollars for these events and the TBA members always seem to appreciate it, particularly this year. The handshakes, hello, how are you, the standard operating procedures for the first day of any type of convention when you are an exhibitor.

Foster began talking with the other exhibitors, typical for Foster, he would talk to the wall if it would listen. A smoke, a cup of coffee and some shared conversation with the Lexis rep, a brief discussion with the Geico girls, who Foster quickly learned were the most fun attendees, not for any improper reason, they were just a whole lot of fun and

enjoyed their job. They were, after all, the largest contributor to the event. Foster's Geico collection started that very morning, and it has grown every year since.

There is always one female exhibitor at these types of conventions that is just so sure she is the prettiest thing in the room. This particular year it was a banker, and yes, she was a beautiful young lady, but these women always are. The pride that filled Foster's heart was incalculable when Mrs. Foster entered the room in that perfectly fitted white suit accompanied by those bright red stiletto heels. Foster watched from across the room as she stunningly swaggered through the front door of the convention hall. He chuckled with grin on his face as he watched everyone in the room turn and look at her. Wondering why she had hung on with him through the last nine months of what was most certainly shear torture for her, Foster knew it had been for him. He thought, God must just be looking out after me. A belly laugh belted from deep within when he saw the banker girl who had been so sure of herself just moments before paint a very noticeable grimace upon her face as Bridgette passed by strutting her stilettos. Bridgette, a very intuitive female picked up the banker's obvious ora of disdain for her, and Bridgette, being the beautiful woman she is, knew exactly why and did not give it a second thought.

The true fun began when the attendees began to exit their classes. This particular year Foster was more concerned with meeting the judges than the attorneys. This was important because Foster wanted to pick up the judicial temperature towards BHI as this would assist him with any public relations engagements BHI may have needed to embark upon. Here they came, judges from all over the state, circuit, chancery, court of appeals, criminal court of appeals, and some general sessions and juvenile court judges. Now trial court judges are a unique group of folks, each with their own individual personality and style, each with an idea of how to run their courtrooms, but hey that is how it should be. The people placed their faith in the judge they elected in their local jurisdiction; the judge should be allowed to run his or her courtroom so long as the end result is justice being served. A non lawyer type, a layperson in legal terms, might believe judges are hardened black robe wearing, gavel pounding, hard core administers of justice. A non-lawyer with no experience with Courts may watch Judge Judy and equate that with what a judge is and how justice is administered. The laymen, non-lawyer, would be wrong on all counts. Trial court judges have a difficult job and they take their jobs very seriously. Each time the trial court judge puts on the robe, he or she cloaks themselves with the authority granted to them by the state of Tennessee to administer and ensure justice is done. Doing so is not an easy job, the judge, cloaked with the tremendous authority has tremendous and stressful responsibilities. Judges know that the decisions they make on a daily basis have a more penetrating effect on the lives of the people appearing before their courts than any other governmental body. This is the case, in at least, the majority of circumstances. These judges take this authority and responsibility very seriously and that is why they might come across to the non-lawyer type as hardened administers of justice. Although they are administers of justice, they are human just like everyone else.

The judges typically relax, take of the robe, and put the gavel down at these conventions. This particular year Foster experienced this first hand. Judges began strolling by the BHI both, and Foster having done his homework, knew who many of them were; by the name tag he was able to spout off BHI attorney clients that practiced before them, which counties they were in, other judges they might have known so on and so forth. By this point BHI had circulated around the state pretty intensely, was nearing its hundredth client attorney, and as such, had already processed claims through many of the judges' courts. It was during these conversations, overheard by his beautiful wife in that stunning white suit, which Foster was sure the reason so many judges were stopping to talk to the couple, that Mrs. Foster finally let go of her hidden disdain for BHI. As the judges stopped by the booth, invariably they were already aware of BHI as they had received a claim from BHI or knew a judge that had received a claim from BHI. Foster, no dummy, made sure every piece of correspondence that left the door bore his name, Robert L. Foster, Esq., so most of the judges recognized his name as well. Compliment after compliment came from the jurists that were so kind to stop by and talk with Bridgette and her Husband, Foster. Many of the judges acknowledged the major accomplishment of the sought after and received Amendment. Many of them were impressed and all who visited with the couple extended their hand, and at minimum said good luck and call me if I can help. The biggest compliment of all was still yet to come from one of the most powerful of all, but that compliment will have to wait for a different day and time; suffice it to say, it was this compliment that made Mr. Foster understand two very important things: first BHI was definitely a good idea, and a good valuable service to the indigent representation attorney, and that judges, especially higher level ones, are politicians just like those who appoint them. Foster smiled as this reality soaked in, politicians, he liked it, and he was right in the middle of it. That third passion Mr. Foster had tried to hide away in the closet was going to be more readily needed than he had ever imagined, and all he had set out to do was help attorneys become more efficient and have the cash flow they needed thereby assisting them with delivering quality representation. With a shrug of his shoulders Foster asked himself, what can possibly make the increased efficiency and cash flow generation for attorneys so political? Foster had not figured out why, but he was most certain that squarely in the middle of the political arena was where his feet were firmly planted.

The food was great and the company even better when the Gatlinburg Aquarium hosted the TBA convention bench bar party. The music was enjoyable and the conversation was engaging, thoughtful, and insightful. Out of all the events BHI had been to, this one was the best. Just about midway through the evening, Foster saw a local that, although he had never met, Foster recognized immediately. Tall, handsome, silver mained, briskly walking in Foster's direction with a swagger of confidence and purpose; the man could never be mistaken.

The local, an astute businessman, attorney and a respected and powerful jurist, stopped to talk with Foster upon approach. Although the local did not recognize Foster

upon sight, when Foster introduced himself, his blood began to stir, his body clenched, and his heart pounded profusely when the local recognized Foster by name. Foster extended his hand, hoping his palms were not laden with sweat from the nervousness of the encounter and the local clasped Foster's hand. The two men gave each other that standard political male sturdy shake. As Foster withdrew his hand from the sturdy political grasp, the local asked him where he was from. Giving his stock answer, "awe, To his amazement the local chuckled as well and went on to say something to the affect of, well I'm just a mountain lawyer myself, nothing wrong with that, I think it's a good thing. To Foster's further amazement the local went on an said something to the effect of, I should have known you were mountain folk, I read your Petition, and it sure seems to me that you just applied some "good ole mountain common sense"; it's nice to have met you, I wish you well, and good luck.

The conversation exchange of that evening and the mountain words of wisdom that were so articulately spoken resided within Foster for the remainder of his days, and was an honor he would never forget. Foster took the idea of "good ole mountain common sense" to heart and did his best to apply what he believed to be "good ole mountain sense" to his decision making from that point forward. Shortly thereafter, the band packed up, the tours of the aquarium were finished, the bar closed up and the food was all gone. A good time was had by all, many connections and friendships were forged, some good advice given, and the 2008 TBA convention concluded. All the judges, attorneys and exhibitors exited Gatlinburg, Tennessee as quickly as they had descended upon it just days before.

Foster had been handling the sales for BHI for the last several months, while at the same time running the company, dealing with employee issues, financing issues, and a plethora of various other responsibilities a C.E.O. is charged with, even in a small company. BHI had hired a few more employees, training was completed, changes, changes, changes. The company was growing at an alarming rate, bankers were getting concerned at the amount of dollars BHI was consuming, current processes were not going to ensure the continued service delivery. Foster had to find someone to take over sales so he could focus his attention on the operational side of the business for awhile. This, of course, was what he had intended to do so many months before after signing the 50$^{th}$ attorney, but after the last year, Foster's intentions had changed; he had to make up for lost ground first.

It was at the first TBA convention in 2007 that Foster met a man who would soon become his mentor on a number of levels. During their first encounter, Foster had no idea just exactly what impact this silver mained, ivy league, national litigator was going to have on his life, but he soon thereafter realized. The West Law booth was just behind BHI's booth at during this first convention. Apparently aimed at West Law, Edward K. White, III., we will just call him Ted, approached BHI's booth. It was readily apparent that this man would have no use for BHI's services. However Foster and Ted spoke,

exchanging pleasantries and the typical hand shake. Much to Foster's surprise, Ted picked up a brochure, not the slick fancy brochure that BHI has now, but rather a brochure printed from an excel sheet that contained basic information on the company. There was no fancy clock and dollar sign, just a green faced brochure with the bear bones minimum that was thrown together on a shoe string budget to have something to hand out at the convention. BHI was still unsure, at this point, whether it was going to make it or not, the sales projections were at this time 2-4 attorney clients per month. It was its state wide launch, its true statewide infancy, just getting started.

Ted put the brochure in his hand, pensively stared at the words on the page, and said "what is that you guys do?" Foster intently explained the BHI model to Ted, and he exclaimed, in what Foster has now come to know as that set you up tone, "have no use for it" pause, pause, pause, "But wow!! What a great idea!" Ted and Foster chatted a bit, nothing serious, just a bit of get to know you boring background discussions. Boring background discussion or not it became clear to Foster that he had just met one very seriously intelligent, nationally recognized litigator who did not practice much in Tennessee, but happened to be a resident of the state at the time.

After their exchange, and much to Foster's surprise, Ted stated with a grave sense of sincerity, "You know, Robert, I like your idea and I have enjoyed chatting with you, here is one of my cards. I do and have represented entrepreneurs all over the country; I love great business ideas, and I would like to help you. I have just set up a home office so maybe you could help me with an accounting issue I have been having. Here is my card call me." "Thank you, Mr. White. I appreciate your offer, I'll certainly call you, and if I can be of help, I'll be glad to do so", Foster said with suspicion in his mind. Foster, thought to himself, yep that is the guy, the shark swimming in the dirty water, sipping the high dollar liquor planning to put the screws to that pesky plaintiff who had a heart attack because he miscalculated the digestion of a magic horse pill. That was supposed to be me Foster thought. Why in the world would he want to help me? Foster thought to himself as he peered down at his card, "The White Law Firm" Foster found out quite quickly that not only was Ted not a shark swimming in the dirty water, but more like a saint swinging the sword of truth, and that he did genuinely want to help, and he did. Approximately three weeks after their first encounter, Foster visited Ted just as the two had agreed, and Ted became one of Foster's greatest friends, allies, mentors, and most likely the man who saved his life.

Foster was driving back from a long trip to Memphis shortly after the Gatlinburg convention when it dawned on him, and something came over him like a cloak of truth, the answer was right in front of him. Reaching in his pocket he dialed the phone, trying not to run off the road from the excitement. Somehow he knew, he just knew that the other end of the line was going to provide the answer to his prayers and change multiple people's lives forever. "Ted, hey buddy, its Robert, how are you?" Foster excitedly spoke. "I'm fine, how goes it with you?" Ted said. "It's great, hey man, I have a crazy

idea, your son, he is starting law school at the Nashville School of Law in the fall, right?" Foster asked, knowing the answer as a good lawyer always does. "You know he is, why?" Ted asked. "Well, I have a crazy idea, and NSL students are part time, do you think he might be interested in coming to work with BHI as its new sales representative? I think it would provide him an excellent opportunity to network with attorneys and judges all across the state, might help him out when he graduates, all those contacts", Foster said anticipating a negative response; this was an Ivy league guy after all. "Well, I don't know, let me think." Ted stated in that same set you tone Foster had come to know so well. Pause, pause, pause. "Absolutely, and I can go ahead and answer for him, not only would he want to, he is going to. When can we get the two you together? You know he is getting married soon. The two of you should get together before so you can plan this thing for when he gets back from his honey moon." Ted exclaimed with excitement. The plans were laid, not by either of the two men that had just engaged in the exchange, but the plans had been laid nonetheless. Shortly thereafter, Foster, out of respect for Ted, traveled to Ted's home in middle Tennessee. Foster arrived and was invited in, and there he sat at the dinner table, the young Edward K. White, IV., up and coming law student, surely to be a rising star, especially if his father had anything to do with, and Ted was going to make sure that happened. "Edward K. White, IV., Robert Foster, it is a pleasure to meet you. I've heard a lot about you, all good things, hoping we can get to know each other a bit, as I understand it you are the new rep for BHI, all but the details are done, right?" Foster said in an intent and purposeful voice. "Robert, yes sir, I am ready. We'll work out the details, but for now, you can just call me Kendall." The young rising law student said with an air of confidence that assured Foster he had found the right man for the job.

Apparently the plans that had been laid were laid by the right party with the ability to ensure those plans were executed Foster thought as he peered out over the white sands of the pan handle in Florida. With wife, daughter, and new addition to the family, Calvin Jack, aka "Jackpot", he'll have fun with that nickname when he gets older, in tow the first vacation the family had ever had, and the only one since the two nights that Foster and his wife had spent at the Biltmore immediately following the Gatlinburg TBA convention, which resulted in "Jackpot", of course. Foster and his wife had not taken many vacations; Foster, a workaholic, could not find the time for a vacation. There was entirely too much to do.

See, Foster had been raised by his mother and stepfather. His stepfather was a tenant farmer's son who had worked himself to the bone his whole life. His hard work, coupled with his silver tongue had paid off though. Through hard work, dedication, and having been lucky enough to marry Foster's mother, of course, the man had become a successful business man who owned a sizable millwright maintenance company. Foster's stepfather had been in his life since he was two and half years old, basically having raised him his whole life. Foster grew up around the millwright maintenance company and watched his stepfather work himself torturously … 18, 20, 36 hour days; whatever it

took to get the job done. After all, the man was a small business man and an employer of many; he had responsibilities, families to ensure were fed, and he took these responsibilities seriously.

Foster's first job was given to him in the form of a toilet brush handed to him as his stepfather led him into the men's construction bathroom of his company. Quite a place to begin ones journey into the working world, Foster thought to himself in a very depressed tone. Foster's stepfather explained, "When you figure out how to make these toilets shine, we will find something else for you to do. I started at the bottom and you should to. You can move up from there; that is how the world work's son, get used to it. The sooner the better." "Yes sir", Foster explained as he smelled that fresh scent of the construction toilets ever so increased by the wind created as his stepfather allowing the door to shut behind him as he left Foster to his work. Wow, what a first job, Foster thought. Very quickly he made those toilets shine, bleach, pine sol, whatever it took. Foster saw himself as a Jefferson. He was moving on up and as quickly as possible; surely there were greener pastures, or at least more pleasant odors, Foster chuckled as he scrubbed the last toilet in the room. It was then and there that Foster's affliction was exacted upon him. He did not know it yet, but it was that very day that he began his addiction to working because he figured out that if you want to move on up like a Jefferson, you are gonna have to work hard to reach that deluxe apartment in the sky.

Foster would soon learn the follies of being a workaholic, but that time had not yet arrived. Foster and his wife had only taken three vacations together prior to the Florida trip since the returned from their honeymoon in 2004. Problem was each time they went on a vacation alone, they came home with a souvenir. Not just some trinket, but the kind that sticks around for at least 18 years. The first time the two were on the beach together with their two children. Jordon, Bridgette's son, could not make this trip. He was too busy being a high rolling high school student; he was too cool for the couple and their two children. Foster thought about that for a moment, and wished he could go back and be that high rolling high school student; my oh my how different his life would be today, if he just had that all so important do over button. Foster thought to himself as he sipped the morning's coffee staring at his laptop and printer on the desk in the condo the family was staying in. Although the Foster's were in Florida, and BHI was in Tennessee, there was still work to be done. "Just call him Kendall" had grown the company by another 150 attorneys by this point and business was booming, but the attorneys came first in Foster's mind, they were the ones that paid the salaries of the employees, kept the lights on, and food on his family's plate, diapers on their bottoms, and milk in their bottles; the attorneys came first, always. So as with any other trip, vacation or otherwise, Foster's laptop and printer was right there on the desk waiting on him. Each day of that vacation Foster spent at least three hours drafting extended and complex motions and orders, reviewing claims that had to be processed for attorneys, addressing various other issues with claims, billing questions and other matters related to processing attorneys' claims and getting them paid. That was the number one concern; get these lawyers paid as soon

as possible. On more than one day, the whole day was burned taking care of BHI's attorney clients, but it did not matter to Foster; they came first.

Taking care of so many lawyers and their claims was never as easy as it might sound. Documents, proper orders of appointment for particular case types, attorneys not understating how to bill certain case types, appropriate billing procedures, over claim audits, judge issues, judge introductions; it was absolutely crazy and it has never stopped. The bottom line for Foster was, get these attorneys paid for the work they have completed and do so in a fashion that you hassle them the least as possible, they have clients to represent. They don't need to be worried with collecting on money they have already billed for. They need to bill more time taking care of more clients; they have bills to pay themselves and they need their money, ASAP, and they are paid ridiculously low amounts. We have to make it is easy as possible on them to bill as many hours as are available to them so they can feed their own families. That was Foster's demand upon BHI, but in order for that demand to be met, he had to constantly show the employees that were expected to meet those demands that Foster was willing to meet those demands himself. Two to four days turn around in every instance where it is possible, get these attorneys their money and get it to them yesterday if at all possible, that is what Foster demanded. BHI did not exist, in Foster's mind, for any other reason except to help the attorneys it served.

This particular Florida vacation, which was more of a vacation for Foster's wife and children, came in September of 2009. Funny thing about it was that the trip fell on their anniversary, and yes, the anniversary of the document Foster had read two year ago. It was about three months after BHI had hired an internal IT and software development type to assist Foster in the development of an online billing and practice management tool that would be delivered to BHI's clients at no additional cost, merely as an added benefit of being a BHI client attorney. Foster, working with the IT type had come to understand some more serious coding strategies, software pieces, and other technological intricacies. With this project in works and on the anniversary of his wedding and the receipt of that ever present cease and desist order that came under the seal of the Tennessee Supreme Court, two monumental days that most certainly had major impacts on Foster's life, the phone call he received while walking to the pool with his family seemed fitting.

Foster reached into his pocket and pulled out his now iphone. "This is Robert Foster", he said. An attorney from Nashville that had, since the beginning, always kept Foster aware of rumblings in Davidson County and otherwise as she came across them, said, "have you heard?" "Heard what?" Foster responded. "They are doing it again, Robert; they are trying to put you out of business again." The concerned voice from the other line exclaimed, "Hold on a minute, what do you mean they are trying to put me out of business?" Foster inquired. "The AOC, they hate BHI, you know that and they just released something about an online billing system, they are aiming for you again Robert", The seasoned voice clamored. "Well I know about the AOC hating BHI, and I have not

heard about this online billing system, but I can't imagine that they are investing in an online billing system just to get rid of BHI. That may very well be the result if they do it well, and I would not bank on that. The AOC is government; government never does anything as well as private business. So, first I am not concerned about going out of business, and I am most certainly not subscribing to the belief that the AOC is intentionally aiming to put BHI out of business", Foster calmly responded to the caller. "Well you may think that way, but I've been dealing with them longer than you and I don't buy it. I'll call David Byrne and find out more. Thanks, see ya", the caller explained as she hung up the phone in her typical I am finished fashion.

Foster sat by the pool enjoying a few moments of peace, or at least that is what he had intended to do. Unfortunately for Foster, the game he was in changed so often he never knew when he was going to receive a phone call like the one he had received earlier. Foster had enjoyed very few moments of peace and quiet and had not relaxed since that fateful day he read those words that so forever changed his destiny appearing under the seal of the Tennessee Supreme Court. Those directives entered Foster's mind daily. A day had not passed since he read the first one that he had not thought about them and if it were not the cease and desist directives that clouded his mind, it was that omnipresent statement that "we are the Supreme Court, we will do whatever we want." One of the two, if not both of these most disconcerting skeletons in the closet, opened the closet door and spoke to Mr. Foster each day of his life.

If Foster had learned anything about the AOC, it was that things change and change quickly and without notice. Foster thought about the changes and the differing treatments of different parts of the state. Foster began to think about all the different ways things were done state wide and the difficulties the AOC was going to have implementing an online system. Foster knew the AOC would encounter problems and problems the AOC would never anticipate as many of the problems the AOC would face were not identifiable from the bird's eye view of the ivory tower, but rather only from the eagle eye view from the street, the eagle eye view that only BHI possessed. Foster chuckled as he thought about at least one judge that would require a waterproof laptop with a 3G connection if the AOC was ever going to get him to digitally process claims, between baiting his hook and casting his line, he might actually figure how to turn it the darn thing on. Foster let out a belly laugh that drew an eye from the fellow sunbathers when he realized, 3G service doesn't reach the fishing spots that judges goes to; they are way to "fur" up in the hills. Foster contemplated this online system further and was reminded of one judge, that stomped into his state Senator's office, robe neatly zipped, gavel in hand. Banging his gavel on the statesman's desk, he said now Senator, I am judge in this here county, and I demand that you trot yourself on down to Nashville and introduce a bill that outlaws coins in this here state. "What?" the Senator asked, "why in the world would you want me to do that?" The judge banged his gavel on the Senator's desk with such judicial force that it spilt the Senator's coffee, and the judge told him, "I voted for you and thought you were smarter than that, because I DON'T LIKE CHANGE, ya dummy."

Foster's mind, racing with all the issues, remembered that was just a joke he had once heard.

Many judges are not adverse to change, especially if it makes their job easier, but some judges run a tight ship, and it is their ship. Foster learned this the hard way and felt that judicial force on a few occasions in his dealings with the bench simply trying to process claims through their courts. Although the judges were not swinging their gavels when they explained to Foster exactly how it was going to be, the coffee was spilt nonetheless from the trembling hands that offered up an apology for something that had occurred via BHI's system that a judge did not care for. Suffice it to say, Foster had learned, always ask the judge first, do it the way he or she wants it done no matter what, and you will typically be in good shape. If you want a judge to change something, never demand it of him or her. That is the surest way to see to it that it is done any other way than the way you want it. Getting a judge to change the way he or she operates is tricky business, especially when it's a judge that is "adverse to change". Handled improperly the change you desire will never occur. Yet again, that is the judge's purview; he or she can change or not. Who is Foster or anyone else to tell the judge how to operate his or her court? The people elected the judge, not Foster, and not the AOC. Always use logic, reason, legal analysis, exhibits, testimony and the like to influence a judge, but never, never, never demand anything of the judge. Those were the lessons Foster had learned the hard way and he wondered had the AOC? Confident it had not, Foster went back to sunbathing and trying, yet again, unsuccessfully, to relax.

Foster awoke the next morning in his typical fashion, well before anybody else had even considered rolling over quietly got out of bed, went to the condo's kitchen and brewed a pot of coffee. Moving out to the balcony overlooking the emerald green water that was made even more profound by the solid white beach it was ever so slightly rolling up against, he sat down. Foster, beginning to realize the stress that was being the man in charge of BHI, wished he could simply let it all go, if only for a moment he could get this tiger that he was trying to hold by its tail to take a nap for a just a few hours, maybe he could have a few moments peace. Unfortunately, the tiger had Foster by the tail and there was always something that had to be done, Foster had to set the example, BHI attorneys had to get paid. The coffee was ready and Foster slipped into the kitchen poured a cup of coffee began his return to the beautiful view grabbed his yellow pad and pen walked outside and sat down. Foster recognized a golden opportunity, but he had recognized it the moment the female call mentioned AOC and online billing in the same sentence, he had just been capable of suppressing the desire to do what he was about to intently engage in for a little less than twenty four hours. Foster pressed his pen to the page and wrote Number 1. Foster never much worried about anyone reading what he put on his yellow pads, half the time, Foster could not read his own writing, but if he was careful and cautious and wrote in all caps in script, he typically could make out a fairly legible list, which, of course, Foster used often. At the top of the page Foster wrote AOC/BHI as he thought. BHI can really help the AOC on this one, that is if they will

accept BHI's assistance. What can BHI do for the AOC? he thought. A laundry list of items quickly appeared on the yellow pad, testing, street side issue identification, unique judge procedures, programmatic discussion on process, extended and complex in the new system, how will it work, training for BHI clients and others, meeting with judges that have unique issues to assist with moving them to the digital system, working with test judges state wide in a pilot, the list went on and on. Foster's head spinning with ideas, he knew the street side of processing claims and the issues that arose on the corners of those streets better than anybody in the entirety of the state of Tennessee. It took Foster less than 15 minutes to jot down on a yellow pad many of the issues that the AOC ultimately faced but did not forsee when they launched their online billing software state wide. At the bottom of the page Foster wrote, cost to the taxpayers = 0.00. Yep, Foster was willing to direct BHI's resources, printers, computer, labor, and paper to the testing, implementation, working with the developers to provide them with the business logic they would need to programmatically prepare the online system for some of the unique challenges the AOC would face when it launched a claims processing web based processing platform. Foster envisioned assisting the AOC with the printing of manuals and pdf document development, the cost of which BHI was prepared to cover. Hopefully, the AOC would allow BHI to engage in some training on the system with its clients, again on BHI's dime. Foster thought. Foster just knew that BHI could provide the AOC, at no cost, the opportunity to test the online product in multiple jurisdictions state wide and without having to travel the state to do it. Foster was prepared to allocate labor, printing travel and lodging costs covered by BHI to assist the AOC with the initial training of the judges selected across the state to run the state wide test through BHI. There were so many things that Foster knew BHI could help the AOC with, save the taxpayers money, and help ensure the ICE system was 100% ready to rock and roll before the entire state was on it. Lets face it, Foster thought to himself; by the time the AOC is ready for a pilot, BHI will have approximately 300, maybe more attorneys if it continues to experience the growth it's currently experiencing. This would even allow the AOC to properly analyze its staffing requirements as the system grew in participation. Foster thought a little deeper into the idea and realized that the AOC through BHI could step up the usage of the system little by little on a state wide basis and before the AOC reached a point where it could not handle the paper process and the digital process, the growth could be immediately halted until the AOC could get things in order. Excitement, excitement, excitement, finally BHI can show the AOC that it is really a benefit to the AOC and not its enemy. With this thought Foster smiled took a deep breath, sipped his coffee picked up his phone to call the AOC and then realized it was only 5:30 a.m. nobody's at the AOC is in yet.

Foster had developed all the processes and built the software BHI used to process claims all geared at meeting the AOC standards, changing it as necessary as those standards changed. The system BHI had developed was capable of getting attorneys' claims prepared, processed, a check and funding report issued, and mailed typically in less than four days from the receipt of the claim, and with all necessary information,

sometimes the same day. BHI had always taken care of its client attorneys; sometimes they would call and ask for BHI to turn the claim in 24 hours and BHI would comply, other times they would call and ask if they faxed over a claim now, could I get a check this afternoon? I'll drive there and pick it up and BHI would comply.

Foster wondered from time to time if BHI could do all of these things in its typical turn around period, and all the AOC was required to do was audit a claim, enter it into its database system, typewritten easy to read, from BHI always, and issue a check. Why could the AOC not get these tasks accomplished in under 2 weeks every time, instead of the typical 90 days; the only step the AOC took that BHI did not was the audit of the claim from a cross checking and cumulative time perspective. Maybe there was more, but it just never seemed logical to Foster. Each time Foster asked himself this questions the answer became even clearer, the AOC is government, its staff and management get paid no matter how long it takes to process a claim; BHI on the other hand would not, or at least not for long. Efficient processing aimed at getting claims processed from time sheets to claims along with necessary orders and documentation and drafted extended and complex certification was required. That is what BHI did and it did it well, it did it daily, and it had, by this point, processed thousands and thousands of claims in that same efficient, effective manner. Although the AOC had entered claims prepared by BHI and non BHI attorneys into a processing system, it had never engaged in the actual development of a claim from the street side like BHI did daily, and the AOC had never processed claims or extended and complex certifications back and forth from judges like BHI had been doing, and doing well, for years. Foster knew the online system would necessarily encompass the street side development of claims and the processing of those claims and extended and complex certifications were required to and from the judges of Tennessee. Foster also knew, based upon the AOC's lack of street side processing experience, it would be impossible for the AOC to anticipate many of the things that BHI could. Foster had so hoped that the AOC would take him up on the offer of assistance he was about to make. It was an opportunity to mend some fences and maybe convince the AOC to allow its filed away version of that wonderful piece of prose Foster had delivered to them many years ago to join its counterpart in the Greene County Dump.

Foster had finished the pot of coffee and put another on to brew. It was now approximately 10:00a.m., the children worn out, still asleep, and the wife getting some much needed rest. It is just as difficult to wrangle two small children on a daily basis as it is to wrangle several hundred attorneys Foster thought to himself as he stepped out the back door of the condo. Continued thoughts of this idea circulated in his brain, and he concluded that he was not sure which job was more difficult, his wife's or his, but he was certain which one was the most important. Foster was glad she was getting her much needed rest. Email check, response or two, tagged emails for later review, text message, phone call to the office, answer a claims billing question, deal with an employee issue, and Foster was finally able to sit down, take a breath and make that much anticipated call to David Byrne, assistant counsel, to offer up what Foster believed would make a perfect

marriage. A marriage that would spawn the perfect offspring, a beautifully crafted asymmetric online billing system built from the gene pool of both the bird's eye view of the ivory tower and the eagle eyes view from the street. Foster was well aware of the fact that he was very likely about to offer up trade secrets, processing secrets, and a plethora of other protected proprietary information that could, and if properly implemented, would result in the demise of BHI in its current form. Foster recognized that should the AOC take him up on his offer, the end result would be a system so well planned, procedurally sound, user friendly, and built from the eagle eye view perspective and the bird's eye view from the ivory tower perspective that it would ultimately eliminate the need for BHI. Foster did not care; BHI would morph into something, maybe the health plan, maybe the state wide law firm with the backroom administration or finish the indigent representation practice management software sooner. Foster considered. BHI might have to swift to a different service, but Foster knew he had the trust of his clients, and so long as a service that attorneys would use could be implemented into BHI's infrastructure, which he was confident it could, BHI would survive no matter what. It might however, have to change its name and logo if it no longer handled billing. Foster had resolved himself to this conclusion the moment his pen made the first stroke on the yellow pad earlier that morning and he did not care. Foster set out to help his fellow attorneys have a more effective and efficient practice so they could deliver higher quality of representation, and if he could help the AOC create that for them without having to pay BHI's fee to do so, then Foster had accomplished the goal he had set his sights on so many years ago. "May I please speak with David Byrne" Foster so kindly spoke to the receptionist at the AOC. "One moment please", she responded.

"Hello Mr. Foster, how are you today?" David said. "I am fine, finally enjoying a few days vacation, thanks for asking, and you?" David respond with his typical humorous response about being a state employee and thinking about doing a third party billing agency. David Byrne is a soldier of the AOC as he should be. A former private attorney, he was the only attorney in the brass at the AOC Foster knew to have actually practiced law in the real world, or at least in the real world where someone did not make your payroll. It was many years ago when Mr. Byrne was out in the real world, but Foster had always known David had not completely forgotten. The tone in David's voice at times lead Foster to believe that Mr. Byrne oftentimes made decisions and took actions that he did not personally agree with, but as a soldier of the AOC, if he liked his job, he was to carry out orders, that's what soldiers do. "David, I understand the AOC is starting the development of an online billing system. Tell me about it would ya." Robert inquired. "Yes, it is going to be released in pilot program sometime next year. I don't know a whole lot about it right now", David explained. "Well, David, I have been thinking, and BHI could really help the AOC and I just wanted to make myself and BHI available to the AOC to help in anyway we can. I believe we can identify many issues for the AOC that we know the AOC is going to encounter simply due to our experience. I would be willing to come to Nashville any time and stay one or two weeks, if necessary, to counsel the AOC on these issues and others, no charge for my time, on BHI's dime", Foster

offered. Foster was confident that if the invitation was given for the extended visit to Nashville that all the items he was planning to offer up would be accepted as the extended visit would have necessarily shown, at minimum, the development team that the business logic that forms the bases for the operation of software they sorely needed was all in Foster's head. "I'll pass that on to Libby; can't speak for her. We can always use help", David responded. "Tell Libby I really believe we can help, and we would really like to; think it would be a good thing for the attorneys if we did. We'll talk to you later, David. Thanks", Foster replied. Foster knew from the tone in David's voice that it would not be that wonderful piece of prose that he has so ill advisedly delivered to the AOC years ago that would be joining its counterpart in the Greene County dump, but rather the list he had penned that morning would be joining the counterpart to reside together in blissful harmony forever.

Foster, with morning coffee in hand, received notification that the AOC was holding its first meeting concerning its new ICE system in Lebanon, Tennessee, in Wilson County. Although it was not yet ready to launch, the AOC was holding a showcase type meeting to introduce its new system to the 15th district, as that is the district the AOC had chosen to engage its first district pilot launch of the new ICE system. Foster was excited to see exactly what the AOC was offering and knew that the he would uncover at this meeting the credence, if any, to the opinion of the female caller relayed to him by the phone call he received concerning the online system while in Florida. Yep, Foster thought to himself, he would finally determine whether the ICE system would be the demise of BHI and would be capable of determining from its web platform whether such demise was intentional or simply a function of circumstance.

It was approximately a 3 hour drive to Lebanon, Tennessee from Foster's home in Greene County. Home of the Cracker Barrel, Foster thought, as he climbed into his truck early the morning of the scheduled ICE introductory event. Foster had never met Director Sykes in all the years he had been working with BHI, and he had always wondered why she did not attend that first meeting Hammer and he had with the AOC, what, at this point, seemed like ages ago. He wondered as he drove west on I40, would Director Sykes be at this event, and if so, what her reaction would be? Foster pulled into the country club where the lunch meeting was parked his truck and waited on one of BHI's attorney client's to meet him there. Foster, always seeking out the opportunity to meet judges and others in the system for purposes of relationship building and for the benefit of the attorneys BHI serves, had arranged an early meeting with an attorney that he had not yet met but had dealt with for several years.

This particular attorney was one that had asked BHI to help her on several occasions to rush something at the last minute in order to get a judge's signature at the 11th hour before a violation occurred. Attorneys who engage in extensive indigent representation are so busy hopping from court to court, drafting pleadings, motions, letters, strategic plans, oftentimes themselves because many can't afford an assistant on

the true hourly rate that equates from the 40 and 50 dollar an hour everyone likes to talk about they just can't always find the time to get their billings together even when they have a company like BHI to processes the same. No, no, no, many of these attorneys, after the deductions are made from their overall billing amount due to caps and/or other denial of payments, are reduced to making not much more than they would make at the local Wal-Mart, if that. Foster had always found this distasteful; these folks were the protectors of all of our constitutional rights, the champions of justice, the champions of freedom. These indigent representation lawyers who were oftentimes required and expected to work for free are the first line of defense to the wolves of the door, the wolves being ourselves, our government and the elephant bureaucracies that run it. Foster often thought that we should be paying these lawyers much more as we owe them more than just payment. We as Tennesseans owe them a debt of gratitude, for just as the soldier who protects our freedoms abroad, which in turn allows attorneys to protect our freedoms at home, the indigent representation attorneys are on the front line of defense protecting our freedoms, soldiers of justice. However, these indigent representation lawyers still prefer the hourly rate so they can at least be paid for most of their work, and if they are with BHI, they know they can call at the eleventh hour and get things done. So needless to say, when BHI helped an attorney save a few thousand dollars by dropping everything to ensure a claim was signed at the eleventh hour to avoid violation and denied payment, especially when that was done multiple times, it made a friend.

Foster and the BHI attorney from Lebanon met personally for the first time in the parking lot of the country club. It had been arranged earlier for the attorney to introduce Foster to many of the judges of many of the courts that BHI had been processing claims to in the district. Every opportunity that presented itself for Foster to meet the local judges, he always took. Foster believed it was much better, for BHI and its attorney clients, if a judge could put a face to a name, meet the lawyer in charge of the company that was represented by the stopwatch and dollar sign that crossed their benches often. The pair walked into the meeting and hands began to exchange the typical political shake. Foster was so kindly introduced by BHI's attorney to many judges who immediately knew Foster's name and most of whom extended the complimentary you guys certainly help these attorneys, we know they appreciate. Foster was especially thankful to meet the kind staff of the local Lebanon courts who had been so helpful to him when BHI first began providing its service to attorneys in Wilson County. These particular clerks took their jobs as servants of the public seriously and happily met their responsibilities with what should become an example setting attitude that they work for the people. Foster thoroughly enjoyed meeting the judges and the clerks, the handshakes had concluded and the pleasantries exchanged, the meal was prepared, Foster was ready to view this new online billing system and determine what it meant for the future of BHI.

As Foster made his way to the buffet line, much to his surprise, Director Sykes walked through the door just a few short feet from where Foster was standing. The perfect opportunity for Foster to finally meet the Queen of the elephant bureaucracy that

he had gained the attention of so many years ago had finally arrived. Extending his arm forward, a bit nervous as to what the encounter would bring, Foster said "Hello Director Sykes, Robert Foster, nice to meet you, and how are you today?" Much to his surprise, and not the response he had anticipated, Director Sykes said "Well hello Mr. Foster, nice to meet you, please call me Libby." A brief exchange occurred between the two concerning the new system. Libby took her spot at the front of the large, completely packed room. Foster found his seat and settled in for the much anticipated debut of the ICE system.

It became apparent that the AOC had no intention of putting BHI out of business as the system was unveiled, or at least that is how it appeared. Foster never knew the true intentions of the AOC, but for now it certainly did not look like the AOC had its sights set on snuffing BHI out. Foster happily thought to himself, maybe the full attention of the elephant bureaucracy he had attracted so many years ago, was finally beginning to diffuse; at least he had hoped so.

As the AOC unveiled what appeared to be a system the AOC should be proud of, Foster was pleased to see the great strides the AOC had made in an attempt to make it easier on the indigent representation attorneys to get paid for the toiling work they do in Tennessee. Judging the book by its cover, it appeared that ICE was going to be a good read. During and after the expose on the new ICE system led by Libby and the AOC Projects Development Manager, Vicky Hutchings, questions fired from the floor, mostly poised by the judges in the room. As the questions fired from the floor from the judges, Foster was reminded of the gavel pounding the Senators desk spilling the good Senator's coffee. This was change, and Foster was intently listening as the experienced, stern and intelligent jurists in the room fired off their penetrating questions. Less concerned with the answers given, Foster knew it was the questions that were most important as it was the judicial inquiries that would set the tempo for the introduction and launch of ICE. And it came, the question Foster had so hoped someone would launch and he had so hoped that it would be a judge who postured the question, "Libby, a lot of attorneys around use that private company to prepare their claims. What does that mean for them?" Foster's knees buckled under the table as he knew some folks were staring directly at him anticipating the facial gestures that would paint the picture of his true reaction to the question, and more importantly its answer. Foster, with eyes on the judge that asked the question, quickly turned his attention to Libby, and with a face much like you would see from a player sitting at the final table in a world series of poker match, Foster awaited the turn card. **The chips were on the table, but not everyone was all in, as Libby said** something to the affect of, well the AOC has taken them into consideration and that is when it became crystal clear to Foster that AOC was not actively seeking out the demise of BHI. Wanting to jump out of his seat with excitement having seen the turn card that matched the king he was holding, there was still an ace on the table, so Foster sat there emotionless, showing no sign of excitement, but rather as if he had just anticipated this move by the AOC, or that he, as most good lawyers, already knew the answer to the

question the learned jurist had poised. It was if the dealer at the table in the final round of the world series of poker tournament took the last bets and the sturdy handed jurist in the room went all in. "Libby, this private company, they get these claims turned around and these attorneys paid in a couple of days. How is this system going to compare?" The judge with his stone face intently launched his inquisition. The tension mounted, Foster could feel it in his temples as if he head was gripped by a vice and Libby was tightening its hold. Foster, holding his poker face true to his conviction, knew this was the river card, and at this point, and with the ace on the table, it was apparent that this was the card that may very well seal BHI's fate. It was as if an atom bomb exploded deep within Foster's soul when Libby flipped over that third matching king and said, "We are never going to be able to do that." Foster was all in, and it was all done; BHI was here to stay.

Foster, still sitting at the table, poker face steadily supported by the bone structure and sturdy muscles in his face, raised his hand to ask a question of his own. Libby standing front and center of a large room full of lawyers and judges, most likely thought back to that scathing piece of literature Foster has so ill advisably delivered to her so many years ago as she saw Foster's hand reach for the sky. Foster quickly thought of Mark Twain, who believed that the difference between the right word and the almost right word was the difference between a lightning bolt and a lightening bug. He silently asked himself, is Libby thinking about my offer of help, was she anticipating another wonderful exhibition of scathing stupidities such as she had been given by Foster before, or was she simply concerned, knowing Foster was the one man in the room that could ask the most pensive, penetrating questions aimed at ripping this new system to shreds, contemplating all of these things simultaneously and in a split second, Foster formulated his comment. "Libby, Robert Foster, President of BHI. I just want to say from all of my experience, it certainly looks like you have done a great job developing a system that will most certainly help the attorneys of this fine state. You and your staff should be commended." The meeting ended shortly thereafter, Foster collected his chips from the table and was reminded of that oh so famous Kenny Rogers song he had listened to over and over on an 8 track in his room as child, and said to himself, you have to know when to hold em, know when to fold em, know when to walk away and know when to run. Foster yet again was reminded of the full attentions he had received from the elephant and thought back to that very night he dreamed up BHI, and said to himself with a fleeting chuckle, sure wish I would have run away back then. I should have folded, and now, there is no option, I can't even walk away.

Some weeks had passed since Foster collected his chips in Lebanon and he found himself riding shotgun in his brother's car headed back to Wilson County for the first set of state wide training courses on the new ICE system the AOC set up. Foster thought to himself, as his brother chauffeured him down the road, blues music, Jim's forte blaring through the older model white infinity's sound system, BHI should have been handling this event, and the state would have saved substantial dollars if it had. As his thoughts wondered, Foster intently pursued the thought of private business and government

working together, ivory tower and the eagle eye, what a great combination it could have been, and maybe, just maybe, one day will be.

Foster's brother was with him on this excursion because several months prior, BHI was lucky enough to convince him to bring his skills to the table. Accounting, finance, anal retention of the highest order, a talented musician, a guitar player who applied the mathematics and sound theory to his music and the same type of precise strokes to his work, he was just what BHI needed, and he came on board at just the right time. Jim Foster, bluesman extraordinaire, had agreed to take a few years and help his brother with the continuously growing and aggressive tiger, BHI. He came on board to help make sure that, at minimum the tail holding could be exchanged, he, much like his brother, was not sure just yet who was holding the tail, BHI or his brother, Robert.

Jim was brought on board to take over the tracking of BHI's claims and to assist in the continued development of a more efficient tracking of BHI's dollars. Millions of dollars were involved at this point; 1.5 million dollars in claims receivable at any given time. Needless to say, this was a stressful, difficult and timely undertaking. However, Jim knew that with his brother's knowledge of the system as a whole that it was he that would help transform BHI from the small town mountain lawyer side business into a potential reaching mammoth that was both lean, mean, profitable and extremely beneficial to the attorneys who utilized its services. After all, it had all the ingredients. All it was lacking was the introduction of the proper sue chef to man the Kitchen, while the head Chef continued to develop the menu and market for patrons ensuring they were all served the steak they had ordered cooked just the way they had requested it be prepared.

Entering the room in the technology center in Wilson County was Libby Sykes, Pam Hancock, Fiscal Service Director for the AOC, and Vicky Hutchings. This was the second time Foster would have the opportunity to speak with Libby but was more interested at this point in an engaged conversation with Vicky Hutchings. Jim took his seat. He never talked much, a much better listener than his brother. He began to soak it all in. Foster had a very educational enjoyable conversation with Vicky Hutchings. She really knew what she was doing and was a perfect fit. Unfortunately she was perched atop the ivory tower as well and could not have possibly seen the eagle-eye view BHI gazed upon every day. The show began and when Libby stood up to introduce herself and address the small crowd of attorneys, none of which were BHI clients, as they expected BHI to gain this knowledge for them so they could go on with their days serving the most vulnerable of our population, indigent folks, Libby made a few statements that caught Jim's attention more quickly than his brother's. As she talked to the crowd she explained that "we are tired of doing your work for you." Jim, cool as ice, no pun intended, did not flinch, he did not move, but he began at that moment to formulate his debriefing of his brother that was sure to occur on their three hour drive home. Just before turning the program over to Vicky Hutchings, Libby made one other statement

that caught both men's attention with the precision of a jet engine's turbine, and it had about the same effect on the two as it would have had on the jet it was attached to as it fired up. Libby explained to the crowd of attorneys that the best thing about participating in the pilot program was that when the state began to run out of money as it did every year, the participating attorneys would be paid. The two men looked at each other, engaged in a momentary brotherly exchange and the unspoken word of concern was communicated as if the two mean could reach each other's mind. Both men knew this was going to be problematic.

Libby turned the program over to the actual training and that is when Foster got his first look into the guts of the ICE system and immediately recognized multiple issues that seemed logical from the ivory tower, but from the eagle eye view of the street would soon prove to be problematic. Foster, mockingly smiled as he thought back to that phone call he made the year before from Florida, and the continued thought of the advancements that could have been made and the tax dollars saved had the bird married the eagle and laid their eggs. The thought of how many great advancements and achievements could be made in this house of indigent representation if only the ivory tower would tell the eagle let's work together.

As the training session went on, the trainer made sure to go over the third party billing side of the system, as she knew Foster and his brother had driven several hours to participate in the training, and that was what she thought the two men had come to learn. She was kind enough to spend substantial time going over how the system would work for BHI and made sure the two men properly registered for its use. There it was, right there on the screen in a drop down box, BHI and another company, yes, the one from Alabama. On the registration page for an attorney user that assigned their claims appeared a drop down list with both company's initials. The AOC had set the system up for both purely financial service assignments and for the full service product BHI had. Foster immediately thought about that phone exchange with the owner's assistant so many years ago, maybe his friendship with the commissioner had helped BHI. Silently Foster imagined what the owner that he had never seen or spoken too might look like, and said "thanks".

As Jim and his brother entered the older model white Infinity that would carry them back home to their sleepy little mountain town in beautiful East Tennessee, blues music blared out as Jim turned the key in the ignition. Foster immediately turned the radio off, looked at his brother and said "we did a lot of thinking on the way down here, but turn that blues music off, its not Stormy Monday in here and we are gonna have to do a lot more talking on the way home." As Jim navigated the Infinity onto the I40 East, a road Foster had traveled so many times that he was just about capable of negotiating the interstate blindfolded, the gentlemen began the intense debriefing conversation concerning what they had just witnessed and heard really meant that dominated their journey home.

The conversation and the plans that were laid on that ever so long drive home led Foster back to Wilson County the very next day, this time alone. The project manager had been kind enough to allow Foster to come back and listen in on the judge training session. BHI processed claims to judges all across the state and Foster needed to know exactly what the judge's were being told and exactly what they expected. He needed to identify some judicial processing standards that the system was sure to create. Most of all he wanted to hear the judicial reaction to the system. As Foster entered the technological center for the second time, he chuckled under his breath as he thought about the gavel pounding the Senator's desk.

The training began and immediately the judicial inquiries ensued. One resounding theme of the session seemed to be making sure the judges knew with certainty how to use the system to cut claims. As the trainer began going over the series of clicks and keystrokes required to carefully reach into the indigent representation attorney's pocket and skillfully remove his or her hard earned dollars with the proficiency and tenacity that only a bureaucratic elephant could exact, Foster listened intently for the judicial response. Foster could have not been more pleased with the jurist sitting in the room when the rumblings about the hard work the attorneys did in their courts began. It was clear the AOC staff in the room was not anticipating the reaction of those learned jurists. Foster enjoyed watching the banter, and, although a bit selfishly, enjoyed witnessing the AOC perched squarely upon the "hot seat", a stool the AOC was not used to being on, and was most uncomfortable resting its hoofs upon as tempered judicial arrows from the bows of the front line protectors of justice fired upon them. Needless to say, the judges in the room were quite displeased with the obvious marching orders the jurists had just received from the ivory tower. Although this was just an "informational meeting" the message from the tower was clear. We want you to reach into these attorneys pockets and with an elephant bureaucracy's precision, remove their hard earned dollars. Foster anticipated this response from this particular room as he knew some of the judges in the room, not necessarily personally, but from the processing of claim through many of their courts. BHI kept up with which judges across the state cut claims and which ones did not. This was its business, and this information was invaluable. As priceless as this information was, it would have cost the AOC nothing. Had the bird married the eagle, this knowledge would have been one of many offspring. Foster spent a few moments with the judges after the training session was over, answered a few questions about the ICE system, offered up a suggestion or two on certain intricacies of the claims process, and exited the room. As Foster left the technology center in Wilson County, he wished some of BHI's client attorneys could have witnessed what he had just seen as they would have really appreciated the judges going to bat for them. They would have been proud. As Foster opened the door to his truck, a scowl crossed his face as he put his bag on the passenger seat and turned the ignition. As he pulled out of the parking lot onto the road that would lead him to I40, an interstate that he had spent more time on than he could at this point calculate, with a deep concern for the indigent representation attorneys of the sate and what their future held, he thought to himself, the slashings have begun.

On the three hour drive home Foster knew what had to been done. BHI had to prepare for the introduction of ICE and he knew that was going to be difficult, but for now it could wait. BHI had been developing a new software piece to process its attorneys' claims and provide its client attorneys with a higher degree of service for months now. The piece contained all the necessary judicial and attorney data such that a conversion from its intended use, paper claims, could be done without scrapping all the work that had been completed, but it was not going to be an easy task. Since the rest of the state was not using ICE and the AOC had not made it mandatory, BHI continued business as usual. BHI had intended to wait until Davidson County came live before it molded the ICE system into its operations.

There was a reason for this delay though; with Foster there always was. Oftentimes nobody understood Foster's reasoning; many thought him to be a "lunatic" at times, but in the end they always found out what the reason was and why Foster did things the way he did – purposeful intent planning, proper execution, and artful delivery. Foster oftentimes thought about his real father, a Captain in the United States Army, who would have most likely been on the Joint Chiefs of Staff had he continued his military career. Foster's mother and he divorced when he was just an infant. Foster's father used to say son, always remember the rule of P's: Proper Prior Planning Prevents Piss Poor presentation. These days each time Foster thought of his father articulately delivering such counsel, he thought back upon that scathing ill advised document he so ignorantly delivered to the AOC so many years ago, and always wished he would have applied the rule of P's to circumstances he was faced with upon its creation. Yep, the rule of P's something Foster tried, sometimes unsuccessfully, to live by. Oftentimes it was living by this very rule that caused confusion to those who worked with him. Those that had known and worked with him for awhile generally accepted Foster's sometimes abstract ways because they had come to realize that Foster had a reason and purpose for each and everything he did, calculated to obtain the end result. They had decided it best to just sit back and watch the calculations unfold.

"Davidson County, that is the county that ICE must conquer before BHI gets involved", Foster explained to Hammer as the two discussed the future of the company. Both men knew exactly why. Davidson County had multiple sessions court judges, multiple circuit and criminal court judges, and a mammoth juvenile judiciary. The judges elected in Davidson County, at least for the processing of claims, had their own way of doing things. The Davidson County judiciary was different than the rest of the state in many respects, at least regarding what the judges' expectations regarding the submission of Rule 13 claims were Davidson County had the largest mixture of the potential processing requirements of any county in the state. Each judge had his or her own way of doing things, some of the systems matched, but there were several processing possibilities. BHI, of course, had a procedure already in place for each judicial officer it processed claims to. BHI knew ICE was not going to meet these judicial procedures with a smile.

BHI did not really want to be in the middle of ICE implementation in Davidson County, at least not on its own. The process manual concerning each judge's particular procedure was something BHI would have shared with the AOC, and BHI anticipated major problems, especially with those judges that required a pre drafted order of appointment to be submitted with the claim for signature. The ICE system required such document to be obtained and uploaded prior to submission to the judge; Foster anticipated this as a major problem, as well as other issues that ICE would face when it met the judicial arm of the County that housed the State's Capital, the AOC and Music City USA. Foster assumed, he found out later, incorrectly, that the AOC would have all of these issues ironed out before launching ICE onto the judicial scene in Davidson County. Who would not have thought that? Each of the Davidson County courts were within a stone's throw of the AOC. Surely the bird's eye view of the ivory tower would have the issues identified in its own back yard, Foster thought as he finished his meeting with Hammer and went on about his day. Regardless, Foster wanted to see the implementation of ICE in Davidson County before he placed BHI, and its warriors of justice in the middle of the transition. As Foster contemplated this undertaking, he was consistently reminded of the spilt coffee on the good Senator's desk.

Nothing was wrong with the way the judges in Davidson County did things they just did them a little bit differently. Who was Foster, BHI, or anyone else to tell them to how to operate their courts? The people elected them to their posts. Obviously the people liked the way the judges did things, It was their courtrooms, the Honorable Jurists should be left to run them the way they see fit. Foster just wanted to see the ICE transition and believed it in BHI's best interest to allow the AOC to handle this transition without BHI in the middle of it. BHI had planned to bring its Davidson County attorneys on board after ICE was implemented in Music City, USA. After all Davidson County was BHI's largest market, and Foster knew the attorneys were going to face some issues with the ICE system. Since ICE was optional, BHI figured it would save its attorneys from those hassles and continue to process paper claims for its client attorneys until the issues were all ironed out even though the ICE system promised to pay BHI faster than the paper claims' payment process. As with everything BHI did, it was always about the attorneys. Foster wasn't about to change that now. Unfortunately, that option was removed from the table.

"Hello Vicky, what can I do for you today?" Foster said as he held the phone intently to his ear as he always did when talking to someone from the AOC. Vicky had called Foster to discuss why BHI had not brought its attorney clients onto the ICE system. Foster explained BHI's position on the matter, but the conversation was clear, the well laid plans of BHI were changed and Foster's intentions were altered yet again. My, oh my, how intentions change, not always by desire, oftentimes by circumstance or necessity, Foster thought to himself as he quickly contemplated the many changed intentions he had experienced over the last several years of his life. Immediately, Foster changed gears, called a staff meeting, developed a new set of plans, scheduled staff for an

upcoming East Tennessee ICE training session and spotted off countless instructions as ICE had just infiltrated BHI.

Foster had a matter of days to prepare BHI for the chilling takeover of its operations ICE would have. Davidson County had not yet come online and that was going to have to be addressed, but not yet. BHI was in no position to completely modify, what was at that point about 30% of its operations based upon the counties ICE was operating in. Foster was not quite sure how it was going to happen, he just knew that it was. There was no other option. In just about 7 short days BHI had to be ready to process claims through this system for its clients in ICE eligible counties. Foster knew that there were going to be some delays, but they had to be kept to a minimum, BHI attorneys needed their payment for the work they performed. They entrusted BHI to get it to them, and whatever it took, Foster was going to make sure BHI delivered. Coupled with the insurmountable obstacle of reworking the entirety of BHI's processes and procedures in about a week, BHI was already beginning to feel the pains of the preferential payment of ICE claims over paper claims. Payment time was dramatically increasing. Jim had really helped over the last year or so to not only switch the holding of the tail, but due to his help and the increased staff of BHI, Foster had almost tamed the tiger. Unfortunately the phone call from the AOC and the initial pain of preferential treatment was tantamount to placing a slab of raw meat on the other side of the room just before Foster was able to bolt the door of the cage and fasten the lock shut; the tiger was loose. Foster reached with a fury to grab its tail as the tiger launched across the room with a starving fury. Luckily, Foster placed his keyboard in his lap, thought about his mother and that first computer she had given him so many years ago, struck the first line of code, reached down to pet the tiger, and placed its tail firmly within his grasp. Foster thought to himself as he had so many times before, time to make the impossible possible, and did what every wise man should do when faced with a mountain of magnanimous scope, he prayed!

"Robert, I know you are swamped, but we really need to talk!" yelled the sue chef. "Ok, geez I am bug eyed and exhausted, I have gotta get this coding done so we wont have a glitch in the system; you know that; what the heck do you want?" Foster spouted back at his brother, rather angrily. "I can't get responses from the AOC on our outstanding claims. I have tried not to bother you with it as I thought it would get better, thought it was just a lull, but a lull does not last this long", Jim stated with a sense of sincerity. "Ok, can't wait to hear about this. I'll be down in a minute", Foster replied.

Considering the long list of outstanding paper claims, the complete lack of response from the AOC on BHI's request for status updates, the penetrating pain of preferential treatment, the dwindling dollars to fund claims with that were not being replenished as usual, and the pending deadline of ICE infiltration, Foster banged away at his keyboard, sipped his coffee and thought to himself, "why did I get myself into this mess?" Foster had known for years now his chance to fold passed by many, many years

ago, Foster and Hammer were financially tied to BHI at the hip, they were all in, there was no easy way out, no walking away, and nowhere to run. Foster hadn't slept more than 2 hours a night for the last week or so, and at that, the sleep he got was on the floor in his office. Foster did not have time for sleep. BHI had to be ready to process claims for its attorneys in ICE by the deadline, which was looming closer by the minute. Foster had not even had time to consider the yearly shut down that was around the corner, but it would not be long before that reality smacked him in the face; yet another threat to BHI's very existence. Foster continued adamantly banging away at his key board and with a view of the light of the end of the tunnel that would be ICE ICE baby, BHI's new ice processing software ready to ensure BHI's attorneys got the steak they ordered just as they had asked for it to be prepared.

The magnitude of what Foster and the staff of BHI accomplished in just a few short days following that inquisitive phone call from the AOC could only truly be appreciated by someone who actually saw it happen. In just a few short days, less than two weeks, each employee had their own dashboard containing all the appropriate links they would need to do their job, funding procedures and printouts were created, standard instructional emails drafted, reference tables, tracking tags, importing functions, tracking functions, with extended and complex processing both real world and in the system, paper claims, digital claims, digital claims with extended and complex motions and certifications, standard requests for information, a whole new set of policies and procedures to operate the system, template forms, access forms, registration processes, training, implementation of the system, testing on a very few attorneys, 180 day calculations, if statements to deal with this, and if statements to deal with this, code, code, code. It was absolutely amazing. BHI was ready for ICE. Foster sent an email to all of the staff with an attachment to Vanilla Ice's most memorable tune "ICE ICE BABY". BHI was ready for the system put the ICE in the glass, lets poor a drink, Foster thought. BHI made it; made the impossible possible yet again. Foster met with the staff, gave some last minute instructions, worked with Hammer on some funding issues, dealt with Ms. Reynolds on the training needed for her dashboard, sat with Mr. Redmon and all the generators, discussed a few intricacies about the new system while Mr. Redmon divided up responsibilities, non-ice and ice, as there were two separate and distinct systems to operate now, spent a moment with his brother and went home for a much needed two day nap.

Foster had not slept in days; he was exhausted, so when his head hit the pillow, he drifted off to sleep immediately; exhausted, stressed, and on the verge of a heart attack or stroke most likely. Sleep, he thought as his eyes closed for a much anticipated and deserved recharge. Foster hadn't rested well since college. His addiction to work was such that it infiltrated his sleep. In law school Foster would study in his sleep. The outlines he had so intently type and retyped, because that is how he burned them into his brain, would appear in his dream and he would read them. Whenever he was working on a coding project, the code, the diagrams, the business logic, the database design would all

come together and he would analyze them in his sleep. Policies, procedures working process charts, all came to him as he snored to the sound of silence, at least for him. So as Foster slipped into that deep dreamy sleep following the BHI / ICE merger, he was headed for 10 more hours of solid work.

Foster knew as his head hit the pillow that he needed rest and this time he had to allow himself to get it. He had worked so many hours of the last two weeks that he was beginning to become delusional from sleep deprivation. Foster typically had delusions of grandeur, but those always came in lucid moments. This time it was for real; Sleep ... Sleep ... Sleep. Foster knew his problematic dreaming was an issue, and he had hoped that this time, considering his state of exhaustion, he would not drift off into that office in the sky, but rather into that hammock hanging between the trees. Foster was well intentioned, but his intentions changed as the dream began. Numbers, bankers, attorneys calling, extended and complex denials, preferential payment, status reports unanswered, millions of dollars on the line, all converged upon the glass desk where his Admiral Nelson and cheap knock of coke still sat as a constant reminder of that ever fateful night when efficiency ruled and he should have just folded. The office in the sky is where he had drifted off to; so much for the hammock and some real rest. Foster could not control his dreams, but he was certain that he could control his reality.

The next morning Foster awoke, feeling somewhat rested, but with some fresh ideas that had been worked out over a glass of cheap rum and knock off coke in that office in the sky. Although BHI was providing a decent income for Foster by this time, keeping the bills and obligations paid, BHI, and therefore Foster, was subject to the same payment and billing issues that each of BHI's client attorneys had faced prior to signing on, just on a much larger scale. Realizing that the employees must be paid first, the lights must be kept on, and the client attorneys had to be funded, Foster never knew when he was going to have to trade that steak dinner he had planned for a bologna sandwich, just as he done so many years ago. Foster often wondered if the employees and brass of the AOC ever really stopped to think about the true differences between government and small enterprise. Even if they did, could they fully understand it? The AOC was funded by tax dollars, the employees received their checks whether the attorneys were paid in a timely fashion or not, the C.E.O. of the AOC, its Director, received no bonus or reduction in pay based upon the efficient and/or profitable operation of its affairs or lack thereof, but rather from the funds provided to the state of Tennessee from small businesses across the state, just like BHI, and just like small solo practicing attorneys and small law firms. nope, no way Foster thought; the bird atop the ivory tower never dips into the trenches like the eagle in the street. Foster thought to himself as he left for the office, wonder what the Director and her staff would do if they had to wait for their paychecks? Had their checks ever sat on a desk cut, ready to be mailed but not funded because the till had run dry, Foster asked himself. He did not know the answer for sure, but he was all but certain they had not.

A few months past after the revamp of BHI and the real problems began. Week by week more BHI attorneys were moving to the ICE system, more claims processed through it, and daily issues to address. The staff jokingly turned Foster's initial email concerning the new process from ICE ICE BABY to ICE ICE MAYBE. Multiple issues arose concerning ICE, and in all fairness Vicky Hutchings worked feverously to see that all issues that were identified were fixed. It was software after all there were going to be bugs; Foster had anticipated that. Foster knew that many of those bugs could have been remedied before they came about had the database design and business logic included the eagle eye perspective that BHI had offered up. It did not matter to BHI, why should it BHI could not do one thing about it, it was what it was. BHI made the best of it. However what did matter was that fateful call that came in from the AOC to inform BHI that it was the policy of the AOC that court time had to be specifically spelled out on the claim forms when entered into ICE. This caught Foster, Hammer, and Redmon's full attention immediately.

The issue, again, was simple; but the solution was monumental, especially under the confines of the what the AOC told BHI it was going to do. For years BHI had processed paper claims and "in court" had been accepted as a sufficient description of time spent before the court. This was important because "in court" time paid the attorney ten more dollars per hour, considering the measly 40 and 50 dollar an hour rate of pay the attorneys received subject to caps, cuts, slashes and denials, every penny counted to BHI attorneys, and presumably to those who were not. There was one such date that had always needed a further description and that was the date of adjudication in a dependency and neglect case. BHI missed this date at times, admittedly, but not often considering its volume of claims, but, hey, BHI is run by humans; mistakes are going to happen, they should just happen as scarcely as possible.

The phone call about the dates was not surprising to the three, but the demands, well more like threats were. Foster, Hammer, and Redmon were aware of the pending issue of court time descriptions. Presumably the AOC had hired a new processor, because BHI had never heard her name until the ICE system infiltrated. However, messages after message began coming across the ICE messaging system. Part of the sue chef's job was to ensure that these messages were dealt with. Sometimes BHI could answer the questions and sometimes it had to engage its attorney client for the answer or additional documentation requests. BHI always tried to do everything it could to not bother the attorney client. The client was busy trying to make a living, they did not need to be burdened with any more non billable time if it could be helped. BHI knew for these attorneys to survive on the rates they were making, they needed every billable hour they could spare simply to keep the lights on and feed their family.

The messages asking for court date descriptions led Foster to call this newly discovered staff member of the AOC. Foster engaged her in conversation and the result was that the AOC only needs the adjudication date described as it always had; it would

prefer the descriptions on the other dates, but the claims would be processed without them. Problem solved, not hardly! Foster and Brian Redmon, BHI's operations manager sat down to discuss the import of Foster's conversation with what BHI believed to be the newbie. Little did they know the very lady who later would opine that she needed 10% of every claim she processed in order to be able to go out to eat for lunch was about to become one of the largest thorns in BHI's side. Foster and Redmon agreed that if the AOC would rather have court time descriptions, BHI would ultimately get them for them, even though the AOC had not yet told them they had to have them, but it was going to take a little time. Foster walked away from the meeting and thought about the gavel pounding the Senator's desk, and said to himself, attorneys don't like change either, this may prove to be difficult. BHI could not just hold up every attorney's funding for something that was not yet required, and that was not acceptable to Foster. Attorneys first, AOC second, BHI third – that was the pecking order. Admittedly, the project was not one BHI engaged in immediately, but Redmon began working on plan to fix the problem. He liked hassling the attorneys the least and would not do it unless absolutely necessary. That was probably because he always got the blame for whatever it was that the AOC was requiring that day. Redmon hated to call attorneys and ask them for anything. If it was at all possible to process a claim through his operations department without calling the attorney or requesting something from the attorney, he always found it. Redmon, BHI's operations manager knew who paid his salary, it certainly was not Foster, not the AOC, but it was the attorneys he served in his capacity as the man who pushed their claims through the door to Hammer's office so their checks could be cut. He was serious and he expected it to be done as fast as humanly possible and with limited errors.

Having been stationed in Korea for his stent in the United States Army, Redmon was a soldier, and administrator, and he ran his ship as tightly as possible. He had been with BHI from the beginning, and he knew more about processing claims and the ends and outs of the phases, claim types, caps, etc. that arose than most any other person in the state of Tennessee. He was a pro. So when he started seeing message after message after message from the newbie, he became concerned because he knew that if BHI could not answer the question via the sue chef's office, he was going to have to call and hassle one of BHI's attorneys. It was as if as the newbie had a microscopic laser pointer and an eyeglass that she applied to every claim. Problem was she was not always right, but the claims were held up none the same. Foster always wondered if she did this to every attorney in the state or did she just pick out BHI attorneys. Obviously BHI's made 10% of each claim; maybe she did. Foster never knew and was never willing to level that accusation, and he never did, but he always thought one day he might attempt to verify or dispense with his suspicion. Foster also wondered if the continual messages were merely an attempt to hold up payment, again not something he actually believed would happen, but as with everything else he knew it was a possibility and this was a government bureaucracy he was dealing with.

"Hello," Foster said with the phone clenched tightly and firmly pressed against his ear. It was the project manager for ICE. She explained to Foster that there was a serious problem with BHI and the processing of its claims. As usual the message was clear, but Foster was very disappointed in the message and the tone, as it was completely and totally unwarranted. Foster always liked Vicky Hutchings. She was his favorite staff member; she was always reasonable. However, as the days went on and the ICE system melted further across the state, Foster could hear the stress and it increased as time went on. The tone in her voice and the air of suggestion troubled Foster because Vicky was typically the most sincere and kind person he had dealt with at the AOC. Vicky informed Foster that the AOC was going to delete what would have most likely been several thousand dollars of BHI claims from the ICE system and explained that they would have to be recreated if they were going to be paid. Alarmed with the knowledge of the tremendous amount of time, hassles to attorneys, and slowing of claims payments this would, cause Foster gingerly asked, why? In a surprising tone she suggested BHI had no idea what it was doing, Vicky explained to Foster that she thought BHI had been told court dates have to be adequately described, BHI was not doing that and it was causing major problems for the auditors and that can't happen anymore. She went on to explain about the AOC's policy on "in court" time, a phrase Foster had come to love because he never knew what that was going to mean. Foster replied, "how long has that been the policy Vicky? BHI has been processing paper claims to the AOC now for 5 years and I processed claims to the AOC for about 5 years before that directly as an attorney, and other than the adjudication dates on dependency and neglect claims and a conversation I engaged in with one of your processors the other day who told me the AOC preferred the "in court" time descriptions, this is the first I have heard about the requirements, you would think I would have heard about such an important matter before now, wouldn't you?" Foster, very irritated at the thought of the threat of deletion of claims that were already at the AOC and knowing there were multiple other digital claims on their way to the AOC, many of which would have to changed, or recreated after their deletion, fired off again before he gave Vicky a chance to answer, "have you looked at the drop down menus on the software? Hearing is an option, but yet you are telling me that it is AOC policy for "in court" time to be described and your own software provides otherwise." Foster reeling at the thought of what this deletion would cause, incensed with the tone of suggestiveness, and upset with the thought of the problems this was going to cause for BHI clients, all the while knowing the attorneys would ultimately blame BHI for this mess that was created by an abrupt, retroactive policy change that did not even come with the benefit of a written notice, fired off again before he allowed Vicky to speak again,"I talked with Mrs. Brown about this and she told me all you needed was the date of adjudication description. We have always tried to ensure you got that. She told me the other "in court" descriptions are optional. We are working on getting this accomplished, but we have almost 400 attorneys; it is going to take some time. They are not used to this." Vicky answer, well she should not have told you that that is not her call, but I will talk to Pam Hancock and I will get back with you. Foster thought about that full attention of the elephant bureaucracy and he was sure he was about to obtain it again, and in a state

of disbelief as to the conversation he had just engaged in with the person he liked the most at the AOC, he placed the phone on its hook and Yelled "Brian, get in here. Houston, we have a problem." As he heard Redmon's footsteps headed toward his office Foster wondered, was this aimed at BHI or were all attorneys in the state going to be subjected to this retroactive policy change that was a disastrous train wreck of monumental proportions? The train was just about to derail. Foster knew that if every attorney in this state was required to go back and determine what their "in court" time was from a descriptive standpoint and retroactively comply with this new policy, it was going to take some substantial time out of their days, and they had much better things to do than to dig back through files to locate notes, motions, something that described a hearing that may have occurred 6 or more months ago, but that was something that would only have been recognized immediately from the street level eagle eye. As Redmon stepped through his door, Foster gave one final thought to himself, they have no idea what that is going to cause. Sure wish they would have allowed themselves the view from the street eagles eye before they turned on the ICE maker. ICE ICE Maybe he chuckled.

"Mass communication immediately and stop all claims that do not have descriptive "in court" time entries" Foster blasted out expecting the soldiers typical snap when Foster instructed him to do something Foster knew he was not going to like. "What what why? Do you know what that is going to cause?" Redmon said, knowing full well Foster knew exactly what it was going to cause. "Yep, we have to; marching orders from the AOC, and let me stop you before you get started. I have already addressed all the issues with Vicky. I realize its retroactive they have never asked for it before, but they are about to delete all our claims that don't comply with the in-court time and we may have to recreate all the claims that were pending," Foster said with deep concern in his voice. Redmon, knowing better than Foster exactly how many claims that affected both in process, in house, to the attorney, to the judge, sitting at the AOC; it was a lot, not to mention the intakes he had sitting on his desk, made a quick calculation, took a deep breath to control the anger that was so easily identifiable on his face as it always was, said, "You know the attorneys are going to blame us for this and this is going to hold up payment to a lot of attorneys, right?" again knowing Foster most certainly did. Neither of the men liked what had to be done, and liked even less what it was going to mean for the attorneys, agreed to move forward on resolving the train wreck and picking up the pieces. Notice to the attorneys began, and Redmon, knowing he would have to answer all the questions, cussed as he left Foster's office.

It was not too long thereafter that Vicky called Foster back. Thankfully she had gotten to the bottom of it. It was not AOC policy, but it is now she informed Foster. Foster inquired as to what that meant for current claims. Its policy, that was the message he got. Is there anything we can do? Foster inquired still concerned about the many claims in process and the thought of getting 400 attorneys to comply with this new policy immediately. Thinking to himself that she did not understand what an impossible task she was requesting, this was going to bring BHI to a screeching halt and upset, to put it

lightly, every attorney in the state all based upon, what Foster would later learn, an unwritten policy, apparently changed on a whim, without notice, and with retroactive application. "Vicky, please, please, lets be reasonable. BHI can accomplish this, but don't apply it to existing claims in the system and please give us some time", Foster begged. Vicky was always reasonable and Foster knew at this point she was gaining an understanding of what she was requesting and much to Foster's pleasure, and maybe more likely to his lifeline, she agreed. BHI now knew what the AOC had told BHI it was going to do. "Redmon, get in here, and don't stop the presses just yet. Vicky just threw us a lifeline", Foster excitedly exclaimed, knowing that his remark would make Redmon's day.

The in court time description debacle was not quite over although the severity of it had been lightened substantially. Still BHI had to inform its client attorneys and help ensure that they began giving proper court descriptions, knowing it was going to cause problems, BHI was going to blamed for it, and it would take a long time before all the attorneys finally complied. Redmon was especially pleased because he knew that it meant many claims were going to get held up for proper descriptions and the attorneys were going to be upset. After multiple emails, letters stuffed in every check that went out the door, faxes, and direct phone calls at times, several months of additional information requests, several attorney client phone calls and complaints blaming BHI and the daily call from an attorney who disagreed with BHI, delays in payment to attorneys, the potential train wreck morphed into a one car accident and finally blew over.

When ICE initially launched its turn-around time was wonderful, but just as BHI had anticipated, as soon as it began to melt its way through the state, with more users, more claims, and more judges, the turn-around time from submission to payment began to slow. That was not the real issue BHI was facing, because for the most part, ICE was paying at least a little bit fast, but not always, and most importantly not consistently. Consistency in cash flow is one of the most important factors a small business model counts upon. In fact, one might say the consistency in cash flow is directly correlated to the ultimate success or failure of a business; it's that important. Got cash? Foster often thought equating the ever famous "Got Milk?" to what it takes to run a small company, solo or small practice, all of which are small enterprises, yes small business. In days past, the robber barrons as they were called, the big businesses, they were the warriors of the economy, they were the megalithic employers, powerful bold, audacious and their bags had probably been packed for years ready for that long vacation in Mexico. America still has some of those around, the ones who didn't take extended vacations or who were not overtaken by the Chinese, it always will, but Foster knew that small business ruled today. Small businesses employee people in sleepy little small mountain towns and large cities all across America and all across Tennessee, and in this day and age the hooded knight bearing the industrial sword and shield of the economy in today's world is the small business owner.

When Foster thought of this reality, he was always happy to know he was one of those knights working himself to death never removing his shining, but most certainly dented and battled scared, armor. More importantly he knew the attorneys BHI served were the true warriors; BHI was just the support staff. Foster always felt a sense of pride in the status of support staff. It is honorable to support the protectors of the constitution, the protectors of freedom, and the warriors of justice. He often dreamed of the day when the rest of the state would understand their importance and the general public would finally come to the realization that the warrior in court defending the alleged criminal fights for the innocent, not the guilty. The champion of freedom unsheathes its sword and impales the heart of injustice so the victor's shield can cloak us all in the constitutional blanket that is American Liberty. Foster knew the champion was the solo attorney and the small law firms across the state, the ones that were in the trenches on the front lines protecting the most vulnerable and cloaking them with the much needed warmth of the constitutional blanket so the rest of the citizenry could be protected by the shield of liberty. Who did that daily, Foster always thought to himself; every one of BHI client attorneys, yes they were indigent representation attorneys engaged in the daily delivery of constitutional competency and the effective impalement of the heart of injustice. Foster and all the staff at BHI are honored to serve them. It was this Honor, and this Honor alone, that allowed Foster to push through the coming months which would prove to be the most challenging of his life.

The phone calls were becoming overwhelming Bankers, stockholders, attorneys; you name it, the phones at BHI would not stop. It was the domino effect Jim and Foster had discussed during their debriefing conversation on their return trip from Wilson County so many months ago. They knew it was coming, but they had underestimated the magnitude of it.

BHI was just about to come out of the typical year's budgetary blunder that is the "shut down", or that is what it is called at BHI. This occurs every year when the AOC runs out of money. In all fairness, Director Sykes had successfully negotiated with the legislature for additional funds each year before and had this particular year; it was 2010. However, the funds typically don't become available until the Governor signs the budget. This, of course, was the most stressful time of year for BHI. BHI was not getting paid, but its attorney clients must be paid. Each year Foster would wear his finger to the bone clicking that mouse button to refresh the legislative page, phone calls to his representative, and others in an attempt to pinpoint the exact moment in time when the funds would be released so everyone at BHI could actually take a breath. It was hectic to say the least, stressful would be an understatement, and a gut wrenching undertaking to have millions of dollars out there and demands to meet the expenses, the payroll for multiple employees, light bills, phone bills, internet service, paper, and most importantly funding dollars for BHI's attorney clients. A far cry from 10% of every claim that some state employees think BHI makes. It was a balancing act every year, a Rob Peter to Pay Paul escapade aimed squarely at making sure BHI bore the brunt the budgetary blunder

and not its attorney clients. BHI had dealt with this every year it had been in business and had always pulled it off, but this year Foster was not sure the impossible was actually going to be possible. The domino effect recognized months earlier by the brothers converged at exactly the wrong time and it presented a major challenge; one that this time nobody was sure would be overcome.

The problem was the converging of so many high impact results of AOC inefficiencies and slashing occurring all at the same time. BHI was always prepared for the shutdown months; proper contingency plans were in place to ensure client attorneys were paid. Dealing with delayed payments and cuts was never a problem, but when preferential payments, failure to provide status updates, heightening audits, and an ever increasing number of denials of extended and complex claims that met the appropriate factor in the rule all hit BHI at once, it was somewhat overwhelming.

It was mid-August, 2010, the time following the annual budgetary blunder that the AOC typically began catching up on unpaid claims that had been resting under the elephant's hoof held tightly by the weight of its mammoth bureaucratic body for so long the dust had to be blown from them so the mail man would be capable of reading the name through the window of the envelope they were finally placed in. With this anticipation, and as they had done every year before, Foster and Hammer sat in Hammer's office reviewing the numbers, making decisions, robbing Peter to pay Paul, doing everything within their control to ensure BHI attorneys were paid. As always, that was goal number one. This was a habitual occurrence as the budgetary blunder was an annual occurrence. Foster oftentimes wondered how in the world solo practitioners and small practices who relied on indigent representation work to fuel their practices and who were not clients of BHI actually made it through this annual period of financial drought. Surely they suffered, he thought and the quality of their work most likely suffered as well. Hammer and Foster sat at Hammer's desk each year during this time and reviewed numbers on a daily basis. Foster was certain the solo attorney and the attorneys of the small firms who were not clients of BHI and who relied on indigent representation work to meet their obligations engaged in similar activities regarding their business, personal, and family budgets. The quality of Foster's and Hammer's work suffered this time of year because the ever increasing obligations and the concentration piercing worries of the inability to meet them clouded their minds, and therefore, their judgment. Surely, the non-BHI attorneys who relied on indigent representation to meet their obligations were affected by similar penetrating worries. However, BHI client attorneys were not, and that was because Foster, Hammer and others at BHI consumed those worries for them. BHI attorneys' pastures were at least healthy as the financial drought that was the annual budgetary blunder did not reach them; consistent rain, or at least a consistent drizzle, kept their grass growing allowing their minds to remain focused on the task at hand, the daily delivery of constitutional competency and the effective impalement of the heart of injustice. Foster was certain BHI was making a difference and working to the betterment of the indigent representation system by assisting its client attorneys, the warriors of

justice, deliver a higher quality of representation because their battle worn brains were not burdened by the overshadowing thoughts of the inability to meet their obligations caused by the annual budgetary blunder.

BHI typically had monumental claims receivables outstanding during the late spring and summer months, and their claims funding cash reserves were stretched to their limits each and every year. Just because the state ran out of money did not mean BHI could; it had to ensure its attorneys were paid. Needless to say, with 400 client attorneys, this was a substantial, difficult and stressful annual endeavor, but an endeavor that was nothing new to Hammer and Foster as they had traded their steak dinners for bologna sandwiches around this time for several months of each of the last 3 years. Just because BHI was starving did not mean its attorneys were going to. This particular year was more problematic than most, and it was squarely a result of the domino effect recognized by Foster and his brother so many months ago. Unfortunately for Foster and Hammer, apparently this time they had failed to properly follow the rule of P's. The AOC had all but stopped answering any status requests, and BHI had hundreds of paper claims that were outstanding. Foster had met with the AOC earlier in the year in an attempt to get some answers, but he was met with the understaffed brick wall. It was conveyed to Foster that the AOC did not have time to answer BHI's requests it was understaffed. The stock answer AOC can either pay claims or give status updates was given.

Jim, who had taken over the tracking of BHI's claims some months ago, had sent requests on a regular basis to the AOC in small batches, and for a long time the AOC was very responsive; that was until the staffing cuts came. Jim, working with staff members of the AOC, was able to readily identify any claims that needed information, were caught in an overclaim audit, whether a claim had been sent back to the attorney, or that had not been received. These status requests were important, especially considering the pensive application of the 180 day rule that would violate a claim and result in non payment for hard work completed for the state if a claim did not bear a judicial signature or a file stamp within 180 days of the disposition of the case or the date of last relevant activity for certain case types or phases of case, whatever relevant meant. There were always differing opinions on what was relevant. Foster always thought a list of relevant activities, standards he thought, would be helpful. Foster was of the opinion that an attorney should be able to determine exactly when the hands of the clock began to move towards his or her pocket aimed at removing his or her hard earned dollars simply because he or she was too busy to comply before the bureaucratic elephant's trunk sucked earnings off the receivables page of the indigent representation attorney's financial statement. BHI certainly needed to know when the clock began to tick. More importantly, since the mail was used to process claims, it was important to know if the AOC had received claims from courts, BHI, or attorneys. This was extremely important considering the rigid application of the 180 day rule. Claims got lost from time to time, by judges, by clerks, and yes, even by the AOC. Therefore, BHI had to at minimum verify which claims the AOC had not received that might have been lost. Thankfully,

BHI was told during the meeting Foster had just left that the AOC would accept and answer some requests, but only those that were very close to violation. Of course, that did not cover the approaching one thousand claims Jim had called into question as trackable claims that needed status responses; hundreds of thousands of dollars. Not what he wanted, but Foster accepted this because what could he do about it; it was the AOC, they always told you what they were going to do and BHI always accepted it; there was no other option. As Foster pulled his truck back on to that ever so identifiable stretch of interstate he headed east towards the mountains that was his home–beautiful small town America, Greeneville, Tennessee. He thought to himself, the ICE system is gradually eliminating some of these issues, thankfully. Although it has its glitches, it's much better than the paper plan, ICE ICE MAYBE, he thought, well maybe it really is, or will become, ICE ICE BABY, dun dun dun da da dun dun, he hummed to himself, and chuckled.

"Robert, get down here, we need to talk." Jim blasted from the sue chef's kitchen, the master chef was needed to work, not on the menu or the marketing, but on ensuring the patron's checks were paid. "Ok, I'll be there in a minute", Foster replied. During the business day Foster's brother never bothered him about anything unless it was important and in the sue chef's kitchen, if it was important, it meant it was a problem. Foster entered his brother's office ready for the news that the world was falling down, as he already knew from his earlier conversations with Hammer, exactly what the meeting was about. "Robert, the AOC is simply not paying paper claims, ice claims seem to running fairly smoothly, but these paper claims are just not getting processed. I have got almost a 1000 of them that should have been paid months ago. You are going to have talk to Libby and get this thing worked out", Jim commanded; after all he was Foster's older brother. Foster and Hammer had waited and waited for the paper claims that had been caught under the elephant's hoof to have the dust removed from them and mailed to BHI. BHI was well past August at this point, when the claims' payments typically arrived, and it was a big problem; the reserves were running low, almost depleted, and the patch cash that BHI utilized every year was coming due, soon. The situation could not have gotten much worse. BHI attorneys had not experienced any substantial delays prior to this time, as Foster, Hammer, Redmon, and the staff at BHI worked diligently to ensure they were paid. There were a few delays as the ICE system infiltrated BHI during the transition, but overall BHI had kept its turnaround time to the least number of days humanly possible thanks to Redmon and his operation staff's unrelenting dedication to the warriors of justice BHI served, and Hammer's continuous and ongoing efforts to get the checks out the door. Unfortunately, Jim, Hammer, Redmon, and Foster knew the delays were coming because without the AOC replenishing BHI's reserves via the payment of claims that should have been paid months ago, there was going to be no funding dollars. This was serious and the three men knew something had to be done about it and fast.

Back at the ivory tower, Foster sat in the room with Libby and David Byrne. The three sat at the beautiful conference table in the eloquently adorned room, the war room,

presumably of the administrate arm of the Supreme Court of Tennessee. Smack dab in the middle of the ivory tower sat the eagle eye staring across the table at the bird perched upon the tower. "You have lost a lot of weight, Robert", David said, acknowledging the almost 40 pounds Foster had lost since the two men last met. Foster responded explaining how he could not afford to eat until the AOC paid BHI's claims and the stress the AOC was causing him was melting the pounds away. At least something good is coming from this debacle, Foster thought to himself, and then he quickly realized, as his suit paints almost slipped off of him because they were about 5 sizes too big for him, hopefully I can get these guys to pay these claims. I really need a new suit. Foster chuckled to himself and engaged the two in a conversation regarding the paper claims. Banter back and forth consumed the next few minutes. The understaffed brick wall came up again, and finally, the AOC, yet again, told Foster what they were going to do. It was clear that either the Director did not know how far behind the AOC was on paper claims, or that she was not about to let Foster know that she was aware of the problem. Either way, Foster did not care, he wanted the claims paid so he could keep the fuel in the vehicle of justice that was BHI's attorney clients. The result, thankfully was Libby told Foster she would see to it that the staff switched over priority from ICE to paper claims and process as many claims as possible. Upon his return to Greeneville, a follow up conversation occurred and Libby told Foster that the AOC had hired some temporary staff to process claims and they would be working overtime. Foster thanked Libby profusely, not just on behalf of BHI's warriors of justice, but on behalf of all those indigent representation attorneys who were experiencing the same delays statewide. As he hung up the phone, Foster thought hopefully this time he was able to help all those indigent representation attorneys in the state, not just BHI's constitutional defenders, wield the sword of justice without the overshadowing concentration piercing thoughts of inabilities to meet financial obligations. Maybe, just maybe, he had helped them hone the aim of their sword for a more effective impalement of the heart of injustice. He smiled, and even if he was having a lucid delusion of grandeur, he enjoyed the thought of the possibility of being of assistance to the attorneys of this state who daily engaged in the battle of constitutional constraint.

The weeks prior to and immediately following the eagle eye's departure from the heart of the ivory tower were very challenging. In fact, it was the time that Foster really began to think BHI was going to fall. A massive campaign aimed at slashing attorneys claims, especially extended and complex had been put into motion. Paper claims were not being paid as ICE was receiving preference, at least, until Libby hired temporary staff, "Informational meetings" with judges were occurring, at least in Knox County, A former IRS agent had been hired to engage in audits of attorneys, both for billing too much in one day, and for making too much in one year, and a black list letter had been sent to judges, a letter that Foster was later chastised by Mr. Byrne for characterizing as such. Foster found out a few months later that a better characterization would have been the introduction into the 100,000 grand club, or at least that was how the Knoxville News Sentinel would take it. The domino effect was coming into full swing. Foster and his

brother had swamped out travels to Nashville, staying in hotels for days, just to show up each afternoon to pick up checks from the AOC and get them deposited in the bank so BHI would have money to fund with. The payments were so slow and delayed, like never before. BHI could not spare the mail time. Yes, there were substantial additional costs that BHI had to bear; travel, lodging food, and time away from the chores of the kitchen for at least one the cooks several days a week. The additional costs did not matter, BHI was delayed, not by desire, not by process, but by the inability, potentially intentional delay of the AOC's payments and none of that mattered to Hammer or Foster, BHI attorneys had to be paid, whatever the costs, serve the attorneys. Albeit, during this time attorneys got their steak, but it was not always prepared the way they ordered and it was typically cold when it was served as the delayed payments had begun. Foster was sick at the thought of this. Finally the inefficiencies of the AOC and/or their understaffing had infiltrated BHI. BHI's wall was thick, but not too thick for the bureaucratic elephant's trunk to pierce, and it had almost drilled its way all the way through to the street desk where the eagle eye was perched. That was not going to happen, and Hammer, Foster, and Jim and the remainder of the staff at BHI were going to make sure of it. The state of payment for indigent representation work was headed for certain destruction, and if something was not done about it, Foster knew the warriors of justice would sheath their swords, lay down their shields, and go home. Maybe, Foster feared many of those warriors, the protectors of our constitution, the champions of freedom, the indigent representation attorneys who had so honorably wielded the sword of justice, covering some many with the constitutional blanket of American Liberty, many for the majority of their careers, would surrender their swords, take off their armor, and quit. Worse yet, Foster feared they would seek out that corporate client and help its C.E.O. plan on putting the screws to the guy who miscalculated his second ingestion of the magic horse pill while sipping high dollar liquor in an overpriced bar accomplishing nothing more than a mounting legal bill. Foster, with a diluting thought of hope, said to himself, or maybe they will go to work for the ivory tower and help swing the trunk of a Tennessee bureaucratic elephant, he sure hoped not because Foster believed at the direction this country was headed everyone was going to be working for the government and that was, in plain old mountain terms simply not good.

The extended and complex slashing had become ridiculous at this point. Tennessee Supreme Court Rule 13, the Rule that governs the administration, sets the amount, and terms and conditions of payment was fairly vague either, intentionally, or simply because it was drafted from the bird's eye view atop the ivory tower without the benefit of the eagle eye in the street. Rule 13 had been over time subject to extreme misinterpretations in Foster's opinion. Misinterpreted or not, it did not matter, it was what it was and the interpretation of the day was whatever the AOC said it was. Those were the rules of the game. However, as the slashing ensued, the indigent representation lawyers, the warriors of justice, were begging to feel the bureaucratic elephant's trunk piercing their armor with the might of Thor's hammer and they were starting to hear that

ever so identifiable sucking sound of the trunk's powerful lungs vacuuming up their hard earned dollars from their wallets and purses.

Rule 13 was fairly clear on what constituted an extended or complex case the Rule defined an extended or complex case as one that involved complex scientific evidence, and/or expert testimony, multiple defendants and/or numerous witnesses, multiple or protracted hearings, novel and complex legal issues. The Rule did however leave a very important word out between the last two lines of the definitional word and that was "or". Further, the Rule did state that the factors were "neither controlling nor exclusive" and required simultaneous execution of a certification order and a claim. The Rule also clearly stated that specific facts supporting the finding of extended or complex must be included in either an attached motion "incorporated by reference" or by in the certification order itself.

Foster, having drafted thousands of extended and/or complex motions and certifications for BHI attorneys had always had success with getting them paid for the attorneys of BHI, at least until the summer of 2010. Over the years Foster had identified multiple problems with the extended or complex provisions of Supreme Court Rule 13, but the AOC had for many years been fair to the attorneys on payment of the extended and complex cases so the issues were not that important to address. The primary goal for BHI was to get its attorneys paid, and ensure they had the funds to keep their constitutional swords sharpened. Foster oftentimes thought about when it was going to be recognized that the appeals processes in the provision of the Rule was, in mountain terms, about like having the fox watching the henhouse. Foster read the rule over and over, he knew it inside and out, Rule 13 was BHI's livelihood, but only because it was its attorney's livelihood. Foster pondered the language "if the director denies payment, the director shall transmit the claim to the chief justice for disposition. The determination of the chief justice shall be final." Foster oftentimes chuckled when he read this and thought, well at least I would have capitalized Chief Justice, but that was not what bothered him.

Foster contemplated the Rule that provided absolute authority, no notice, no opportunity to be heard, upon the denial of payment for a claim that the very person that knew the most about case's facts, had certified, pursuant to his or her ethical obligations, to a lower court the facts were accurate, and the court had agreed and the front line jurist with a bang of the gavel agreed. Each time Foster read this portion of Rule 13, Foster always thought, this seems to me like a taking, and under this set of circumstances why even involve the local judge at all, if the front line jurists opinion on the attorney's work in a case meant nothing, why was the jurist troubled to provide it. Foster always chalked it off as just another quarter, held in reserve, to be deposited in the coin slot of the vacuum housed within the bureaucratic elephant's trunk.

Foster had identified a, maybe more troubling portion of the Rule and that was the simultaneous signature requirement and its application across the state. In all fairness to the AOC Foster knew that it was being as fair to the attorneys as it could be in its application of this provision. Foster, knew that in some local courts compliance with the simultaneous signature provision of this rule were a physical impossibility. Shelby County Juvenile Court was one of those jurisdictions. In this particular jurisdiction and extended or complex certification via local practice had to filed with the court, argued in front of the judicial magistrate, signed by the magistrate, forwarded to the juvenile court judge, returned to the attorney, then attached to a claim and filed with the Court, the judge would then sign the claim and it would be submitted for payment. This, or course, created numerous hoops to jump through for the warrior in the trench, and there was no compensation for the time spent cutting the red tape and it always substantially increased the time it took for the constitutional protector to get paid for the work he or she did on the front lines of justice.

Problem was the court's local practice required the extended and complex certification to be signed before the claim therefore making simultaneous execution of a claim and its certification an impossibility. Foster always disliked this procedure, especially each time he had to explain why it took so long to process an extended or complex claim for payment by BHI in Shelby County Juvenile Court. He liked it less each time he witnessed a warrior of justice get denied payment for the wars he waged in the name of constitutional constraint simply because the process ran him afowl of the 180 day rule. However, much he disliked the process, who was Foster, BHI or any other to tell the judge how to run his court, the people elected him, it was his purview. Foster was confident the judge never intended on the procedure he chose causing one of his local defenders of justice to fall prey to the 180 day rule, but Foster knew that the grandest of intentions did not always birth the desired results.

When the ICE system began to melt its way across the state of Tennessee, the extended or complex procedures became even more troublesome to Foster and BHI. Although there were many intricacies with the procedure by which such a certification was to navigate its way through the digital processing system and one of which made it an impossibility to comply with the simultaneous signature provisions of the extended or complex provisions of Rule 13. The AOC did take this into consideration just as it had the Shelby County Juvenile Court's procedures. The AOC was to be commended because it recognized the impossibilities of compliance and did not enforce the simultaneous signature requirements sternly written in the Rule, and Foster was thankful for accepting as the circumstance defining the Rule or its interpretation. Foster had always believed that the language of the law was what it was and Rules should be applied to the circumstances, not defined by them, even when it was not in his best interest. In his heart and soul, and since the first day he had set foot on the campus of Cecil C., Foster had the deep rooted belief that one cannot champion justice only when it is convenient or in one's self interest; one must choose to champion justice always or never.

Trying to ward off the trunk from smashing through the front door was a difficult and daunting task made more difficult by the slashing of extended and complex claims that had begun to take hold. Extended and complex claims were, or at least they used to be prior to the summer of 2010, typically granted and paid when they met the definition of the Rule. That all changed in the summer of 2010. BHI typically funded these claims for their clientele, these warriors of justice and champions of freedom, but BHI had to stop, it had no choice. Foster was saddened by this because he knew these warriors worked long hours helping children and parents to help ensure children were properly cared for and, if at all possible, out of states custody, warmly nuzzled on the sofa at home with their families where they should be. Yes, Foster knew these champions of justice also represented those accused with crimes, what the non-lawyer would call a criminal. Innocent until proven guilty until budget constraints set in; that is Foster often thought to himself and halfheartedly chuckled. It was no laughing matter though, and Foster knew it and so did many others. Unfortunately the others that knew it were great enough in number but had no solidified voice in Tennessee; but they all knew, just as Foster did, the Founding Fathers intended on all of the rights they so intelligently penned many years ago to work in unison, for when one such right was not functioning properly, nether was the country, neither was American Liberty. When all the rights did not function together there were holes in the ever so warming blanket of constitutional constraint so often protected or provided by the champion of freedom wielding his sword and impaling it squarely into the heart of injustice, Foster thought to himself as removed the pen from his pocket.

Liberty is not free Foster, thought. Many men and women have spilled their blood in foreign lands and here at home to protect our freedoms. Those men and women paid the ultimate price, but a necessary price for us all to enjoy each of our rights, working together just as the founding fathers had intended, unpopular among the legislature and less popular in the public eye, Foster thought. What was to be done about it? At that point he did not know, and a thought came to his mind with quickness. He placed his yellow pad upon his desk and jotted something down, TACCIR!

As the phone calls rang the phone off the hook and the complaints began to come in all related to the extended or complex slashes that were occurring, Foster was finally prompted to call the slashing's primary exactor, David Byrne, assistant counsel for the AOC. Although confident, having worked with David for years, that he was not the author of the now abundant slashing scenarios, he was a soldier of the AOC; he had a job to do; he did not give the orders, but he did follow them without question. Mr. Byrne was not to blame, although he, much like BHI, received a lot of it. He was just following orders and that is exactly what he should have done; after all the AOC was his client.

The staff at BHI and Foster had worked diligently to successfully navigate the domino effect, at least to the extent that BHI was no longer in peril and its attorneys were being properly funded. Many difficult issues remained that, although very serious, were

capable of being dealt with and the one that was squarely on Foster's plate today was extended and complex, no pun intended. "David, how are you today? This is Robert Foster", Foster said as he tightly gripped the phone a pressed it to his ear.

The conversation with Mr. Byrne at the AOC was, at minimum, very disconcerting to Foster as it appeared to him that the AOC had no intention of paying these champions of freedom for the swords they were swinging in the name of constitutional protection and American Liberty. The policies of the AOC had changed yet again. No memo, no notice, and yes, with retroactive application. Mr. Byrne, in the two men's engaged conversation, explained to Foster that the definitions of extended and complex in the Rule were now recognized as run of the mill, basically standard across all cases, and therefore instructions have been issued that extended or complex authorizations for payment were only to be made in the most "Extraordinary" of circumstances. Foster immediately pointed out that if the run of the mill case takes more of the attorney's time, it would make sense to raise the caps first, not just deny attorney's payment for their work. Foster also pointed out that regardless of the run of the mill status of the case, the attorneys still did the work but now they are going to be denied further payment. David mumbled something in a tone that let Foster know he understood his position, and most likely agreed with it, but was not daring to, but Foster knew that. David was the AOC's attorney and he should never be expected to take a position against his client's interest; more importantly he should never be placed into a situation that incentivized him to. Foster hung up the phone, and with concern in his heart for the indigent representation thought, yet another penetration of the constitutional warrior's armor aimed at keeping from the champion of freedom the payment he deserved for the wars he was waging in the name of constitutional protections and American Liberty. Foster as he began to make a list of attorneys he needed to call, thought to himself, the mill cost more to run these days; why not pay what it costs to run; nope, not possible. Foster further contemplated, this will simply result in less quality wheat produced by the mill. One can't expect a mill that costs more to run today than it did yesterday to produce the same quality of wheat as it did in the past without covering the costs of production. The mill wheel was about to begin grinding justice to a halt, or at minimum rolling the constitutional warrior right out of the system.

The scathing calls continued to come in both on the extended and complex issues and concerning the new addition to the AOC, none other than a former IRS agent, Rule compliance extraordinaire, and was as if a new sign had been placed on the sixth floor of the First Tennessee Building in downtown Music City USA, and it read "Audits-R-Us". Never a dull moment around the halls of BHI; always something, always, Foster thought as he and the staff dealt with the daily onslaught of calls from upset attorneys.

What does the AOC mean by "Extraordinary"? When will I know if I get paid? Who is this lady, and why does she want me to bring my files? My files are confidential and they are not getting them, these protectors of freedom spouted at Foster as if he was

the one requesting to peer into the sanctity of their clients darkest secrets, or at minimum open the closet door containing all their skeletons with a blind eye. The closet was supposed to be locked by the sacrosanct relationship of confidentiality between a constitutional warrior and those he directly shielded. This was off limits, Foster thought, but he was not sure how to handle it, and in doing so he was confident that if any dilution had occurred in the attentions he received from the elephant bureaucracy doing anything about this issue was going to replenish the well and most likely place the elephant's trunk squarely around his neck. Foster was not sure at that moment in time that he wanted that attention, so he was going to have wait; but he could not wait long because the audits were piling up. It was obvious to Foster that there would be more audits than the one's he had learned of from the onslaught of calls, and it was obvious that there were some constitutional warriors that were going to have to go to the table and swing their sword of justice while their constitutional shield protected, none other than the wielder of the weapon in hand; their professionalism and ethics were being called into question, albeit an unintentional calling.

The calls rambled in, all aimed at Foster, as if this was somehow BHI's fault. Foster, over the next few weeks, just when he was ready to settle in and deal with some internal issues and hopefully get a few moments rest, while continually developing the indigent practice management tool and, for lack of a better term, AOC watch forum, had a mess on his hands. Always, always, the scathing calls would come in. Attorneys were more than happy to share their thoughts with Foster concerning the AOC. They were not, however, so keen on sharing their thoughts with the AOC, and he was finally beginning to realize why. Foster was witnessing attorneys refusing to bring their files to the AOC based upon privilege and confidentiality and this was sticky situation for Foster. Foster, an attorney, could not in business, or otherwise, advise these attorneys to breach their confidentiality, but yet BHI did need to be paid. This presented a serious issue because attorneys who were refusing to comply with requests to appear with their client's closet in tow were subject to, at time, a freezing of the entirety of their accounts, which meant no payment for claims that were not subject to the inquisition, claims that had not yet reached the AOC for payment, and not for the work the constitutional warrior was engaged in at the moment or any work thereafter. Foster thought, while sitting at his desk contemplating how to handle this delicate but pressing matter, what a position for an attorney to be in; stand your ground, protect your clients under the belief that their confidences and privileges were subject to breach, or receive payment for the toiling work you had done in the trenches protecting American Liberty. Foster found this thought to be ironic, and a bit repulsive.

Foster often wondered what would the attorney who did not have BHI to work with do when their accounts were frozen, no payments coming to them, not even for cases that were not subject to the AOC's inquisition, and he thought about that old country song each time, did they hold em or fold? He would chuckle to himself and then

quickly snap his internal laughter to an end. Why was he laughing, he would think to himself, for he did not know whether to walk away from this situation or run himself!

Luckily for Foster he personally knew two of the attorneys that were called into question; one had been a professor of his in law school, the other he had met through BHI but had become fairly close friends with. An ex marine and a former law professor, what a combination of men to deal with, both of whom squarely opposed providing the AOC their files, but both highly intelligent, very upset, and ready for whatever it meant to oppose this attempted peck into the sanctity of their files; absolutely not, both men stood their ground. Foster, after a phone call with each, realized that neither of these two men were going to fold em, and yet again he thought to himself with a fleeting chuckle, I can't even walk away! Again, based upon the discussions with these two men and several other attorneys around the state, Foster reached for his pen, pulled his yellow pad, placed it on his desk and wrote, TACCIR! Foster, and several other attorneys had engaged in what some would have called abstract plans, but the plans were laid, the marching orders given, and the men began an undertaking that would most likely consume the next couple of decades of their lives, if not more. The plan must be pulled off with absolute precision, no mistakes, the gentleman agreed. Immediately it became clear that these three men, a few others, and several others, were all engaged at this point. Only a few knew the entirety of the scope of the plan, and there was only one man that knew the whole thing. Foster thought through the entirety of the 15 year plan and how it all would end, how it all would go. He knew working with the folks that had come on board that they could pull it off; they could will it into reality. Foster could feel the pulse of the indigent representation bar, and their blood was beginning to boil, tired of being mistreated, and tired of being chastised, called into question, and most importantly tired of not being paid for the valuable services they delivered to the great state of Tennessee down in the trenches wielding their swords of justice and providing the citizenry with the warmth of a the constitutional blanket, all protected by the shield of liberty they carried. Needless to say, the warriors were getting fed up. The time was right, the stage had been set, and the plans laid; yet again, intentions changed, and a whole lot of fun in the future the gentleman set out to engage the world; the wheels of justice would keep on turning no matter the cost to run the mill.

As if the audits, slashings, and freezes were not enough, Foster began receiving calls from Knox county attorneys with some ramblings about the AOC and a Justice having been in town. None of the attorneys were exactly sure what was going on, but they certainly felt the result. Foster began receiving reports from attorneys about what was going on in these inquisitive audits brought in the name of the budget. Foster, at this point began to think about who the right of confidentially belonged to, the client, of course, not the lawyer, and surely that confidentiality belonged to the most vulnerable just as it did the C.E.O. of the horse pill company; surely, Foster thought. He also began to consider what the AOC and a Justice was doing in Knox County. It would not be long before he found out.

It was the week before the fourth of July, 2011. Foster was going through the normalcy of his daily routine with BHI, never a dull moment. Foster had moved his office to his house as the company was beginning to run fairly smoothly without his daily presence, and he needed some time with his family and needed to finish some software. That did not stop the phone calls, emails, texts, and ims that bombarded Foster daily. The company had hired a new employee; her training was almost complete. She had been brought on to test the new software and handle, what had become over the last year or so, Foster's favorite thing, extended and complex. Things had settled down quite a bit. There were, however, still some pressing audit issues to deal with, but the plans for that had already been set in motion, and the time for those would come. The typical issues, judge changes from paper to digital in the middle of an extended and complex delivery, glitches in ICE, claims not getting submitted, messages, getting attorneys to actually do what they were supposed to do to get claims processed. Foster often thought to himself, wow these guys must really be busy, and they were daily deliveries of constitutional competent counsel to those in need, wielding of their swords at the site of injustice, and calmly taking a child by the hand to ensure his interest was met and he was cared for; yes, the defenders of liberty, and champions of freedom, the true warriors in the trenches ensuring the shield of liberty protected us all; these were BHI's clients, and Foster was proud of it.

Foster's intentions were clear, but as usual, and over the last few years of his life, they were most certainly apt to change. The next couple of months were laid out working from home, launch the new software piece, spend some much needed time with the family, execute a few of the items on the task list that was the overall plan, and keep doing what he had always done and in the name of Davy Crockett, forge ahead. Yep, Foster finally had it under control, or at least that is what he thought. Little did Foster know that he would soon be presented with a document much like the one he had received so many years ago; a document that would yet again alter the course of his life, a document filed by the Supreme Court of Tennessee.

Uncharacteristically, Foster followed suit with most folks around the state, and took Friday before the fourth holiday off. Bridgette, Foster and the two little ones headed to Foster's mother's home for a relaxing weekend. The view from the family retreat was like a picture painted with Picaso's hand, a panoramic view of the Appalachian and Smoky Mountains, the one of only two places that Foster typically found peace. Kids were unloaded, their toys strung about the yard in less than five minutes after the family's arrival, feet in the pool, cool drink in hand, and a few days of relaxation, family, food, fun, sleep, and for once, no work the entire time. Little did Foster know that this was the last bit of potential peace Foster was going to have for a long while. Foster, shortly following that weekend, which was as an enjoyable a time as he had experienced in several years, figured out why he relaxed so much because he was going to need it.

July 5th 2011, another day that added to the collection of days Foster would never forget started out fairly calm. Foster returned home to his office alone; the wife and kids had stayed at the folk's house for one more day at the pool. Walking into his home office, he moved his mouse expecting a mountain of email as he had not worked in several days; the multiple screens that were Foster's office clicked on. Foster is a computer geek, and had been since his mother gave him that first Apple IIe as child, which was exasperated when his mother handed him an article years ago, something about an inet, she said as she handed her son the magazine. This was apparently just after Al Gore had invented the internet because Foster knew nothing about it back so many years ago, but his mother did. Just like her father, she was always ahead of the game. Foster often chuckled when his mother would demand he help her send an email or find that yoogle site. My, oh my, how things change, Foster always thought when she would collar him for some enjoyable mother son time in front of a computer. You introduced me to this and now I am teaching you, he would chuckle to himself.

Foster's office was quite a site, built by a friend and he; desks to the wall bronze and black, custom built to suit Foster's characteristically abstract way of doing things. Ipad, iphone, four computers and nine monitors all engaged in some task simultaneously. It really looked like a stock broker's office with all the monitors all doing their own things. Everyone joked when they walked into his office about the technology around him. Show off they would typically say; you don't need all of that. Then they might have the opportunity to watch him work and their mind immediately changed. ICE on one screen, email on another, word up on one screen, in-house black and grey processing screen, dashboards of other employees watching claims roll through BHI's system, multiple pieces of development software open all simultaneously and all manned by Foster and he loved it. Oftentimes Foster would sit at his desk and think of that movie he once saw with the Vote Pedro teeshirt and sing to himself in his off key and out of tune voice, "I love technology, but not more than you, you see, but I love technology".

On the left monitor of his main working station was where the email program was typically open as it was that morning. Foster had worked for awhile that day on some other items, looked a few emails, but he had not seen them all, and he really had not seen this one; no he had not, and looking back on it he had wished he would have skipped it at least for one additional day. There it was, blasted out to all, Rule 13. Foster always looked at anything that had that language in it. Seeing Rule 13 on an email subject line caught Foster's attention much like the penetrating hook that snagged the largemouths caught the fish's attention the last time that mountain judge's line hit the water, and he clicked it immediately. Supreme Court Seeks to Amend Rule 13, Foster's heart began to race and his body tightened as he thought to himself, not sure if I am gonna like this. I've been down this road before. Foster thought back to that fateful night when he was still practicing law daily and he sorely missed the life of the small town mountain lawyer and this time he wanted to fold em, he wanted to run.

Foster printed off the order and placed it on his desk, skimmed over it and thought, looks like BHI may be going into the contract administration business, and he chuckled, knowing then and there that this might affect BHI, but it certainly wasn't going to be its demise. As he continued to ponder what that meant, maybe the statewide law firm and finally putting the group health plan together the attorneys always asked about and BHI had been eyeing for some time. Foster even pondered the thought that maybe, just maybe, BHI could get its claims paid, wind down, and Foster could have some peace in his life for a change. Foster thought about his father and the rule of P's, took a sip of his coffee, set the document aside and did nothing. This was certainly an adverse situation of monumental proportions; he needed time to think. Foster had no intention of telling anyone at BHI, or any of its client attorneys, about this proposal until he had a day or two to think about it. Although he set it aside, he knew right then and there, this is exactly what the indigent representation bar needed, and it had needed it for some time. Foster smiled as he set the document so artfully crafted and prepared to deliver justice aside. He absolutely fell in love with the idea of the Amendment. Foster selfishly imagined shaking the Justices' hands individually with that ever so sturdy political shake as he looked forward to thanking them for what they had done. The Supreme Court of Tennessee had potentially solved the problems facing indigent representation attorneys in Tennessee with the stroke of pen, or at least set the solution into motion. Foster knew exactly what this meant. He glanced at the document one more time, smiled and remembered that advice he had been given by his friend and mentor, Ted, "always appear as if you are in control, but always recognize that you are not; there is a higher power at work." Thank you Lord. We needed this one, Foster prayed briefly and went on about his daily affairs and thought about the book that would one day be written.

Foster was reminded of a dance he had shared at another TBA bench bar party just a few short weeks before, fittingly hosted by another Aquarium in Chattanooga, Tennessee. His mind wondered for a moment as he heard "Stand by Me" playing in the background, and he thought about those few moments he spent engaged in a dance with one of the most powerful women in Tennessee, maybe the most powerful . The two twirled around the dance floor like they had known each other for years completely comfortable with one another as they shuffled together in unison as if they had danced together before. A few moments in time that Foster would never forget. Looking back on those memorable moments Foster thought, was that omen? Would the two engage in a dance in the non-traditional sense of the word, he certainly hoped not, or was "Stand by Me" the true message delivered from the higher power in control? He was not sure which it was, but he was confident in the coming months the prophecy contained those most memorable moments would most certainly be revealed.

Foster chuckled as he thought back to the conversation and plans that had been laid and thought to himself, the wheels of justice will keep on turning, no matter the cost to run the mill, and TACCIR was born.

## Thank You For Reading our Story

Thank you for reading the first part of the up and coming novel The Sixth. I stopped here because it will ruin the twist. The above is based upon true events, true conversations, and hopefully makes it very clear why I am so passionate about the work BHI does assisting the warriors of justice, the need to change public opinion about these champions of freedom and liberty, and the need to repair the house of indigent representation but to do so in the confines of "what is ultimately the best system for its purpose."

My interests have been called into question, and I expected that; but rest assured, although I must make a living just like the warriors of justice BHI supports, my true passion is American Freedom, American Liberty, and helping in any I can to ensure that the small business owner who wields the industrial sword and the holds the economic shield is firmly protected and promoted, for they are the hooded knights ordained with the responsibility to save our country from certain financial collapse. They are the ones that did not take an extended vacation to Mexico and who have not been overtaken by the Chinese. The warriors of justice and champions of freedom discussed above are small business as well, and small businesses that are in dire need of assistance from the Court and the Legislatures, for the wheels of justice must keep turning, no matter the cost to run the mill. Without the mill wheel of justice, the well laid plans of our Founding Fathers will be missing a scope and the wonderful concept and idea of American Liberty will simply run off its track.

The Court has before it comments from much more influential people than me and legal arguments presented by much more brilliant legal minds than mine. I certainly hope that the Court will strongly consider the comments and arguments presented. Justices, you are the Court, the highest Court in the State; and just as I have written above, I am not in position to tell you how to run Your Court. You were appointed by brilliant leaders and they picked the people most qualified. The people have placed their trust and faith in you to be the ultimate protector of freedom, the ultimate protector of the Constitution, the highest generals of Justice. So I humbly ask the Court to unsheathe its mighty sword and impale the heart of injustice, cover the most vulnerable with the warmth of the Constitutional blanket and protect us all with the shield of freedom that is American Liberty.

Although the Court is the ultimate protector of freedom, the generals of justice, I humbly ask the Court to strongly consider the warriors in the trenches who wield their swords and engage in the daily delivery of constitutional competency providing their valuable services to the State of Tennessee and its citizenry by raising their shields in the name of American Freedom. After all, it comes down to the foundational statement "with Liberty, Freedom, and Justice for all". The constitutional warriors in the trenches are the ones who toil daily to protect and promote that most famous and powerful

collection of words that so accurately describes America. Please, Justices, I implore you, help them!

The Court has before it a unique opportunity to assist me and others with writing the last few chapters of "The Sixth" wherein the twist will unfold. The actions taken by the Court on the pending Amendment will most certainly place in motion the events that will be recounted as the novel reaches its conclusion. It is apparent that there are some repairs needed to the house of indigent representation. I implore the Court to apply some "good ole mountain common sense" and repair the house of indigent representation within the confines of what is "ultimately the best for its purpose."

When the roof of your house needs replacing, your windows are not airtight, your faucet is leaking, the paint is peeling off the siding, and your garbage disposal is in a complete state of disrepair, you don't add an addition to your home, you repair the house you have. Doing otherwise would be working outside the framework of "good ole mountain common sense", especially if you are on a tight budget. That is the situation that exists in the house of indigent representation. There are many issues in the house that need to be addressed, tweaked, painted, and/or repaired and we are working on a tight budget. Those issues are perfectly capable of being addressed in the confines of what is "ultimately the best system for its purposes". So I humbly and respectfully ask the Honorable Justices of the Supreme Court to apply "good ole mountain common sense" to the house of indigent representation and repair the house as it exists now and refrain from adding an addition to it.

The application of "good ole mountain common sense" will certainly avoid the insertion of the following chapters to the novel "The Sixth" which, based upon what has occurred in other states and the national attention Tennessee is already receiving, is all but certain to occur in some form or fashion should the Court decide to work outside the framework of "good ole mountain common sense."

## A silver bullet wrapped up inside a crystal ball

The tall dark suited attorney had just left his meeting with the C.E.O. of "Be Fit, Inc" having enjoyed his multiple martinis and more importantly the hours he had just billed, and entered the back seat of his long black limousine. Maximus Stradler, Max as his friends called him, what few he had, was a "shark swimming in the dirty water". He cared nothing for the people he penetrated with his pensive pen only about the hours he billed and the money he made putting the screws to the pesky plaintiff that engaged in the stupidity of miscalculated digestion of his client's magic horse pills. Max was the litigator's litigator; tall, dark hair, pensive stair, boisterous personality, handsome with a flowery voice of legal analysis all wrapped in a package suited in a 2000 dollar Armani suit armored and ready for war.

As Max was chauffeured towards his high rise apartment in the sky, he was calculating the hours he had just billed, called his assistant at 12:00a.m., which was not uncharacteristic of him, glanced at his watch and shouted "3 hours of strategic planning, 5 martinis". Send Mr. Taylor a bill ... Let's see, that should be $1,650.00 and get it out tonight, due by Friday." Immediately pushing the button on his Bluetooth, not even allowing for a hello or goodbye, have a nice evening, or any pleasantries, Max was rude crude and cared for no one. He was Maximus Stradler, litigation extrodinaire, single, no children, a workaholic, and he was a force to be reckoned with.

Max had graduated law school from Vanderbilt University. Top of his class, smarter than everyone there, a real pompus arrogant type, but he knew how to turn on that southern charm. As pompus and arrogant as he was, he during his law school days went and a few months thereafter, went through what he would later in his life term as a momentary lapse of reason. Having grown up poor, Max had to scrap and fight for everything he had ever gotten. Max was top of his class in high school, quarterback of his high school football team, scholarship to the University of Tennessee, Sigma Chi President, and a full ride to Vanderbilt Law School, where he was the moot court chief judge and editor in chief of the law review and President of his student bar. Max although poor had a silver tongue and work ethic like nobody else he had ever come in contact with, and he was off the chart's brilliant, and he knew it. Max fought and scraped his way through his early years, his intelligence, silver tongue and work ethic was put to use every minute, every hour of every day, alert to everything going on around him Max even worked, plotted, planned, prepared, and strategized in his dreams. Max, later in his life, would keep a billing sheet beside his bed and every morning when he woke, there would be at least one entry, strategic planning 2 hours, if not several more.

When Max graduated law school, and passed the bar with ease, he opened up his shop in a little sleepy small town in West Tennessee. Max, silver tongue in hand, immediately started pressing the flesh with the local judiciary. Max knew that although he had a fine legal education, he knew nothing at that point about the practice of law. Max immediately remedied this like so many other young lawyers did by approaching the bench and convincing the local judges to begin handing him court appointed cases. Max, having grown up poor himself had a deep rooted desire to help the most vulnerable of his home state. Early on in his career Max quickly became a champion of freedom, a warrior of justice proudly unsheathing his sword and impaling the heart of injustice, and covering all he represented, and all those he didn't, with the shield of American Liberty. Max felt as though he was giving back to those who lived in the impoverished world from which he came, and he enjoyed, even with his grand legal education and accolades, holding the hand of a child, working with her parents to get them on track so the child could be returned to her rightful place, sitting at the dinner table engaged in conversation about the days events with her parents. Max enjoyed representing the accused as well, and engaged each case criminal, juvenile, or otherwise, he was appointed to as if it were his last and as

if CNN had its camera pointed directly at him every time he walked to the podium and said, "Good Morning, Your Honor. I am Maximus Stradler, and I represent_____, if it please the court."

During his early years Max represented each accused with the fury and might that only a true warrior of constitutional freedom could exact. The general public of his sleepy little town did not care for him much, as they saw him as that joke of a lawyer that got all those criminals off. Max knew better and gave their piercing, ill advised, and uneducated remarks no mind. Max knew the truth. Max knew that the Founding Fathers penned the rights of the American people such that they would work in unison to create what they called America, "with liberty, freedom, and justice for all". Max, like so many others just like the founding fathers, understood the importance of the protection of each and every one of those rights and the need to protect them with a fury aimed at solidifying the 10 sided wall of the fortress that enclosed America. Max knew the chain was only as strong as its weakest link, and he was going to do his his part to ensure The Sixth was not the weakest link in the chain. Max, on the other hand, did not blame the general public of his small sleepy little town, or the politicians that had the same attitude. Max knew they just did not engage in the out of the box thinking that the founding Fathers engaged in that provided them with the wisdom to pen the Bill of Rights. Max had concluded that America had become complacent and had put way too much faith in its leaders. Max knew the American public had fallen asleep and forgotten that the power rested in the people and the people needed protection, he was their protector.

About 2 years into practice, Max's law firm relied solely on indigent representation to fuel its engines of justice and to provide the polish for the armor the warrior wore daily as he marched into the front lines of the battle of constitutional protections. Unfortunately Max began the feel the ever sucking pain of the Elephant bureaucracy's trunk vacuuming up his hard earned dollars. He had heard the stories from the local bar of how so many young, passionate, protectors of freedom had been pushed out of the indigent representation system by the force of the elephant's trunk. Max's performance and quality of representation was beginning to suffer, bills were piling up, student loans for college, not law school as he had a gotten a full ride, various other obligations and the inability to meet them clouded his judgment as he questioned witnesses, met with clients, and prepared documents. The ever increasing concentration piercing financial worries were beginning to take hold.

Max was sitting at the front of his small office with no assistant, as he could not afford one, reviewing the bills laying on his desk and placing torn pieces of paper in his hat. Phone Company one read, the other, mortgage payment, the other, West Law bill, and various others. Just as Max was about to reach into his hat to pull from it a torn piece of paper that would provide the instruction for which bill he was going pay that week, Mr. Taylor walked through his door. "Hello Maximus, My name is Johnston Taylor,

C.E.O. of "Be, Fit Inc." Taylor extended his hand toward Max, and Max reached out to clasp it. Max had never before met Mr. Taylor, but he knew the man he had read several articles about his company's wonderful new weight loss pills and the legal furies they were creating. "Nice to meet you, Mr. Taylor. What can I do for you? And please call me Max."

As the gentlemen sat down at Max's hand-me-down conference table with mismatched chairs scattered about it, Max immediately realized in about 5 short minutes that fate, destiny, or whatever you wanted to call it, had just walked through his front door and he was going to have some difficult decisions to make. "Max, I read about your recent victory on that burglary charge, full blown jury trial; a beautifully crafted closing argument. In my opinion that was a showcase of legal talent of the likes of which I have never seen. They should just call you Mr. Mason."; Taylor complimented Max, knowing that bolstering a young lawyer's ego was exactly what needed to be done as it would allow the corporate giant to manipulate the young man and mold him into the henchman he was there to recruit. "Well, thank you", said Max with confidence; I was just doing my job." Max replied. Having studied Max's history thoroughly Taylor knew exactly what words to use Taylor, although not an attorney, was quite the silver tongued devil himself. Taylor was well aware of Max's passion, but he had also studied the system that paid him, and Taylor, just like Max, when Max entered the courtroom, was waging his war, corporate war. Taylor was prepared to do battle. Today's battle for Taylor was to recruit the soldier, the warrior, the most talented legal mind he could find; a workaholic lawyer that he would pay handsomely to wage war protecting his secrets, defending his company, and most importantly, shielding its profits. Not believing one word that was about to come out of his mouth, Taylor began his chess game by moving the pawn situated in front of the King out one space so his Queen was ready to launch its attack. "Max, most folks look at you as someone that protects criminals, and gets them off. Even worse, they see you as the guy riding the coat tails of the taxpayers to keep criminals out of jail. Not me, I get the big picture. You are a true champion of justice a protector of the constitution and you should be paid for your toiling work. I know that it is guys like you that shield us all from the governmental intrusions into our lives, a true protector of American freedom and liberty. I am honored to finally meet you. I have been planning on coming by to introduce myself for some time now", Taylor said, knowing exactly the manipulative effect such a statement from an icon like him would have on a young hot shot lawyer trying to cut his teeth and starving to death doing it. It was Max's response that informed Taylor that he had him hooked at the handshake. "Wow, Johnston, may I call you Johnston?" Max said. "Sure, you can call me Johnston son. As you might imagine, I have been called a lot worse", Taylor said with carefully planned words aimed at penetrating Max's soul, gaining control of it, and putting his skills to use representing the true criminal, "Be Fit, Inc.", and more importantly protecting its mastermind, yours truly, Johnston Taylor. "Oh, surely not, you are just a business man, employer, a megalithic giant. Johnston, thank you for your kind words. I surely wish more people understood the plights we young lawyers face. It is nice to know somebody of your

stature actually understands and cares and sees us for who we are", Max said with a sense of pride in his voice. "Well, I do care, and I think I have a proposition for you that might help you further your goal", Taylor said with the slick tongue of a lying devil. "What, might that be?" Max asked trying not to show the excitement on his face as Max knew where this was headed. It was the turn card, the chips were about to be placed upon the table and he knew at that moment Taylor was all in, but was he? "Be Fit, Inc." has some pending litigation and some new products launching in next few years that will probably generate more litigation, and we need somebody with exceptional legal talent and a work ethic to take over our litigation. See, our current litigation man is just about to retire. He has sucked us dry, and I want to make sure we get everything out of him we can. I know you have not done much work in the civil arena, spent most of your time representing the innocent, but I did a little studying on you and I am confident that if you will come on board with us, our attorney could train you. Now before you say anything or respond further, this is covered by confidentiality, right, this conversation, I don't want anything said here to get out; don't want our lawyer to know I am seeking you to replace him", Taylor said, knowing that he had just delivered a statement worthy of edit by Mark Twain himself. "Absolutely", Max said, "Lips are sealed." Max, holding the excitement and anticipating what was coming next, said with a solid sense of security in his voice.

"Well ok. You see, I made a mistake, and although our current lawyer has done a good job, we have had him for years. He came from one of those big firms, in the high rise. He never really appreciated what we did for him as he was already making the big bucks. More importantly I recognized the folly of not finding the passionate your protector of justice, talented legal mind. Had I done that I am sure we would have been better off. See, "Be Fit, Inc." is a protector as well, just in a different world. We are doing the best we can to protect folks, help them with their health problems. We do great work and spend our money on great beneficial things. We want to help the public and the people, just like you. Our current lawyer never had that passion; but Max, you do and you are the man. One year working with Sam, our current attorney and you will be ready to help us champion our cause. I am sure of it. I know you may need some time to think about it, and whatever you do, do not ever tell Sam you are his replacement. You need to just follow his lead, and act as if you are his grunt. He will retire next year, and he has done a good job. I don't want him to ever think that I believe for one second that you will outshine him and quickly. You have all that it takes, passion, work ethic, exceptional legal talent, and a strong desire to help people, and that is exactly what we need at "Be Fit, Inc." Taylor said knowing he had just sealed the deal. "Yes, I will need some time. What are the particulars of the offer? You know I really enjoy what I do now. I grew up poor and I like giving back, but it is awfully hard to make a living in the world of indigent representation", Max said, still holding his cards and waiting for Taylor to place the chips on the table. "Well, I need to know first, if the package is right, will you come on board? I can tell you this, I saw that hat on your desk. I remember when I used to pull the name out of the hat. Needless to say, I don't do that anymore, and if you come on board with us, neither will you. Taylor said, knowing that he had Max exactly where he

wanted him. His soul was just about to fall prey to the hands of "Be Fit, Inc". "Ok that sounds good. Here is my card; call me Thursday and we will talk", Max said extending his flimsy card printed on the ink jet printer in his office. "No need for the card, no offense, but I'll be back Thursday morning, say 9:00a.m?", Taylor said, intending on making Max believe that he was the one that was over-excited about the prospect of Maximus Stradler and "Be Fit, Inc.". Taylor was setting Max up for the kill, Taylor, by allowing Max to believe he was the over-excited one would allow him to negotiation from a position of strength, even though he knew Max would believe he was negotiating from a position of weakness, the standard Taylor set up, when he was moving in for the kill. "Ok", Max said, "but I am busy until 2:00p.m. Would that work better? Could you just come by then?" "Let me check my schedule, and I will call you. Most likely that will work. I may have to move a few things around, but I will try", Taylor said as he walked toward the door, knowing that he had just reeled his target in with a fervours quickness and Max had no idea. The standard Taylor trick, Max had now invited him back to his house, and a vampire can only enter your home when he is invited in, Taylor chuckled to himself as he exited the small office in sleepy little West Tennessee. Turning back as he walked out the door, to finish his prey off, Taylor said "Oh, and by the way; after a few years with "Be Fit", you will be able to pursue your passions and give back to the impoverished folks that live in the world from whence you came. I grew up poor myself ya know. I understand, and in a few years I look forward to helping you give back myself." The door to Max's office closed and Taylor knew he had just secured his corporate warrior that would protect him, his company, his secrets. A protector of freedom a protector of the constitution, Taylor thought to himself as he contemplated Max thinking of himself as one who championed the cause of liberty fighting for the innocent when he represented the accused criminal on a shoe string budget. My, oh my, Taylor thought. Maximus Stradler is about to find out that it is all about the Benjamins and the sword he will unsheathe in the future will be used to impale the heart of the vulnerable, aimed at protecting his company's profits. No honor in that, only money. Maximus Stradler was about to begin his lifelong stent of defending a true criminal, "Be Fit, Inc."

Thursday came and the two gentlemen struck their deal. The warrior of justice and champion of freedom had been so easily seduced by the thought of actually being able to pay his bills and being appreciated for the work he did. Yes, the constitutional champion sheathed his sword, laid down his shield, kissed the Bill of Rights goodbye, and left the indigent representation system of Tennessee that so badly needed his legal talents.

Many years had passed since Johnston Taylor had entered Max's office that fateful day, a day Max thought about often. Max's office was much nicer now. Situated atop a high rise in downtown Memphis, Tennessee, Max's office was quite a site. Adorned with all the trappings of a litigator's litigator, it was the command center for "Be Fit Inc.", Max's primary client. Max had a few other corporate clients that had hired him to be

their warrior and protector of profits, but "Be Fit" was still the main client. Max's office was fully decked out, a litigator's dream. Monitors everywhere, large screen TV's on the wall shuffling stock quotes, news, always watching for anything that would have to do with one of his clients so he could bill some extra time, media review or some colorful billing language he had become so articulate at crafting. Billing, billing billing. Max sat in his office, all alone, no children, no family. He had been seduced by the corporate devil Johnston Taylor, and he knew it.

It was the summer of 2011 and Max was sitting at his desk, having just successfully secured the settlement of one of those pesky miscalculations of his client's horse pill was attempting, unsuccessfully, to relax. Thinking back to that fateful day so many years ago when he had first met Johnston Taylor, he allowed his mind to travel back to his law schools days, third year as President of the Bar, and thought about all the wonderful things he had planned to do with his life.

As Max day dreamed he thought about the first few years of practice in that small town situated not too far from where he was sitting. Max reminisced about his days as a true warrior, a protector of liberty. He smiled as he thought about his days as a wielder of the shield of American liberty. He missed those days and oftentimes wished he had not taken the path he did, but he could not go back now. He owed his soul to the devil, "Be Fit Inc." Thinking back to the time when the elephant bureaucracy's trunk was situated squarely around his neck sucking the hard earned dollars from his wallet, he wished that the system would have compensated him enough to survive, pay his bills, and have hired an assistant. The corporate world was great; plenty of money, a private limousine and driver, all the amenities a "shark swimming in the dirty water" could desire, but he missed small town Tennessee. Max missed unsheathing his sword and impaling the heart of injustice as he had been reduced to using the same powerful sword to slit the throats of the plaintiffs who so stupidly miscalculated their ingestion of "Be Fit Inc.'s" horse pills. Max never let another soul know about his longing desires to be back in that office in sleepy little small town Tennessee. No he never talked with anyone about how he missed that office with the hand me down conference table. Max actually missed the flimsy business card that was printed on his ink jet printer in the office. He preferred it to the over priced, two sided slick business card, Maximus Sadler, Corporate Litigation; what a joke he thought. As he sipped his martini he thought my, oh my, how intentions change, not necessarily by design or desire but oftentimes out of circumstance or necessity. Never would Max ever let anyone see his depression over the idea that he was a protector of profits having been seduced to become such by the silver tongued corporate devil he had met so many years ago. No, Maximus Sadler showed no weakness. He was always in control.

Lost in thought of the days past and the glories of being a true warrior, the phone buzzed, startling Max. He screamed "what?" "Maximus, you have a call, it's someone

named Bailey, that is all he told me," His assistant said, not anticipating any response, as Max was not into pleasantries. Max clicked the button to quickly cut his assistant off and thought about the name, Bailey, Bailey, wonder if that is ... it has to be. "Hello this is Maximus Stradler. Is this Bailey from law school?" Max spouted off with his typical sense of confidence. "It sure is, it has been awhile," Bailey said. After a short exchange of pleasantries, the kind Max was not accustomed to and disliked as they did not accomplish anything, unless, of course, they were used to further some strategic plan laid out by he and his corporate vampire, Johnston. Max said, "What can I do for you?"

Max and Bailey had not only gone to law school together, but they had practiced together in that small sleepy West Tennessee town. Yes, Max and Bailey had been in the trenches together. Immediately Max remembered that last beer they had shared together the night he had packed up his office for the move to Memphis. Bailey had chastised him that night a sell out and told him that he would live to regret it. Although Bailey was right, Max would never let him know it. "Max, can I send you something? Get your thoughts on it? Maybe some advice? I know you are well connected now and maybe you could help," Bailey inquired. "Sure Bailey anything for you. Just email it to me, I will take a look at it and we will talk," Max replied. The gentlemen spent the next half hour or so talking, much more time than Max would give most, simply because it was not billable. But today Max had already been reminiscing, and he wanted to continue doing so. The two talked about their days in the small town courts, helping children, defending alleged criminals, protecting the innocent, and being good stewards of the educations and licenses they had been given, something Max was very far removed from doing now.

It was late the afternoon of August 31st, 2011 when Max finally got around to reading the email that he had promised his friend he would review. Max was far too busy at this point to worry about whatever it was that was troubling a small town Tennessee lawyer, but Bailey had been his friend years ago. They cut their teeth together, and Max thought he probably owed it to him to at least review what Bailey had sent him. "Forward that email to me from Bailey," he spouted across the speaker to his assistant. "You know the one about some Rule change or something whatever it was that had him so upset I know he has called you several times. I think I am going to take a look at it for him." Click, the receiver went back to its base in Max's typical style.

There it was ***RE: Supreme Court seeks to Amend Rule 13.*** Max did not even know what Rule 13 was, and cared even less. He was just looking at this thing because his old friend had asked him to. Then it came to him, Rule 13, Rule 13, it sounded familiar to him, as if he had dealt with it in the past; and then it hit him like a ton of bricks. I know Rule 13, Max said to himself as he remembered that sucking sound of the Elephant's bureaucratic trunk. Rule 13 was the rule that got me paid when I was in the trenches, he thought, or rather the Rule that kept me from getting paid, he chuckled as he thought to himself.

As he read the proposed Rule, he became concerned. Max had supervised several contract programs for young puppy lawyers for several of his corporate clients, each of which had failed. Max thought to himself, no way I would work for a contract price; hourly billing that is what gets the job done; that is the only way to ensure quality, proper interests and competency! This was going to be a mistake of monumental proportions Max thought as he perused the vague and ambiguous proposed Rule change. Then he became more concerned when he thought of Johnston and began to foresee a profiteering giant like that getting his hands on something like this. Max envisioned unprofessional exploitations of grand proportions, the likes of which the Court had probably not even considered. Max asked himself, will websites be developed and promoted through the media channels, on facebook, twitter, tv and print? Immediately he thought about downloadable affidavits of indigency forms promoted by the very firm or association that received a contract. To a profiteer that would be appealing but to a warrior of justice it would be appalling! His mind raced, scared of what this might bring, and thought immediately about educational sites promoted by the lowest bidder that explained just exactly how to ensure one was considered indigent so that the firm that had the contract got the job. Then he thought about the ever so popular bathroom stall advertisement and envisioned, "Indigents-R-Us", if you can't pay, call today!, visit freelawyers.com before you drive home!" Max quickly thought to himself, if I dreamed it up, I am confident a profit centered organization that does not have the interest or passion that the constitutional warriors in the trenches have will too.

A profit centered flat fee for minimal service organization will not only dream up such marketing efforts; they will make them a reality, Max thought to himself as he hit print on the screen, and especially if they are ever controlled by a man like Johnston Taylor. Something has to be done about this and immediately. The Court is about to make a mistake of grandeur, he thought. He quickly thought about a gentlemen he had recently met at a TBA convention or something, remembered talking to him and remembered his unique counsel and quickly wrote on his white pad, P's.

Max was too late, and he was displeased he had not taken the time to read his friend's email in time to do anything about it. Max knew a few people in some high places at this point in his career, and he was saddened that he was not capable of using his position as corporate warrior and sword wielding slitter of the throats of the vulnerable to the advantage of the very ones his blade had injured. The time for comment had passed so phone calls pressing, etc. would not do much good, and he knew what a hard sell indigent defense was anyway. He thought back to the reputation he had when he was in that small sleepy West Tennessee town realizing that the public did not appreciate the services of the warrior of justice. He thought to himself, as he shuffled through the research he had done over the last few days on the subject, he pulled out his white paid and wrote "systematic reform litigation." He knew exactly what this meant and exactly how to pull it off. Although it been a long time since he had been on the Plaintiff's side of the table,

he was confident his years as a defender of corporate profits would pay off, he saw dollar signs and an opportunity to take a shot at the elephant whose very trunk pushed him out of the system he had so loved and was so passionate about all those years ago. Yes, this was the option, this is what he had been looking for it was the elephant that created, or at minimum, made him vulnerable to the corporate devils silver tongue, and he was ready for revenge.

Max thought how much fun it would have been to champion this cause from the street, but he knew that would have never worked. It took dollars, man power, equipment, and many other things to pull off this type of litigation. Good thing he had all of those things at his disposal. Max thought back to that day when Johnston first came into his office and made all those promises, which he knew now, were all lies. In particular he remembered the promise of giving back. "Johnston, this is Max. We need to talk, immediately. Can you come to my office?" Max said. By this time Max had figured out that when you wanted the corporate vampire's help, you had to invite him to your house, and that is exactly what he did. For years Max had snapped to attention whenever Johnston shouted a command, but things had changed. Max had done such a good job slitting the throats of the vulnerable with his sword of injustice, thereby protecting Johnston and his profits, Max had gained the upper hand, and he now controlled Johnston, albeit at the mercy of Johnston's checkbook.

The two men met at Max's office and on the board of the command center in 10 inch letters appeared two statements: Proper Prior Planning Prevents Piss Poor Presentation and directly appearing thereunder was the phrase "Systematic Reform Litigation." The two gentlemen entered into their discussions. Max made his demands, reminding Johnston of that conversation the two had so many years ago sitting around that hand-me-down conference table with mismatched chairs scattered about, and secured the funding he needed for the organization that was going to engage the state of Tennessee, and as much of it as he required.

Max immediately called Bailey and several other lawyers he knew in Memphis. Max had been planning on hiring an associate or taking on a partner because he had been a one man show. Max was going to take this cause on, and if he was going to properly engage the rule of P's, he needed someone to handle his corporate affairs, at least to do so under his supervision. Thankfully, Max had already interviewed the star and he called him in, hired him on the spot, with immediate instructions to report to Johnston. Johnston was well aware of the star young lawyer as he had carefully picked him, in much the same manner as he had hooked Max, at the handshake. Max made multiple calls to attorneys across the State, invited them to Memphis for a weekend roundtable rented out the entirety of the floor below his office, which was luckily available due to the economic downturn, and went to work.

"Bailey, Max here," Max spouted across the line. "Yeah, what's up Max?" Bailey replied. "I know we have discussed this before, but withdraw from your cases, pack your bags and get to Memphis, ASAP. You're hired and we have a lot of work to do." Bailey, divorced with an older child that he saw only on the weekends, had a small apartment in sleepy town West Memphis so it was no big deal for him to pack up and move. Plus Memphis was less than an hour and half away, but Bailey needed to be in Memphis, and he knew it. The following Monday, Bailey met with all his local judges, made all the appropriate arrangements, called his clients and explained the move, withdrew from his cases, packed his Suburban and headed to Memphis. Unlike Max, when Bailey left sleepy little small town West Tennessee, he did not sheath his sword nor lay down his shield. Not quite. Just before he got onto I-40 West he sharpened his blade and shined his shield. He was moving to the management level to help command a battle that would reform the indigent representation system of Tennessee and work to ensure the citizenry was shielded by the warmth of the constitutional blanket that is American Liberty. "Liberty, and Justice for All, Bailey thought. He had just been promoted from a warrior in the trenches to a General in battle to protect American Freedom, he was moving on up, like a Jefferson, to that deluxe apartment in the sky.

The floor below Max's office had been completely furnished, a command center set up, a jury room was in place to bring in mock juries, complete with a podium and a bench. It was Saturday morning in the Fall of 2011; the Court had passed the Amendment and was preparing to launch its first set of requests for proposal so Max knew that it would only be a year, maybe longer, before the first pieces of litigation would be filed in the Federal Court of the Western District of Tennessee. As he looked around the newly adorned floor, sipping his coffee and waiting on the attorneys from all across the state that he had met for drinks at the Peabody last evening to arrive, he thought to himself, its really amazing what good big corporate dollars earned on the backs of the vulnerable can do when put to the proper use.

As Max began to think back on the years of his life since he left that small sleepy town something caught his attention. How ironic, he thought. The very elephant that pushed me out of the system, away from my passions, and into the arms of the corporate devil put me in the very position to be able to make sure that so many other young lawyers just like me back then will not suffer the same fate. Wow, he thought. Ultimately the same elephant that pushed me out sucked me back in. It only pushed me out long enough to fill my war chest for the battle that lay ahead. Max further studied this thought and realized that maybe intentions don't change; maybe the journey to reach the goal of intentions simply gets blurred along the way. Then he thought back to another gentlemen he had met so many years ago and thought, huh, maybe I am not in control; maybe there is a higher power. Max made a commitment at that moment to himself, no more cocky, confident liquor drinking corporate lawyer, no Max was headed back to his roots, back to his passion, only this time he was well funded, suited, armed

and ready for battle. Max chuckled as he said to himself, yep, this can't be my doing, but I will act as if I am in control, but from this point forward, I will recognize that I am not; a higher power must have laid these plans.

As the attorneys, many of them, began to fill the conference room of Max's newly constructed corporately funded war room, the men and women in the room took their seats, flipped open their laptops to review the agenda that had been emailed to them earlier in the week and prepared to begin engaging the State of Tennessee. Max took the floor, looked over at Bailey sitting to his right. He thought to himself, this is why I went to law school; this was my calling. As Max began to speak to the attorneys so intently focused on the man leading the charge, he felt a sense of pride in his profession, of being a Tennessean, and most certainly of being an American. Before he uttered the first word he thought to himself, this is what American Liberty is all about, men and women joined together for a cause, ready to go into the world and speak their mind, armed with knowledge, education, their pens and voices; this was protected political speech. The time had come for attorneys across the State of Tennessee to stand up, make their voices heard, and become yet again, true champions of justice. So proud to be a part of what was about to happen, and even more proud to be leading the charge, Max began to speak to the crowd of intelligent, driven and dedicated attorneys sitting before him. Appearing behind him on the dry erase board that spanned the entire wall were the ever so appropriate words "Proper Prior Preparation Prevents Piss Poor Presentation" and directly under them appeared the words "Systematic Reform Litigation". "Thank you all for coming today. We have a tremendous job ahead of us all, but we are well funded and ready for battle. I commend each of you on stepping up, and win or lose we shall engage the State and it is our job to ensure the mill wheels of justice keep on turning, no matter the cost to run the mill. It is our job to ensure the well laid plans of our Founding Fathers are not missing a scope and do not run off the tracks."

As the day went on you could smell the cigar smoke, hear the clanging of the ice cubes in the tumbler, smell that easily identifiable scent of the freshly brewed coffee and hear the banging of the keyboards and the conversational planning of the systematic pens of litigation aimed squarely at the State of Tennessee at its taxpayers' pockets. All emanating from that back room, inside that tall building, where Max and his team were planning what to do with the large fee resulting from the class action suits they were drafting. The only thing missing from the suits they were preparing were the names of the Plaintiffs, but they would soon be there; women, men, parents, children, and yes, criminals, but they were all going to be Tennesseans. If one listened ever more intently, one could hear the choking laughter rising from deep within the bellies of the lawyers in the room as they loaded their litigation arsenal with the silver bullet that was the AOC's written report to the legislature in January of that year.

Max had been working as the others chatted and banged at their laptops. He had prepared something for the group to practice before the meeting concluded. Max called their attention as he stepped to the podium. The suited for war litigator took a deep breath, paused for a moment, unsheathed his sword prepared to impale the heart of injustice, raised his shield high as he had not done in so long, and he, himself, felt the warmth of the constitutional blanket that was American Liberty. He thought to himself before he spoke to the room, "with Liberty, Justice, and Freedom for all", this is America. The tall dark suited attorney traded in his two thousand dollar suit that day for the battle scared and dented shining armor he had worn so long ago, and began to address the crowd, "Attorneys of the State, here we go. Join with me, hand in hand, as we wage our constitutional battle. It will be long, it will be hard, it will be costly, it will make history, and it will end just like this.

"Ladies and gentleman of this fine jury, today is the day; the time is now, and you have all that you need. You have listened to the testimony of the attorneys and heard the testimony of the defendants, parents, and children, and most importantly, you have read the report of the AOC. You must ask yourself as you analyze the testimony and evidence, the AOC reported to the State that a contracting system would result in a dilution of quality of representation, and that it would provide an incentive for attorneys to work against the interest of their clients, but the State of Tennessee implemented such a system anyway. You have heard the attorneys readily admit under oath, before God, before this great honorable court, and before you that the contract system forced them to act against the interest of their clients. Even more importantly, you have heard the testimony of the clients that were impacted by this improper action. Most of all, you read the report that clearly shows the AOC and the State of Tennessee knew that all of these things would occur. Now I ask you to imagine, what if you were one of these defendants? What if it was your child that is now in State's custody? All of these horrible indifferences and violations of these people's constitutional rights could have been avoided if the AOC would have simply followed its own advice.

Ladies and gentlemen of the jury, it is one thing for injustices to occur when unforeseen consequences or mistakes happen, and those injustices should be remedied as well. It is entirely a different matter however, when a governmental body peered into a crystal ball and foresaw the future; a future filled with injustice, improper interests, and constitutional violations of monumental proportions, and that very governmental body took the exact path it knew would result in those very injustices and violations. The AOC charted the course that brought us before this Honorable Court today, to the end of our journey, so the question remains – will you wield the power the Founding Fathers of this great country bestowed upon you and bring the journey of injustice in Tennessee to a screeching halt or will you join with our government, continue peering into the crystal ball of injustice and participate in the systematic destruction of all of our constitutional rights? A great man, Dr. Martin Luther King, Jr., a champion of freedom, a champion of

justice, a man who changed our world once said that "a threat to justice anywhere is a threat to justice everywhere". Ladies and gentleman of the Jury, I ask you to join with the late great Dr. Martin Luther King, Jr. and be a champion of freedom, a champion of justice, and let your names go down in the history books of the great State of Tennessee as honorable men and women who championed freedom and championed justice. Today is your day; let's us together make history and end the journey of injustice that was prophesized by that crystal ball the AOC filed with the state legislature in January of 2011."

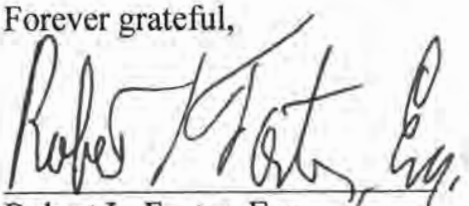
The End

Justices, is there any truth to the above story? I hope we never know, but as with all legal fiction, the question remains, is it possible, and the answer is a resounding, absolutely! The Court can most certainly make sure it is not, and my offer still stands. Please consider a marriage between the bird perched atop the ivory tower and the eagle in the street. As BHI and I extend the olive branch, please imagine what wonderful offspring the two could create.

I would like to thank the Justices of the Court for considering the story. Again I implore the Court, help the warriors of justice, the protectors of our liberty, the champions of freedom. They need Your help, and you may very well be their last hope!

Thanking the Honorable Justices for the consideration of my commentary, for their service to the State, and for cloaking us all in the Constitutional blanket that is American Liberty, I remain,

Forever grateful,



Robert L. Foster, Esq.
President and C.E.O.
Billable Hours, Inc.
119 E. Depot St.
Greeneville, TN 37743
Office: 423-639-0091
Fax: 423-639-0454
Cell: 423-620-3290
BPR#: 021189

*From the Desk of*
*Robert L. Foster, Esq.*
*119 E. Depot Street*
*Greeneville, TN 37743*
*P:423-639-0091 F:423-639-0454 Cell: 423-620-3290*
*robert@billablehoursinc.com*



**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,

Please be kind enough to file this comment for consideration by the Honorable Justices of the Supreme Court concerning the pending Amendment to Supreme Court Rule 13.

In an attempt to clarify my position, I am not opposing the Justices of the Court nor am I opposing the AOC or any of its staff members, leaders or counselors. In fact, I firmly believe the Justices of the Court, the AOC and I share the goal of ensuring the delivery of constitutionally competent, effective and adequately compensated representation to those individuals who **qualify**, and as such, are entitled to appointed counsel. I simply disagree with certain methods employed by the Court and the AOC and with the pending Amendment as vehicles to reach those common goals.

It is evident that where a rule making authority convenes to make decisions on the implementation of rules and laws there will be common goals and differing viewpoints. When decisions concerning rules and laws affecting the citizenry are on the table, opposing viewpoints with common goals sitting at that table can generally identify grand solutions. The current proposed Amendment is not such a grand solution and I respectfully request the Honorable Justices of the Court to vote not to adopt the proposed Amendment.

A wise course of action would be for the Court and the AOC to take this opportunity to step back, consider the offers of assistance made herein, and begin the thorough

process of identifying grand solutions to the issues affecting indigent representation in this great State. One of the greatest benefits of being an American Citizen is that opposing viewpoints can be made, and made publicly, without the fear of retribution from a government body with a differing opinion. Hopefully, the Court and the AOC will also take this opportunity to remind the attorneys of this great State that they can speak their minds on the issues freely, openly, and without any fear of retribution from any level of their government.

There are times when the citizenry needs to be reminded that they do have the right to free speech, and especially political speech. This is one of those times, and I implore the Court and the AOC to make it crystal clear to the attorneys of this State that not only is there no threat of retribution for speaking an opposing viewpoint, but that those opposing viewpoints are actively sought by the Court and the AOC and strongly considered by both in order to identify grand solutions to the issues affecting the house of indigent representation in our great State. Through this process, optimistically, I anticipate the Court will consider the opposing viewpoints fleshed out in the filed comments and come to the conclusion that adopting the proposed Amendment is not in the public interest.

It is worth noting that because the Court, via the Chief Justice, proposed the Amendment, I must make the assumption that the Court and I have opposing viewpoints. This assumption is made because the Court proposed the Amendment, therefore, one must assume the Court, or at minimum, the Chief Justice, believes the proposed Amendment is in the public interest. It is also worth pointing out that I am unclear whether all the Justices of the Court, at this point, are in agreement that the proposed Amendment is in the public interest. However, for purposes of discussion and comment, wherever this comment refers to the Court's opposing viewpoint, it is operating under the previously stated assumption. Regardless of the currently formulated opinions of the Court, after careful review of the filed comments and arguments contained therein, hopefully the Honorable Justices of the Court will conclude that the pending Amendment is not in the public interest.

The proposed Amendment is a measure aimed at reducing costs, standardizing and centralizing the system, and reducing administration. A much wiser course than centralized czar creation indigent representation contracting would be to focus in on standardization of the system as a whole, but standardization within the confines of what is "likely the best system for its purposes."

By standardization, I mean software should be developed that allows the judges to have access to standardized orders of appointment for particular case types. Standardized procedures for the appointment of counsel wherein courts are not appointing attorneys out of convenience and wherein courts are not failing to appoint attorneys when they should be. This could be handled via some very simple software. How about a

standardized piece of web based software that judges can access from the bench, or their assistants or clerks can access, that addresses the affidavits of indigency and prepares template orders of appointment or template orders of denial of appointment with the click of a button and the immediate transmittal to the AOC so as to alleviate the need for an attorney to obtain a paper copy? Such software could be developed very quickly; however, implementation might take a little bit longer.

Another suggestion would be to have the affidavit of indigency form data entered into a web based data, collection system so the same could be analyzed. This is one area that centralization would be advisable, and here is why. A centralized auditor could review the data and the system could be developed such that certain items caused certain affidavits, to be flagged as potential inaccuracies. Further, random selection of affidavits of indigency for audit could be implemented into the system. A centralized auditor could engage in audits of the affidavits and if it is found that an individual was dishonest or not otherwise entitled, proper enforcement could then be undertaken.

Of course, it is much too costly to have someone in every jurisdiction in every court to review and investigate every affidavit of indigency. However, it may not be cost prohibitive to centralize the audit and investigation of these affidavits. Further, simply having the audit and investigative office, and after a few individuals who were not truthful in their affidavits were properly prosecuted, coupled with an adequately publicized media campaign would act as a deterrent to improper and untruthful affidavits of indigency, thereby reducing the number of people who are appointed attorneys when they were not entitled to appointment. In turn, this would reduce the overall costs to the indigent defense(representation) fund. So long as the costs of the audit and investigation audit office were offset by the cost savings experienced by the decrease in appointments of counsel to those who are not entitled to it, this would be a viable centralization and standardization solution. I wonder if the resources the AOC is expending on audits of attorneys outweigh the cost savings to the State that the same have produced??? I don't know the answer, but it would certainly be worth looking in to.

The AOC is allocating substantial resources and manpower, including the high dollar manpower that is the top brass of the AOC, including the Director, to audit attorney fee claims. Instead of directing audits at those who have sworn an oath to uphold the Constitutions and truly and honestly demean themselves in the practice of their profession, and who are bound by ethical rules of conduct, I would suggest directing audits at those who have taken no such oath and are not bound by ethical rules of conduct. Auditing an individual who has not taken the attorney's oath and who is not bound by ethical constraints without notice of exactly what is being asked for due to the fear of "manufacture" of documents would be acceptable. This understanding would be conditioned upon ensuring that such audit of a non-attorney is not a due process violation. Maybe, just maybe, the AOC's allocation of resources and taxpayers' dollars is

misdirected. Directing those resources and manpower at eliminating appointments of counsel where appointments are not required would be better stewardship of the taxpayers' dollars. Further, this would not have the effect, whether intended or not, of calling an attorney's character into question and the appearance of requests to breach confidentiality, privilege, or HIPPA or any actual breaches thereof, and would also assist in depressing of the mute button that has been clicked on the remote that controls the indigent representation attorney's political speech.

Standardization and centralization should not be confused. There are many functions in the administrative house of indigent representation that can and should be standardized. Such standardization can be accomplished without the unsettling effect of eliminating the local authority of judges to control their courts such as the pending Amendment will have. Standardization can also be accomplished without centralization and without knighting an indigent representation czar. Those functions of the administrative house that can and should be standardized are limited to those functions that do not depend upon local standards, customs, or the removal of local authority. One such thing was discussed above, a centralized audit and investigation office for the review of affidavits of indigency.

There are many facets of the indigent representation system that should be standardized and a few that can and should be centralized. However, the Court, nor the AOC, or any other governmental body or agency, should seek to standardize the local jurisdiction's customary practice. If anything, the Court and the AOC should be seeking out those jurisdictions where customary practice is of high quality and seek to promote the customs of high quality practice in other areas. This should not be accomplished through centralization, standardization, or even direct judicial influence, or "informational meetings". The proper method of accomplishing this task would be to engage in a public relations campaign wherein the AOC shines a positive light on those jurisdictions that engage in high quality representation. This would be preferable to singling out counties because their attorneys' billings are higher than the average or by singling out an individual attorney who used his or her independent judgment to represent his or her client and in so doing engaged in additional work on behalf of that client so long as that work was reasonable and not done just for the sake of billing for it.

A shift of thinking is in order. Maybe, just maybe, a county whose billings are higher than the average means that the indigent parties are receiving quality representation and not just that attorneys in the county must be overbilling. It is unclear why it appears that the instinctual reaction of the AOC and the Court, who are all controlled by attorneys, would be that if a bill is above average, an attorney must be overbilling; we need to look into the attorney's billing. The better course of action would be to first look into the customs in the jurisdiction where an above average claim originated and determine if those customs and standards should be a part of the aforementioned public relations

campaign. If the customs and standards and practices of the jurisdiction and the attorney that led the AOC to that jurisdiction are of high quality, determine then if they are worthy of inclusion in the public relations campaign. Then, instead of auditing that scandalous overbilling, no good, lying, cheating, document manufacturing lawyer, the AOC should profile the attorney in a positive light and use the attorney as an example of an attorney who is passionate about delivering high quality representation to the indigent clients he or she represents because of the attorney's deep rooted, unrelenting and honorable belief in the constitutional rights of not just wealthy Tennesseans, but all Tennesseans. The AOC, by doing the opposite and calling into question an attorney who practices in a high quality jurisdiction, promotes the provision of a lesser quality of representation instead of complimenting a job well done. This may not be the intention of the AOC, but it is most certainly the result.

The first example the AOC should use when launching its public relations campaign should be Knox County. Recently an expose piece was published in the Knoxville News Sentinel. The expose, among other topics addressed the above average costs of Knox County's Indigent Defense Billing and profiled several attorneys who bill, (not make) over $100,000.00 per year. Such article deemed them as members of the $100,000 club and couched those attorneys as being in the "hot seat". What it did not compare is the overall cost of the justice system in Knox County per capita to other jurisdictions; look guys, we need to look at the big picture. Before you call a county into question, or its lawyers, and before any "informational meetings" occur that send, maybe the wrong message, maybe a better course of action would be to investigate the entirety of the costs, don't just anticipate that a cost cutting will necessarily result in an overall cost saving, just a thought.

Said expose reported of a sit down or "informational meeting" the AOC and a Justice of the Supreme Court had with Knox County judges wherein it was reported that no arm-twisting was engaged in by the AOC for the judges to step up and slash the billings in Knox County by either cutting private attorneys' fee claims or boosting the local Public Defendant, Mark Stephens', caseload. The expose did, however, go on to report that the message was clear. Criminal Court Judge Bob McGee was quoted as stating, "They were asking us to look at the fee claims and see if we had any doubts about what the lawyers were doing." Judge McGee went on to say, "They were reminding us we have the authority to cut some claims." Judge McGee further allowed that "I take it very seriously when a lawyer presents me with a fee claim that they're telling me the truth. I will not gratuitously assume a lawyer is lying to me. I have never cut a claim."

A reading of further statements made by Judge McGee makes it apparent the Judge attributed the higher claim average in Knox County to the high standard of indigent representation set by the Knox County Public Defender, Mark Stephens. Judge McGee said Stephens "sets a very high standard of indigent representation in Knox County. The hours spent, the caregiving would far exceed the standards of any other county in Tennessee" and that "acts as a standard for private counsel. I think we have a very high

standard for the representation of indigent clients." A knee jerk reaction would most certainly be, we are just paying Knox County attorneys too much, they are gouging the system, in the hot seat, overbilling and have more 100,000 dollar club members than any county in the State. However, a more educated and thorough analysis would be to determine what the end result is when there exists a higher standard of indigent representation.

This analysis was called for by Knox County General Sessions Judge Charles Cerney who was quoted in the expose as saying, "I really don't think a sophisticated enough analysis of those numbers has been applied to them so we can ascertain if there is a problem." Cerny went on to say "Different districts have different ways of doing things. Knox County has established a very beneficial habit or pattern to get an awful lot of work done on the sessions court level. As a result, we're seeing cost savings not only in less trials but savings in billings." The cost savings from billings are a result of less hours spent conducting and preparing for trials and preliminary hearings in General Sessions Court. Attorneys' overall billings are most certainly further reduced by the reduction of full blown jury trials in Criminal Court, fewer appeals and less post conviction relief petitions. I think Judge Cerny may have it exactly right; just the type of out of the box thinking that the Founding Fathers engaged in when they penned the Bill of Rights, and we need to get down to business in Tennessee and engage in all of the out of the box thinking we can. Cost cutting does not always result in overall cost savings. Just think about that time you used an unlicensed plumber because it was much cheaper until your house flooded because he did not putty or paste the joints to code as the licensed but more expensive plumber would have done.

Judge Cerny's call to analysis is warranted. It is apparent there are multiple factors in the equation, the quality of representation, the dollars spent on billings, and the overall costs expended by the entirety of the justice system. What is apparent is that there is a direct correlation between the quality of indigent representation and the overall cost of the justice system. That correlation appears to be increasing the quality of indigent representation results in decreasing the overall costs to the taxpayers, and we need to find the breaking point, the point where the two lines meet and it appears where are nowhere near it. A thorough analysis of this correlation will most likely reveal that adequately compensating indigent representation attorneys results in an overall cost decrease to the taxpayers while inadequately compensating indigent representation attorneys results in an overall increase in costs to the taxpayers. The provision of quality representation to indigent parties requires attorneys to be paid more for the work they perform as more time goes into their representation. However, the increased quality and increased costs for representation are outweighed by the overall decrease in billings, general sessions court trials, preliminary hearings, jury trials, appeals, and post conviction relief petitions. All of these aforementioned proceedings involve a judge, or judges, district attorneys, and various other persons and all involve allocation of valuable resources, the most valuable of which is time, and as always the ever increasing expanse of taxpayer dollars.

I personally applaud Judge McGee, Judge Cerney, Public Defender Mark Stephens, the many judges of Knox County and the private attorneys for the great work they do in Knox County. Setting the standards high, meeting those standards, and delivering quality representation to those individuals entitled to counsel is not only a required constitutional mandate, but doing so decreases the overall costs of the justice system to the taxpayer. So instead of attacking attorneys' credibility, calling into question their veracity, referring to them as members of the 100,000 grand club and as opposed to holding "informational meetings" with judges aimed at reducing the amount paid to the hard working attorneys of this State, let's use Knox County as an example and promote quality representation throughout the State; something the AOC has established that contracting does not accomplish. If other counties follow the lead of the Knox County Judges, its Public Defender, and the private attorneys who engage in indigent representation and the AOC allocates substantial efforts to promoting adequate compensation for attorneys in order to ensure delivery of quality legal services, the taxpayers and the counties of this State may very well experience the same cost savings as Knox County. Wow, spending more on one line item of the budget may very well result in an overall cost savings, but we don't want to do that because the line item is unpopular. The end result is what matters, and if the end result is a decrease in the overall costs to the taxpayers, our elected officials should vote for the overall decrease even if the line item that creates it is unpopular.

Many issues with the house of indigent representation have been identified above. As the Court and the AOC and many who read this know I have substantial experience in the administration of indigent representation, and by the filing of this comment I make public my offer, and the offer of the company I am president of, BHI, of assistance to the AOC, the Supreme Court, the Legislature, and the Governor. That offer of assistance is as follows (BHI dictates BHI and me): BHI will make its resources and manpower available to assist any arm of the state government with development of proper standardization and limited centralization and will assist with the implementation of it as well. BHI will develop the web based software as mentioned above and assist with its implementation. BHI will assist with the development of the audit and investigation office and will work with the AOC to answer Judge Cerny's call for analysis. BHI will assist the AOC in developing, drafting, publishing and publicizing clear cut policies, procedures and standards related to the processing, administration, payment, and review of claims for indigent representation work, as well as whatever audits may be necessary to ensure compliance with the developed policies, procedures and standards. BHI is willing to assist the AOC with catching and prosecuting any attorney in this state, including any client of BHI, that has or is engaging in an intentional defrauding of the State via his or her claims billing. The Court should call for mandatory disbarment of any attorney so prosecuted upon their successful prosecution. BHI is willing to take the standards developed and implement them into the indigent practice management software it is currently developing for its clients.

All of these offers of assistance are made free of charge and at no cost to the taxpayers. BHI has the tools, the talent, the perspective, and the experience to be a great asset to the continued betterment of the indigent representation system of our great State. Hopefully, the Supreme Court, the AOC, the Legislature and the Governor will take BHI up on its offer. BHI truly has more experience dealing with the real world problems presented by the administration and compensation issues related to indigent representation than any other non-governmental agency or individual. BHI's primary goal is to assist attorneys to help ensure the delivery of competent and compensated indigent representation. Assisting the government will help BHI achieve its primary goal. I truly hope, this time, BHI's offer of expertise, experience, and eagle eye view from the real world perspective will not be turned down. Again, BHI asks for nothing in return except that the AOC allocate the time and resources to properly prepare policies, procedures, and standards so the AOC and those whose livelihoods depend upon its staff's interpretations and actions will be singing from the same sheet of music, even if the song is not enjoyed by everyone listening.

It would appear that more brilliant minds than the undersigned believe in the approach where private attorneys, business owners and the Courts work together alongside the legislative bodies. In a recent talk, former Supreme Court Justice, Sandra Day O'Connor stated "We need lawyers in every state to get busy and start advocating for adequate funding of the courts. We need lawyers to get busy and say. "'I'm willing to tackle this in my state'.....We need you," O'Connor said, "it's important that the legislators understand how not adequately funding the third branch of government will cause a delay in justice and that, in turn, will hurt the state economically". During the same talk, David Boies, Co-Chair of the Task Force on Preservation of the Justice System, provided some valuable insight on these issues when he said, "The problem is, the justice system, unlike a toll road, is something we depend on to provide us constitutional protection regardless of ability to pay".... "You have to be conscious of enabling people who really can't afford those fees." A thorough review of the talk should be conducted by the Court. Such a review will most likely reveal to the Court that alliances built by offers of assistance such as the ones made therein, are exactly the alliances Justice O'Connor and Mary McQueen, President of the National Center for State Courts, are suggesting should be forged. Maybe plea for assistance to Justice O'Conner should be made. The former Supreme Court Justice might very well assist us. The undersigned, in his capacity as President and C.E.O. of BHI as well as his capacity as an attorney, hereby answers Justice O'Connor's call to action. Justice O'Conner, I am willing to tackle these state court funding issues in Tennessee; and not only am I willing to get busy on these issues, I already have been, at least on one of them. Hopefully, the Court will find it advisable to accept the offers made herein and help answer the call to action issued by former Supreme Court Justice, Sandra Day O'Connor.

Funding, like so many other things is a negotiation. Ronald Regan once said, "negotiate from a position of strength." The Courts and the AOC are engaged in ongoing negotiations with the purse holders, the legislature via lobbying efforts. If the Court

subscribes to the plan laid out by Justice O'Connor and the President of the National Center for State Courts, it must "negotiate from a position of strength"; unity in numbers creates strength. In fact, the strength in numbers may be the foundational building block for the successful execution of the strategic plans laid out by Justice O'Conner and the National Center for State Courts. Strength in numbers may very well be the only fuel the vehicle to reach adequate funding may have; at minimum, it will be the pop from the gun that starts the race to the finish line. Furthermore, proper negotiation tactics should be employed by the Court and the AOC when lobbying for more adequate funding. In a proper negotiation, one who wants more than what he or she has never places on the table an offer for less than what they want and most certainly never offers up less than what they already have.

The pending Amendment has had the unintentional and unforeseen consequence of causing substantial discord and has further separated the attorneys who engage in indigent representation practice, a major, underfunded court system from the AOC and the Court. Additionally, many judges seem to be very displeased with the pending Amendment as their filed comments flesh out. Furthermore, the Amendment is most certainly aimed at paying attorneys less than the grossly inadequate compensation they receive now. Therefore, the pending Amendment goes totally against negotiating from a position of strength due to the unintended consequence, the creation of an atmosphere of discord between the attorneys, judges, the Court, and the AOC. Each of these groups sorely need to be working together in unison on these issues as together we stand, divided we fall. Unfortunately the pending Amendment also provides the genesis for an improper negotiation by placing an offer on the table of not only less than what the indigent representation attorneys want, deserve and need, but less than what they have now.

The Court and the AOC has before it the platinum opportunity to both create unity and engage in appropriate negotiations with the legislature for adequate funding, not only for indigent representation but all areas of the judicial system of this great State. John W. Garnder, Secretary of Health, Education, and Welfare under President Lyndon Johnson once said, "We are continually faced with a series of great opportunities brilliantly disguised as insoluble problems." That is what the Court is faced with here; an opportunity that is brilliantly disguised as an insoluble problem. I implore the Court and the AOC to take that opportunity. British Prime Minister Benjamin Disraeli once said, "the secret of success is for a man to be ready for his opportunity when it comes". This same logic would apply to the Court and its administrative arm. But the question remains, will the Court and its administrative arm look deep within themselves and recognize the disguised opportunity, and, if so, are they ready for it?

Many legislators are paying close attention to the issues related to this pending Amendment, closer attention than maybe ever before. Many have complimented the Court and the AOC for attempting to identify cost cutting measures even though they disagree with the pending Amendment as such a measure. With the legislature appearing to have interest in the issues affecting indigent representation, and with the recognition

that the Court and the AOC are clearly attempting to be good stewards of the taxpayers' dollars, an obvious opportunity exists to properly educate the legislature on the realities of indigent representation and where the true cost savings, not necessarily cost cuts, can be achieved. Throughout this process the legislature can be properly educated on all issues related to inadequate funding of the judiciary. Properly educating the legislature via a unified voice that includes attorneys, judges, business interests, the Court, and the AOC will ultimately result in the demise of the funding inadequacies that currently plague Tennessee's judicial branch of government.

The question remains, how does the Court take advantage of this disguised opportunity? Stating it is simple, albeit doing it might not be so easy, but it is doable. The first step is to vote not to adopt the pending Amendment. Doing so will assist with unification as much as anything and will be a giant leap towards the remaining steps of complete unification. Next the Court should direct the AOC to allocate the time and resources to preparation of standard policies, procedures, and review and audit standards. This is important for if everyone is not singing from the same sheet of music, everyone will be humming their own tune and marching to the beat of their different drummer. Take, or at least begin taking, some of the above suggested actions aimed at promoting quality representation and begin the process of the standardization and limited centralization addressed hereinabove; accept BHI's offers of assistance, and forge ahead.

Engaging in this course of action will bring unification to the indigent representation attorneys, the state court judges, the Court, and the AOC. Without this reunification, I fear that efforts to negotiate will fail. Much discord exists, and a good deal of the discord is a direct result of the pending Amendment. Many have actively opposed the pending Amendment and have filed written comments, including judges, attorneys, national organizations, legislators, bar associations, and even one former Attorney General. The Court and the AOC have probably received many calls from various others that are opposed to the measure. However, as Heraclitus of Ephesus a pre-Socratic Greek philosopher once opined, "Opposition brings concord. Out of discord comes the fairest harmony." Hopefully the Court will see the wisdom in utilizing the opposition and discord to bring about the fairest of harmony and begin to execute on the very well thought out strategic plans of Justice O'Conner and the National Center for State Courts. In the end, this will be a major step towards securing adequate funding for indigent representation and all other areas of the Judiciary.

I. "Good Ole Mountain Common Sense"

It was June of 2007, Judges and attorneys from all over the State had descended upon Gatlinburg for some required CLE credits, socializing, networking, and some relaxation that was needed by all who arrived. Hard working attorneys and judges had come to the event, as they do each year, and were ready to relax, eat, drink, and learn. I was present as a representative of BHI as it was an exhibitor at the convention as it had been the prior year and every year thereafter. I will never forget that particular evening, as it was the

event that followed such a profound victory, a victory that saved many jobs, ensured the ability to assist so many attorneys in Tennessee and began the journey that brought me to the keyboard that I am pecked to draft this comment.

The food was great and the company even better when the Gatlinburg Aquarium hosted the TBA convention bench bar party. The music was enjoyable and the conversation was engaging, thoughtful and insightful. Out of all the events I had been to, this one was the best. Just about midway through the evening I saw a local that, although I had never met, I recognized immediately. Tall, handsome, silver mained, briskly walking in my direction with a swagger of confidence and purpose, the man could never be mistaken.

The local, an astute businessman, attorney and a respected and powerful jurist, stopped to talk with me upon approach. Although the local did not recognize me upon sight, when I introduced myself to him, my blood began to stir, my body clenched, and my heart pounded profusely when he recognized my name. As my hand extended, hoping my palms were not laden with sweat from the nervousness of the encounter, the local took my hand. We both gave each other that standard political male sturdy shake. As I withdrew my hand from the sturdy political grasp, the local asked me where I was from. Giving my stock answer, "awe, I'm just a mountain lawyer from the hills of Greene County, Tennessee," I chuckled." To my amazement, the local chuckled as well and went on to say something to the affect of, well I'm just a mountain lawyer myself, nothing wrong with that, I think it's a good thing. To my further amazement, the local went on an said something to the effect of, I should have known you were mountain folk, I read your Petition, and it sure seems to me that you just applied some "good ole mountain common sense". It's nice to have met you, I wish you well and good luck.

The conversation exchange of that evening and the mountain words of wisdom that were so articulately spoken have resided within me to this day, and will be an honor I will never forget. I took the idea of "good ole mountain common sense" to heart. The man who conveyed to me that idea of the application of "good old mountain common sense" will hopefully read this comment. If you do read this comment, you will know I am speaking to you and respectfully and humbly asking you, if you agree with any of the courses of actions suggested herein, I implore you to use your influence. Apply some "good ole mountain common sense" and convince the Court to vote not to adopt this pending Amendment. This pending Amendment, although well intentioned, is not an application of "good ole mountain common sense" to the issues facing indigent representation in Tennessee.

When the roof of your house needs replacing, your windows are not airtight, your faucet is leaking, the paint is peeling off the siding, and your garbage disposal is in a complete state of disrepair, you don't add an addition to your home, you repair the house you have. Doing otherwise would be working outside the framework of "good ole mountain common sense", especially if you are on a tight budget. That is the situation

that exists in the house of indigent representation. There are many issues that need to be addressed, tweaked, painted, and/or repaired and we are working on a tight budget. Those issues are perfectly capable of being addressed in the confines of what is "ultimately the best system for its purposes". So I humbly and respectfully ask the Honorable Justices of the Supreme Court to apply "good ole mountain common sense" to the house of indigent representation and repair the house as it exists now and refrain from adding an addition to it.

## II. Final Thought

I really hate to be just as blunt as I am going to be, but the indigent representation system in Tennessee is headed for disaster. If we don't fix it the pens of Systematic Reform Litigation are going to be aimed directly at the taxpayer's pocket. I will offer an overall solution that will be palatable to both sides of the political aisle, will allow both Democrats and Republicans to satisfy their constituency, and if analyzed and implemented properly, will most likely create jobs and decrease costs, or at minimum, some costs will be offset by the tax revenues generated by the jobs created. It is as follows:

There are many attorneys in this state that break their backs, work countless hours representing parents, children, and, yes, alleged criminals. The political rhetoric is we don't like paying attorneys to represent criminals. Well, let's face it. According to the Constitutions of the United States and Tennessee and the final arbiter of them, we don't have a choice. Like it or not, it is the way it is and if we don't like it, we should engage in an effort to modify our Constitutions. Everybody likes it when you talk about that; much more unpopular than providing representation to "criminals" that the document requires. Furthermore those attorneys that are breaking their backs, working countless hours getting those criminals off, are doing what? "WORKING", yes, that is right; working and working for the State of Tennessee. Like the work they are doing, or not, it is work that has to be done, and they should be reasonably paid for it. Try walking into the pizza shop owner and telling him, we just passed a constitutional amendment that says everybody has a right to eat pizza. We know you have spent years building this pizza joint, but now you are going to have to sell your pizzas at whatever price we set, even if it is less than what it costs you to produce the pie; and you are going to do as much of it as we tell you to. Bet that would go over well. Sound familiar? So does "tear down this wall".

Bottom line, analyze the system thoroughly and answer Judge Cerny's call. Think about this for just a moment. There are attorneys who engage in indigent representation all across this State who work out of their homes simply because they cannot afford to do anything else. We can spend all our time talking about the honor in representing the underprivileged and the poor and 'pro bono efforts' all the attorneys are doing and, or we can face reality. It is fine when an attorney has made it to the high rise apartment in the sky, but when an attorney is still moving on up like a Jefferson, he has to eat.

What if we paid indigent representation attorneys a reasonable rate, stopped chastising them because they engage in a job that is not politically popular, but a job, nonetheless that has to be done, and promoted quality representation even if the immediate cost was more? Imagine for a moment how the scenario might unfold. Hundreds of attorneys moving from their home to the square, putting dollars into local economies all across the State, renting copiers, leasing phone systems and buying advertising and ultimately hiring assistants that they cannot afford now. Decreased costs to the court system due to the quality of representation being provided much like that being experienced in Knox County, all the while creating jobs and generating revenues, both tax revenues and revenues inserted into local economies, maybe we could accomplish this. This is the type of out of the box thinking akin to that engaged in by our Founding Fathers when they penned the Bill of Rights. Yes, maybe, just maybe we can take an unpopular budget item that is mandated and make the most of it, instead of complaining about having to do it and do it all without the need for an environmental study. All I am suggesting is look at the big picture and don't get bogged down in the politically unpopularity of a job that has to be done whether we like it or not.

And how does this satisfy the constituency of both sides of the aisle? It takes care of the poor, the most vulnerable, women, men, parents and children, it promotes our constitutional rights and helps protect small businesses all at the same time. Wow what a beautiful marriage, and it works to put families back together sitting at the kitchen table discussing the day's events, exactly where our children should be instead of soaking up taxpayer's dollars in state's custody; it even has a family values element. If analyzed properly, and the emotional and political hot buttons are removed, I am confident we can do with the indigent representation system what we should be doing, making the most of mandate instead of sitting around complaining about it.

With this in mind, I am reminded of a tale I have always heard as a native of Greeneville, Tennessee. Not sure if it's true, but I always loved the story, a Greeneville tradition story, one I have heard my whole life. Mr. Bohanon, his father owned some property in Greene County Tennessee. The family was not very well off at the time. Bohanon was working late one night at the tobacco warehouse and had gone around the corner to relieve himself. While engaged in the necessary relief, Mr. Bohanon heard the tobacco giants through the slats in the barn's wall, playing poker and setting the prices of tobacco. Bohanon picked upon their conversation immediately and began to listen, calculating the figures they were quoting to one another. He figured out that if he could pull it off, he would solve his family's financial worries. Now Bohanon had made a friend in the banking world of small town Greeneville, Tennessee. I am not sure how he did it, but he was able to mortgage the family farm to obtain the purchase money for the next day's sale. Unfortunately for Bohanon his father showed up at the sale and having found out about the mortgage began to chastise Bohanon and attempted to stop Bohanon from losing the family farm. Bohanon was unable to convince his father of the financial soundness of what he was about to do, the sale was about to begin, and his father was about to stop it. Bohanon, knew he was right, just like Davy Crockett had, and he

grabbed a shovel leaning against the post, forged ahead, and wacked his father over the head, and knocked him out. Just at that moment, I bet Bohanon was quite unpopular amongst his family and friends, but when the transactions were concluded and his daddy woke up a millionaire, I'm pretty darn sure Bohanan's popularity changed.

III. Conclusion

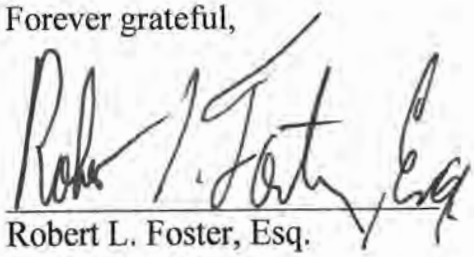
For all of the foregoing reasons, I humbly ask the Honorable Justices of the Supreme Court to apply some "good old mountain common sense" and vote not to adopt the pending Amendment.

IV. Request for Oral Argument

The undersigned, as a licensed member in good standing with the state bar, hereby requests oral argument for the undersigned and requests the Court to allow not only the undersigned an opportunity to appear and be heard, but also to extend that same opportunity to any individual or representation of any organization or other similar association that has filed or does file a comment in this matter.

Thanking the Honorable Justices for the consideration of my commentary, for their service to the state, and for cloaking us all in the Constitutional blanket that is American Liberty, I remain,

Forever grateful,



Robert L. Foster, Esq.
119 E. Deopt St.
Greeneville, TN 37743
Office: 423-639-0091
Fax: 423-639-0454
Cell: 423-620-3290
BPR#: 021189

# NLADA | American Council of Chief Defenders

The American Council of Chief Defenders is a national community of defense leaders

1140 Connecticut Ave. NW, Ste. 900
Washington, DC 20036-4019
T: 202-452-0620
F: 202-872-1031
www.nlada.org



August 29, 2011


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

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

Dear Mr. Catalano,

The American Council of Chief Defenders (ACCD) is a national community of public defense leaders dedicated to securing a fair justice system and ensuring high quality legal representation for people facing loss of life, freedom or family. The mission of the ACCD is to speak as a national voice for public defense clients; to promote best practices in the leadership, management, and administration of justice; and to support development and reform of public defense systems.

We write to you to note that the proposed changes to Rule 13 do not meet national standards of justice. Our particular concerns are set out in the attached August 17, 2011 letter to you from NLADA's David Carroll.

ACCD asks that the proposed changes not be adopted as they do not meet commonly accepted national standards as summarized in the American Bar Association's *Ten Principles of a Public Defense Delivery System*. February 2002. Available at: www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf

Please feel free to contact us with any questions.

Sincerely,

Edward C. Monahan
Chair
American Council of Chief Defenders

Attachment

# NLADA | American Council of Chief Defenders

The American Council of Chief Defenders is a national community of defense leaders

1140 Connecticut Ave. NW, Ste. 900
Washington, DC 20036-4019
T: 202-452-0620
F: 202-872-1031
www.nlada.org



August 29, 2011


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

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

Dear Mr. Catalano,

The American Council of Chief Defenders (ACCD) is a national community of public defense leaders dedicated to securing a fair justice system and ensuring high quality legal representation for people facing loss of life, freedom or family. The mission of the ACCD is to speak as a national voice for public defense clients; to promote best practices in the leadership, management, and administration of justice; and to support development and reform of public defense systems.

We write to you to note that the proposed changes to Rule 13 do not meet national standards of justice. Our particular concerns are set out in the attached August 17, 2011 letter to you from NLADA's David Carroll.

ACCD asks that the proposed changes not be adopted as they do not meet commonly accepted national standards as summarized in the American Bar Association's *Ten Principles of a Public Defense Delivery System*. February 2002. Available at: www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf

Please feel free to contact us with any questions.

Sincerely,

Edward C. Monahan
Chair
American Council of Chief Defenders

Attachment

National Legal Aid & Defender Association

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.

[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.

## *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

---

[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

---

[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]

---

[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.

---

[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

---

[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]

---

[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]

---

[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
1140 Connecticut Avenue, NW, Suite 900
Washington, DC 20036
www.nlada.net/jseri
d.carroll@nlada.org
202-329-1318

---

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."

**THE LAW OFFICES OF JAMES SANDERS**
P. O. Box 9843, Memphis, Tennessee 38190
*An Association of Attorneys – Not a Partnership*

*James Sanders, *Attorney* *Licensed in Tennessee

September 1, 2011

To Whom It Concerns:

**RE: Public Comment On Proposed Amendment To Supreme Court Rule 13**

My sincere hope is that the desire to reduce indigent defense spending will not overshadow the public's need for competent and effective legal representation. There is a core of committed attorneys who persist in this line of work despite the present low rate of pay, the months-long delays in getting paid, and the general lack of respect and appreciation that accompanies court-appointment work. My fear is that reducing the overall compensation an attorney receives for actual services rendered will ultimately result in the loss of some of the most competent, committed and effective practitioners.

Without question, there are components of the existing system that should be improved upon, including the slow turn-around in funds disbursements and the lingering low hourly rate for both in-court and out-of-court services rendered. However, the present system, with implemented improvements, can provide for the legal representation of the State's indigent citizens more effectively than the proposed Amendment now under consideration.

Respectfully submitted,

James Sanders, Esq.

Telephone: (901) 544-9336 Fax: (901) 339-3661

# Law Office Of Victoria W. Gillard

8375 Pardue Dr. MEMPHIS, TENNESSEE 38125

Office: 901-624-8852


September 1, 2011

SUPREME COURT OF TENNESSEE
ADMINISTRATIVE OFFICE OF THE COURT
NASHVILLE, TN 37243-0607

To whom it may concern:

My name is Victoria W. Gillard I am a licensed and practicing attorney in this state. I will be brief as I am aware of the voluminous number of responses that you have received. **I want to add my voice and or vote in opposition to the Proposed Amendment to Rule 13, to the countless other attorneys, justices, magistrates, politicians, etc. who represent and fight for the rights of the indigent citizens of this great state.** It would be a travesty of justice not to mention incomprehensible to think that anyone is considering contracting their inalienable rights to the lowest bidder thereby sacrificing all that the Constitution and Bill of Rights were drafted to protect and defend.

With professional regards, I remain,

Sincerely,
Victoria W. Gillard

Sincerely,

Victoria W. Gillard, Attorney

# Law Office Of Victoria W. Gillard

8375 Pardue Dr. MEMPHIS, TENNESSEE 38125

Office: 901-624-8852


September 1, 2011

SUPREME COURT OF TENNESSEE
ADMINISTRATIVE OFFICE OF THE COURT
NASHVILLE, TN 37243-0607

To whom it may concern:

My name is Victoria W. Gillard I am a licensed and practicing attorney in this state. I will be brief as I am aware of the voluminous number of responses that you have received. **I want to add my voice and or vote in opposition to the Proposed Amendment to Rule 13, to the countless other attorneys, justices, magistrates, politicians, etc. who represent and fight for the rights of the indigent citizens of this great state.** It would be a travesty of justice not to mention incomprehensible to think that anyone is considering contracting their inalienable rights to the lowest bidder thereby sacrificing all that the Constitution and Bill of Rights were drafted to protect and defend.

With professional regards, I remain,

Sincerely,
Victoria W. Gillard

Sincerely,

Victoria W. Gillard, Attorney

**From:** "Tina Hunt" <tina.hunt@capitol.tn.gov>
**To:** <lsykes@tncourts.gov>
**CC:** <gahardawaystaterep@yahoo.com>, <gahardawaystaterep@gmail.com>
**Date:** 09/01/2011 4:27 PM
**Subject:** TBCSL response Catalano Letter Rule 13 8-29-11.doc



Ms. Sykes,
Please disregard the first letter. Here is the corrected copy to be submitted.

Thanks.

Tina

---

Tennessee Black Caucus of State Legislators

303 War Memorial Building * Nashville , TN 37243-0028

(615) 741-2453 * FAX: (615) 253-0268

August 29, 2011

Michael W. Catalano, Clerk

100 Supreme Court Building

401 Seventh Avenue North

Nashville, Tennessee 37219-1407

Re: Rule 13, Section 7

Rules of the Tennessee Supreme Court

Dear Clerk Catalano:

We, the Tennessee Black Caucus of State Legislators, submit this comment regarding the proposed Section 7 of Rule 13. We realize that balancing the need for adequate legal representation for Tennessee's indigent population with an ever-present budget shortage can be challenging. However, we must always bear in mind that if changes are made which do more harm than good to this identified population in

need then nothing has really been accomplished. It is our sincere belief that the proposed Rule 13 will do more harm than good despite what it was intended to do. It is our overall suggestion that we do more to adequately fund the existing public defender's offices throughout this state instead of removing their responsibilities and handing them other attorneys who may have the best bid, but may not offer the best services.

Rule 7 would strip judges of their ability to make appointments based on their experience, knowledge and familiarity with the local bar. According to Rule 13, the appointments will be based on a bid submitted to a centralized location in Nashville. It is our belief that local judges are in the best position to make these appointments and the Administrative Director of the Courts. Furthermore, to date, we still do not have the proposed language for the bid, we don't know what the qualifications will be for the lawyers, we have not seen the proposed contract for these legal services, we have not been made aware of if there will be proper measures in place to ensure that all members of the bar are considered, including female and minority attorneys.

Furthermore, we need more specificity regarding the metrics used to determine the need for Rule 13, and we need more clarification regarding which cases will be included under Rule 13. As it stands now, capital murder cases could be included in Rule 13, and it would be a travesty to retain counsel for a case of that magnitude through a bid process. Moreover, the sheer volume that one lawyer or law firm or association of attorneys would incur in trying to keep up with these cases would likely stifle the docket as opposed to expediting the docket. For all the stated reasons, we submit that Rule 13 should be rejected at this time and that more information be gathered to make a better informed decision.

Respectfully yours,

Representative G.A. Hardaway

Vice-Chairman of the Tennessee

Black Caucus of State Legislators

rep.ga.hardaway@capitol.tn.gov

STEWART & STEWART
ATTORNEYS AT LAW
300 SOUTH COLLEGE STREET
WINCHESTER, TN 37398

MARK STEWART
DAVID L. STEWART
JOHN STEWART

TELEPHONE: (931) 967-4303
FAX: (931) 967-4368



August 25, 2011

Michael Catalano, Clerk
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

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

Dear Mr. Catalano:

Please accept and file this letter as a comment with regard to the above referenced proposed amendment to Tennessee Supreme Court Rule 13.

I would first like to express a concern with the burden this amendment places on the administrative director to "determine the quality of representation to be provided, including the ability of the attorneys who would provide services under the contract to exercise independent judgment on behalf of each client and the ability of the attorneys to maintain work load rates that would allow the attorneys to devote adequate time to each client covered by such contract". It seems unrealistic to expect the administrative director to maintain a familiarity with all the attorneys across the state of Tennessee involved in indigent appointments. The reality is that the administrative director, despite his or her best efforts, will not have sufficient knowledge with regard to the attorneys to determine whose work load is too great for a particular case or who has the ability to provide the quality of representation necessary in each particular case. Additionally, in order to be able to make a determination, this proposed Rule change requires the clerk to have some familiarity with the facts and circumstances underlying each case. That is, the facts of the case may make it too complex for a less experienced attorney. Likewise, as other comments have suggested, the particular talents of one attorney may make he or she better suited for the particular facts of a case. It is inconceivable that the Administrative Office of the Courts' staff would have the ability to designate the amount of time and staff truly needed to make these evaluations. Our trial judges are in the best position to make these determinations and should continue to do so.

This proposed Rule Amendment also presents a conflicts trap. In a rural county it is conceivable that one or two attorneys may successfully bid for the lion's share of appointed cases. If this occurs, it is unavoidable that this small number of attorneys will quickly develop the same conflicts as the public defenders' office does when it represents such a volume of clients. Therefore, once this small number of attorneys hits the critical mass, so to speak, we will

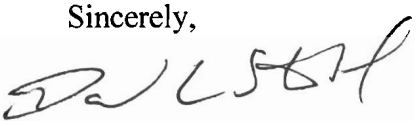
return to square one with the Judge having to make appointments to avoid those conflicts that will develop under the new system. Of course, this hypothetical situation is based on an assumption that one or two attorneys would be able to bid for the lions' share of work. However, the mere fact that I am forced to make this assumption reveals another shortcoming with the proposed Rule.

Specifically, the Rule lacks any detailed direction as to how the contracting process would work. That is, the Rule is silent as to how quickly the Clerk must choose between submitted bids; it is silent on how far a bid may stretch into the future; it is silent on whether the director may withdraw from a bid if a more qualified attorney submits a later bid; the Rule does not indicate whether the attorney is paid for the total package of bids initially or only after completion of each case. This is just a short list of the uncertainties left by the Rule. And make no mistake, I am not advocating for a revised Rule. I am adamantly opposed to the passage of such a proposed Rule at all. I simply point out what I perceive to be shortcomings in the proposed amendment.

The most significant impact of the proposed Rule would be felt by the clients represented by contracted attorneys. This is because the net effect of the proposed Rule forces attorneys to invest the least amount of time possible in representing their clients in order to make ends meet. So, Guardian Ad Litem for abused children working on a bulk contracts would be forced to invest less time in each of the cases. Also, criminal defense attorneys trying to assist individuals who could lose their freedoms, jobs, or families will have attorneys who are forced to spend less time on their cases. Bulk contracts may work in the manufacturer of goods, but they are inherently ill suited for the profession of practicing law.

Perhaps we should consider increasing administrative fees assessed to indigent litigants. This can be a significant source of revenue to offset attorneys' fees. After all, we tend to forget the fact that our court system generates significant revenue at the county and state level. Our county's Juvenile, Circuit, Probate, and General Sessions courts generated approximately One Million Dollars in revenue for the 2010 – 2011 fiscal year at the county level and just over One Quarter of a Million Dollars at the state level.

Sincerely,



David L. Stewart

DLS:jp

# SUMNER COUNTY BAR ASSOCIATION

August 22, 2011

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

SEP 02 20

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

Dear Honored Justices:

Pursuant to the solicitation for written comments by lawyers and judges, please accept this as the response from the Sumner County Bar Association regarding the proposed amendment to Supreme Court Rule 13, Section 7. The Sumner County Bar Association opposes the proposed rule change for two reasons: the rule dissolves Judicial Discretion; and the rule provides a vague and unworkable solution to the State of Tennessee's budgetary constraints.

As the system now operates, the Judge has the ability to select an attorney to appoint for specific cases. Conversely, this rule precludes Judicial Discretion for a Judge to independently choose an attorney whose knowledge and expertise are commensurate with the anticipated issues that may arise in a particular case. Further, numerous members have written or will write specific examples as to how this discretion is lost in various Courts from General Sessions to Juvenile to Criminal Court. Those opinions and oppositions are adopted in this letter of opposition and incorporated herein by reference.

The Sumner County Bar Association further opposes this rule change due to the apparent price tag being placed on Justice. When a Court appoints representation for indigent persons, the appointment should not be based upon the lowest bid submitted. While the Sumner County Bar Association understands budgetary constraints, it appears that pure economic conditions spearhead this proposal which potentially and detrimentally will create a lowest-common-denominator style of lawyer. Ultimately, this process will be against the public interest. The standard should be, as it is now, to appoint attorneys that understand the workings, local rules, etc. of a particular court and its procedures and possess the necessary experience commensurate to the issues.

For the aforementioned reasons, the Sumner County Bar Association opposes the proposed amendment to Supreme Court Rule 13, Section 7. Thank you for your attention to this matter.

Respectfully,
Sumner County Bar Association

130 SOUTH WATER AVENUE
GALLATIN, TENNESSEE 37066
615.451.0307

# CHRISTOPHER HUNTER JONES, M.S.

## ATTORNEY AT LAW

P.O. BOX 3574
CHATTANOOGA, TENNESSEE 37404
PHONE: (423) 486-7020
FAX: (423) 493-2170
JONESCREEK@GMAIL.COM




August 31, 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,

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.

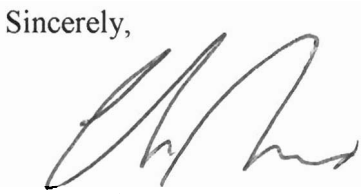
In addition to the confidentiality and independent judgment ethical issues, contracting may place an attorney in such a financial position that he or she may not be able to, or simply will not, deliver proper representation and cause a breach of his or her ethical obligations to indigent clients. As 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,

Sincerely,



Christopher Hunter Jones, M.S., Esq.

BPR#025003