

Report of the IDC to the Supreme Court, September 1997

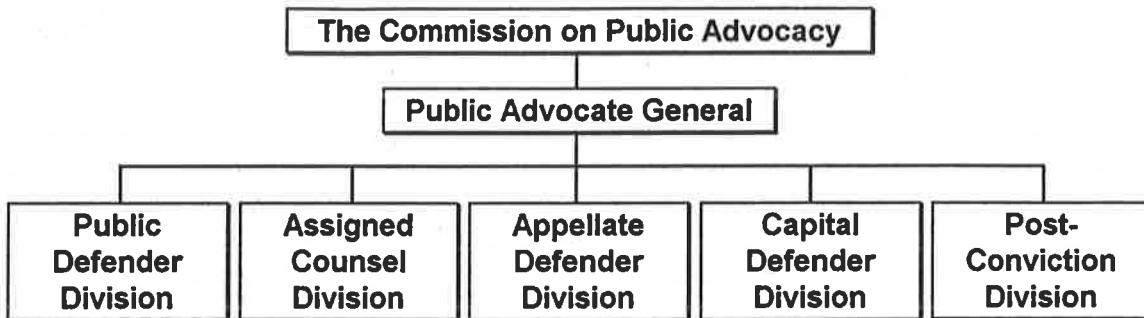
I. Background

The Tennessee Supreme Court, by order dated August 18, 1994, created the Indigent Defense Commission of the Supreme Court of Tennessee. The Supreme Court directed the IDC to "... develop and recommend a comprehensive plan for the delivery of legal services to indigent citizens charged with criminal violations in the state court system." Along with that general charge, the Court specifically directed the IDC to "... (develop) standards for complex and capital cases."

II. Organizational Structure

During the months that followed the Court's directive, the IDC set out to first contextualize any comprehensive plan for the delivery of defense services by developing an organizational structure within which the comprehensive plan would be implemented. It was the thought of the IDC that a comprehensive organization structure could better manage and utilize existing services already provided by the State.

The comprehensive organizational structure recommended by the IDC, for the most part, utilizes existing agencies presently providing legal services to indigent citizens charged with criminal law violations. The system recommended follows:



The details as to the creation and implementation of each of the components of the organizational structure are set out in the IDC's report to the Court submitted in August 1996. It is significant to note that while this organizational plan restructures existing agencies, the plan can be implemented immediately with the creation of only two new positions, the Public Advocate General and the Appellate Defender. All other components, including the staff for a Public Advocate General, are currently operational and providing services to indigent citizens.

A. The Commission on Public Advocacy

The Commission on Public Advocacy will serve as an oversight committee to all components of the indigent defense system. The Commission on Public Advocacy should be charged with the responsibility of overseeing delivery of legal services not only to indigent citizens charged with criminal violations of the law in the State court system, but in all other areas where the State is required by rule, statute, constitution or otherwise to provide legal services to its citizens. The

B. Public Advocate General

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

The IDC believes the Public Advocate General should be appointed by the Commission on Public Advocacy to serve as Chief Executive Officer of an integrated legal services system. Additionally, the Public Advocate General should implement policies established by the Commission on Public Advocacy and manage the delivery of legal services on a daily basis. The Public Advocate General should submit annual budget requirements for operating this system to all branches of state government.

C. Public Defenders

With some adjustments to the existing public defender system presently in place in Tennessee, the IDC recommends, subject to statutory and ethical limitations, that the 31 public defenders and their staff presently operating in Tennessee continue to provide the legal services to indigent citizens in Tennessee charged with violations of our criminal laws. However, there should be adjustments in the present system to include providing an internal uniform structure that provides continuity in staffing, funding etc., to avoid the unequal individual evolution of some of the thirty-one offices. Additionally, the IDC recommends that the present Office of the Executive Secretary of the Public Defender's Conference should merge with and assist the Public Advocate General in fulfilling the duties of that office. Further, the IDC believes that each Public Defender should remain an elected position, and his or her term in office should be an eight-year term.

D. Assigned Counsel

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

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

E. Appellate Defender

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

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

F. Capital Litigation Defender

The Indigent Defense Commission's organizational model contemplates a state-wide Capital Litigation Division, managed by the Capital Litigation Defender, who will work in conjunction with the Public Advocate General to supervise and manage the day-to-day affairs of the Division. The IDC believes that this Division should consist of two components: a litigation component and a resource component.

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

Currently, there is operating an existing model for the Capital Litigation Defender Division within the Public Defender Conference. Mr. David Keefe serves as Chief Counsel of this division. He has a small staff assisting him.

G. Post-Conviction Defender

The Indigent Defense Commission's organizational model contemplates a state-wide Post-Conviction Defender Division, managed by the Post-Conviction Defender, who will work in conjunction with the Public Advocate General to supervise and manage the day-to-day affairs

of the Division. The IDC believes that this Division should consist of two components delineating capital post-conviction litigation from non-capital post-conviction litigation.

Currently, there is operating an existing Office of the Post-Conviction Defender. Mr. Don Dawson serves as the Post-Conviction defender. He has a staff assisting him which would need to be expanded in the event a non-capital component is established.

III. Legal Representation Plan

A. The IDC's Accomplishments to Date:

In its Organization Model and Legal Representation Plan reported to the Court in our August 1996 presentation, the IDC made recommendations to the Court in the following areas:

- Recruitment of Counsel
- Developing a Viable Panel of Assigned Counsel
- Disciplinary Process for the Panel of Assigned Counsel
- Assignment of Counsel (trial and appellate levels, capital and non-capital))
- Compensation of Counsel (capital and non-capital)
- Reviewing Attorney Performance
- Qualification Standards to Hold the Office of Public Defender
- Qualification Standards for Counsel in Capital Cases

Additionally, the IDC was asked by the Court to submit its comments and recommendations on what was, at that time, Proposed Rule 13. The IDC offered its comments and recommendations in the areas of:

- Legal representation in multiple defendant cases;
- Continuity of representation from sessions to circuit court levels;
- Defining a "capital case";
- Appropriate compensation rates for court-appointed counsel in all cases including complex and capital litigation;
- Case-related and expert witness expenses.

B. Recommendation for Qualification Standards for Court Appointed Counsel to Represent Indigent Persons in Tennessee

The IDC has continued its work since our August 1996 presentation and now offers the following recommended qualification standards for appointed counsel:

1. Objective

The objective in promulgating qualification standards for counsel appointed to represent indigent defendants is to ensure: 1) that the effective assistance of counsel is provided for persons charged with criminal offenses in this state; and 2) that counsel paid by state funds to represent indigent defendants have the experience and training

necessary to provide this needed service; and 3) that the judgments rendered by the courts in this state regarding cases of indigent defendants will be reliable and final.

2. Attorney Case Loads

Attorneys appointed to represent indigent persons at state expense must provide each client the time and effort necessary to ensure competent and adequate representation. The appointing authority should not assign cases to counsel by appointment which will by their number or the attorney's existing case load impair the attorney's ability to adequately prepare and represent the indigent client. Assigned counsel should advise the court of his/her inability to effectively represent an indigent client at the time of appointment due to counsel's excessive case load should situation exist.

3. Qualifications to serve as appointed counsel for indigent persons by case type

- a. The appointing authority shall appoint only those attorneys who meet the following criteria:
 - i. Licensed to practice in the State of Tennessee or otherwise qualified to practice by statute or the Rules of Court, or licensed and in good standing in the bar of any other State and admitted to practice before the Court pro hac vice; and
 - ii. Either:
 - A. Meet the qualifications specified below for the applicable case type; or
 - B. Possess significant experience and skill equivalent to or exceeding the qualifications specified below, and who demonstrate to the appointing authority's satisfaction that the attorney will provide competent and adequate representation; and
 - iii. Have adequate facilities to ensure reasonable and timely personal and telephonic contact between attorney and client, and between court and attorney, including adequate support staff or answering service/machine for receiving messages and notifying clients of court dates; and
 - iv. Must have evidence of commitment, willingness and ability to provide effective representation to indigent defendants.
- b. These standards establish and specify qualifications for each of the following case types:

i. **Misdemeanor Cases and Misdemeanor Probation Violation Proceedings in General Sessions, Criminal and Circuit Court**

An attorney is qualified for appointment to misdemeanor cases and misdemeanor probation violation proceedings if he or she:

- A. Satisfies the following:
 - 1. Has served as counsel or co-counsel in at least five criminal cases. Such service shall have included attendance at all court appearances and all client interviews in each case; and
 - 2. has received prior to the appointment six CLE credit hours approved by the Tennessee Commission on Continuing Legal Education in Criminal Law and Practice or procedure within the preceding six months; or
- B. In lieu of the above qualifications, possesses significant equivalent experience under III, 2(b)

ii. **Minor Felony Cases; Felony Probation Violation Proceedings; Contempt Proceedings** (Lesser felony cases include all Class C, D and E felonies).

An attorney is qualified for appointment for lesser felony cases and felony probation violation proceedings, if he or she:

- A. Meets the qualifications specified in Section A; and
 - B. Prior to the appointment, has served as lead or co-counsel in no fewer than two criminal cases in which a jury has been impaneled; or
- iii. Has been certified a criminal trial specialist by the Tennessee Commission on Continuing Legal Education specialization.
- C. **Major Felony Cases** (Major felony cases include all A and B felonies and all charges of murder in the first degree other than cases in which the state is seeking the death penalty).

An attorney is qualified for appointment to major felony cases if he or she:

- A. Meets the qualifications specified in Section B; and
- B. Is an experienced and active practitioner in the area of (criminal defense) with no fewer than two years experience in litigation of criminal cases; and

- C. Has experience as lead or co-counsel in no fewer than three jury trials in cases where Class A or B felonies or murder in the first degree is the indicted offense; or
- D. Can present evidence of additional expertise and competence in the area of criminal trial practice by submitting at least five letters of reference from other criminal trial lawyers or judges, before whom the attorney has appeared in criminal cases. The letters must explain why the attorney has special experience and competence to handle serious felony cases.

C. Proposals for Future Consideration by the IDC:

There are four areas where the IDC will structure recommendations for the Court prior to the end of 1997:

1. **Compensation of Assigned Counsel:** The IDC has a sub-committee preparing a recommendation for the Court dealing specifically with the rate of compensation paid assigned counsel; the "billing process" to be completed by counsel; the management and auditing procedures for the Indigent Defense Fund; Administrative Fees assessed against indigent clients provided court-appointed counsel; expert witness fees; and, case-related expenses.

2. **Performance Standards:** The IDC has a sub-committee preparing a recommendation for the Court dealing specifically with performance standards for court-appointed counsel in all areas of representation.

3. **Rule 13:** The IDC has a sub-committee preparing a recommendation for the Court dealing specifically with Rule 13. This sub-committee is presently preparing a fifth draft of a new Rule 13 and anticipates completing its work by the end of the year.

4. **Appeals in Capital Cases:** In 1996, there were approximately 492 people named in first degree murder indictments returned in this state. There were 102 convictions for first degree murder in that year. Five death sentences were returned in this state in 1996, with thirty-three individuals given a sentence of life imprisonment without the possibility of parole, while sixty-four individuals were given a sentence of life imprisonment with the possibility of parole. The Administrative Office of the Courts paid nearly two million dollars in FY 96/97 for defense services in capital cases. More death sentences have been returned to date in 1997 in Tennessee than in 1995 and 1996 combined. Capital litigation is an expensive proposition that has a direct impact on the state's ability to provide defense services to the indigent citizen accused of crime in our state.

Presently in this state, there is no systematic approach to providing defense services in capital cases. There are no objective criteria to apply to identify those murder cases which are, or will become, capital cases. There are no incentives for district attorneys general to identify those cases in which they will seek death at the early stages of the prosecution. There is presently no system in place for the recruitment or training of attorneys who would be available for

appointment to represent indigent citizens accused of capital offenses, nor are there qualification or performance standards to guide the courts or counsel during the course of their representation. The same holds true for capital representation on appeal and in post-conviction proceedings. Defense services in capital cases are presently being provided on an *ad hoc* basis from judicial district to judicial district.

While the IDC has recommended qualification standards for counsel in death cases, and has also recommended a method for the assignment and supervision of counsel in these cases, the IDC will be studying the implementation of a system designed to provide early intervention of qualified counsel to handle the appeal of cases immediately following a jury returning a sentence of death, and prior to the preparation of a motion for new trial.

Many of the defects and delays in the implementation of a death sentence are caused by the lack of competent counsel at trial or on appeal. This results in protracted litigation both in state post-conviction proceedings and in federal habeas corpus proceedings. Competent and adequately compensated counsel for capital defendants at trial, as well as all stages of the appeal, would restore the state court proceedings, the trial and first tier appeal, as the "main event" in this process. Further, it would reduce the issues available for litigation at subsequent state post-conviction proceedings or in federal habeas hearings, thus reducing delay and the associated costs in the process. Further, we believe that the appellate courts of the State would benefit from a process that would provide them with more thorough direct appeal with better briefing of the issues, and some assurance that the court would be provided the latest precedent on each issue. Therefore, the Court of Criminal Appeals would be made more effective and the issues would be better defined when the case goes on to the Supreme Court.

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

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

In those few cases where a death sentence is returned, however, the IDC will soon be meeting to discuss the recommendation of a pilot program for the appointment of appellate counsel in capital cases. The Commission on Public Advocacy would qualify and publish a list of qualified counsel to serve as lead counsel on direct appeal in capital cases, to be appointed immediately after a death sentence has been returned by a jury, but prior to the preparation of the motion for new trial. From the pool of attorneys established by the Commission on Public Advocacy, the Capital Litigation Defender's Office would appoint an attorney to assume the role of lead counsel on direct appeal.