



# *Administrative Office of the Courts*

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## **MEMORANDUM**

**TO:** Attorneys Submitting Fee Claims to the AOC

**FROM:** Joseph K. Byrd, Lead Attorney (Indigent Services Team)

**DATE:** August 8, 2024

**RE:** Policies & Guidance for Submission of Attorney Fee Claims

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This memorandum replaces the (corrected) memorandum dated September 18, 2023, regarding submission of fee claims. Please carefully review the content below for potential changes or clarifications made since the previous memoranda. The policies/procedures have been established to assist claimants and AOC staff with auditing requirements and streamlining the payment of claims. Please ensure your claim complies with the following non-exhaustive list of requirements in addition to all of the requirements listed in Tennessee Supreme Court Rule 13 ("Rule 13"). Also, please review the separate Memorandum related to expenses.

### **Appointment Orders**

- An appointment order *must* include:
  - the style of the case, including the docket or case number of the court for which the case is being submitted (multiple case numbers can be entered on the properties tab for those cases that proceed to appellate review);
  - the client's name;
  - a finding of indigency (unless appointed as a Guardian ad Litem in a child welfare case);
  - a statement showing you were appointed: and
  - the judge's signature and date.

This information must be correctly reflected on the Properties page in ACAP.

- Except in capital first-degree murder cases, only one attorney may be appointed to represent an indigent client at any given time. In capital murder cases, a lead counsel and co-counsel must be appointed. If the notice of intent to seek the death penalty is withdrawn at least 30 days from the trial, one of the attorneys must be relieved. (Tenn. Sup. Ct. R. 13, Sec. 3(b)(1)-(2)).
- R. 13, Sec. 1(e)(5) provides that appointed counsel shall continue to represent the client throughout the proceedings, including any appeal, until the case is concluded, or counsel has been allowed to withdraw by a court. Accordingly, only one appointment order is **required** and can be used through the various phases of a case. The order must be uploaded with each claim for which it applies (trial, court of appeals, etc.). This does not prohibit another court from entering its own separate appointment order (e.g., criminal court enters an appointment order separate from the appointment order entered by the general sessions court). If a court does enter a new order, the new appointment order should be uploaded.
- If the appointment order of the trial court is being uploaded for the appellate claim, be sure to enter the appellate case number in the properties tab of the appellate claim along with the trial court docket or case number.

#### **Exceptions to one appointment order:**

- **Probation Violation cases:** In order to keep ACAP from triggering a duplicate claim or interim billing, when submitting a fee claim for a second or subsequent probation violation with the same case number which is not required to be combined in a single claim, please obtain and upload a new appointment order.
- **Where the underlying case in a claim ends in mistrial** (see below).
- **When a general sessions case is bound over but the defendant is not yet indicted** (see below).
- **It is no longer necessary to redact Personal Identifying Information (PII) in orders and motions.** However, PII (e.g., birthdates, social security numbers, and checking account numbers) on all other documents such as invoices) must be redacted before submitting your fee claim.

#### **Combining Claims**

- Claims must be combined into a single claim where (1) the court has consolidated the actions underlying the claims; or (2) where criminal charges against an indigent defendant are heard at the same proceeding. (IST Policy #06-002-2023)
- Interim billing for non-capital cases is not permitted. (Tenn. Sup. Ct. R. 13, Sec. 6(a)(5). Claims for activities that should have been included in a previously submitted claim will be denied. The only exception regarding interim billing is capital first degree murder cases

which must interim bill for at least every 180 days but no more frequently than every 30 days. (Tenn. Sup. Ct. R. 13, Sec 6(a)(4))

### **Information on the Properties Tab**

- In criminal matters, be sure to enter the sentence and the disposition.
- When representing a parent in a dependency and neglect or termination of parental rights proceeding, list both the parent's and the child's name on the properties tab in ACAP. When appointed as Guardian ad Litem, enter the child(ren)'s name(s) on the properties tab.
- The birthdate of the minor child in a dependency & neglect or termination of parental rights case must be entered on the properties tab to support the claim was for a minor as required by the Comptroller's Office in its audit of the AOC.
- If a judge has signed an order declaring the case is complex or extended, check the complex box on the Properties page and upload the signed extended/complex order when prompted in ACAP.

### **Disposition Date**

- Tenn. Sup. Ct. R. 13, Sec. 6(a)(5) requires that in all non-capital cases, claims must be filed no later than 180 days from the date of disposition. The only exception are claims for post-dispositional (Phase 2) dependency and neglect cases – the 180-day submission period begins to run on the date of last activity for those claims.
- The date of the “disposition of the case” is the filed stamp date on a final order which (1) resolves all the parties' claims without any contingency; (2) has been signed by the Judge presiding over the case; and (3) filed by the court clerk for entry. (IST Policy # 06-003-2023)
- When the deadline for filing a claim is on a Saturday or Sunday or legal holiday defined in Tenn. Code Ann. § 15-1-101, a claim filed on the next business day will be construed as timely. (IST Policy # 06-006-2024)
- Pursuant to Tenn. Sup. Ct. R. 13, Sec. 6(a)(6), the AOC may require claimants to provide copies of orders to support the disposition date entered on the properties tab to verify timeliness of a claim. When the claim states that the case was disposed of by final order/judgment entered several weeks after your last appearance in court, upload a date-stamped copy of the final order. *A claim may be submitted before the final order is entered, but the final order should be uploaded if it is available to avoid a claim being returned if there are questions regarding timeliness.*

## **Activities Entered on a Claim**

- Attorney fee claims must identify the time appointed counsel expended on each activity. Attorney fee claims may only seek compensation for time appointed counsel spent on case-related work. Time spent recording or entering your time or communicating with the AOC is non-compensable. *However, you may enter time for drafting motions and proposed orders for complex and extended claims – even if these activities are after the disposition of the case.*
- Time *must* be recorded in tenths, or six-minute increments. Time cannot be recorded in half-hour or hourly increments. Recording time in half-hour or hourly increments (“block billing”) will generally result in having a claim returned for revision and can result in a comprehensive audit of your billing practices.
- When claiming compensation for time spent on an activity that appears excessive, such as a two-hour phone call, please explain why the additional time was necessary.
- Only .5 will be allowed for opening or closing a file without a clear explanation as to why a particular file required more than .5 hours to create or close.
- “In-court” time must be entered separately from out of court time. When claiming time for “in-court” activities, you must describe the activity, such as the type of hearing, a continuance, etc. Simply listing “in court” or “docket call” as the activity is not sufficient. Additionally, time for in-court activity is only for time you are engaged with the judge or trying the case before a jury/judge. Time talking to a client or waiting for the case to be called should be entered as out of court time, even though you were physically in the court room. In court hours are aggregated in various reports and must be entered apart from out of court time. Where an attorney has several clients in the same hearing day, the total time may be proportionately entered for each client (e.g., at docket call Attorney A had four clients and spent a total of one hour at the hearing, she may enter .25 hour for each client for that date.
- Claiming 0.1 for each text/email that is sent/received is not allowed. You must aggregate your time for these activities. Failure to aggregate your time for these activities may result in a comprehensive audit of your billing practices.
- Attorneys are capped at claiming 2,000 hours per year under R. 13, Sec. 2(f). The only exception is when the Director determines an attorney, who is working on a capital case, has made a reasonable effort to comply with the rule and could not comply. Auditors will reduce all other claims accordingly after attorneys reach the 2,000-hour cap.

## **Contemporaneous Time Records**

- Tenn. Sup. Ct. R. 13, Sec. 6(a)(6) provides:

Counsel will be held to a high degree of care in the keeping of contemporaneous time records supporting all claims and in the application for payment. Counsel is required to maintain records supporting claims for payment. Failure to provide sufficient specificity in the claim or supporting documentation may constitute grounds for denial of the claim for compensation or reimbursement.

- It is recognized that counsel will not be jotting down a time entry note while in court or at trial. Often, quick hand-written notes will remind counsel to enter time entries into a system once back at the office, usually within that day or close to that period.
- Time records should be either hand-written and maintained in the client file or entered into a case/time management software system that counsel can access and produce as a record of activities and time spent on a case. Counsel should not enter time in ACAP and rely upon those entries as their contemporaneous time records because when there are questions regarding a claim, contemporaneous time records may be required to support the information entered for the claim.
- Although Tenn. Sup. Ct. R. 13 does not state how long an attorney must maintain contemporaneous time records; a general rule of thumb is the “five-year rule.” Rule 1.15(b) of the *Tennessee Rules of Professional Responsibility* provides that “[c]omplete records of [client] funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.” Similarly, Tenn. Sup. Ct. R. 9, Sec. 35.1(a)(2) requires counsel to maintain client financial records for five years. *See also* the Tennessee Board of Professional Responsibility issued Opinion 2015-F-160(a) – Client Files, recommending a lawyer retain client files for five years after the termination of representation unless altered by agreement and/or the type of representation and contents of files.

### **Cases that End in Mistrial**

- Where the trial of the underlying case in a claim ends in a mistrial, the attorney may submit a separate claim for the new trial if it appears the time spent by the attorney in the case will meet or exceed the complex and extended cap for that claim. (IST Policy # 01-002-2024)
- Since the new claim after the mistrial will have the same docket number, ACAP will flag the claim as a duplicate. In these circumstances, appointed counsel should obtain a second appointment order that explains that the original trial ended in a mistrial, that he/she is appointed for the re-trial of the case, and that it appears that the time appointed counsel will be required to expend in the re-trial will exceed the complex and extended cap for the case.
- Because these cases are rare, when entering the new claim in ACAP for the re-trial, appointed counsel should enter a note in the activities tab and/or the history/comments

tab explaining how the original trial ended in mistrial and counsel was appointed to re-try the case.

### **Pending Grand Jury Claims**

- When a case in general sessions court is bound over to the grand jury and the defendant is incarcerated but the District Attorney has yet to seek an indictment from the grand jury, there could be additional work that the appointed attorney may need to do – primarily related to bail if an indictment is not issued in a reasonable period. Tenn. Sup. Ct. R. 13, Sec. 1(e)(5) provides that “appointed counsel shall continue to represent an indigent party throughout the proceedings, including any appeals, until the case has been concluded or counsel has been allowed to withdraw by a court.”
- In questions of bail, pursuant to Tenn. Code Ann. § 40-11-104, the General Sessions Court judge or magistrate has authority to determine the conditions of bail “at any time prior to or at the time the defendant is bound over to the grand jury.” The Circuit or Criminal Court has authority for such a determination at any time after the case is bound over and prior to conviction or thereafter.
- If the Circuit or Criminal Court takes up a bail question where the case is bound over but an indictment is not issued, that court should appoint the attorney in an appointment order for the purposes of the bail proceeding. Generally, a separate appointment order is not required, but to keep the claim for compensation clear in cases pending a grand jury, a separate appointment order is requested. The appointment order can cover the bail proceeding only or the case in circuit or criminal court if it continues forward.
- If the attorney is appointed only for the purposes of the bail proceeding, a claim can be filed for the time in that proceeding (within 180 days of the final order). The order of the court regarding bail or order granting permission for the attorney to withdraw will be sufficient as the final dispositional order for the claim. Attorneys should refer to the underlying charges in selecting the case type in ACAP.
- If the attorney is appointed to continue the case, the time for the bail proceeding, should be included in the claim for the circuit or criminal court case claim. If the delay in the issue of the indictment appears that it may extend beyond 180 days, the appointed attorney should request the court for an order granting permission to withdraw and file a claim using that order as the final order. The court can re-appoint the attorney when the indictment issues and both claims will be paid.

### **Complex and Extended Claims**

- R. 13, Sec. 2(e)(1)(E) requires that the order certifying that a case is complex and extended (“C&E orders”) **must** be signed contemporaneously with the court’s approval of the claim. C&E orders must be dated prior to or on the date the judge/magistrate approves the claim in ACAP. Under Sec. 2(e)(1)(E), *nunc pro tunc* certification orders **are not** sufficient to support payment under this section.

- R. 13, Sec. 2(e)(1)(E) requires the order must recite specific facts supporting a finding that a case is complex and extended or incorporate by reference and attach the motion which includes the facts supporting the motion. Attorneys should draft proposed C&E orders reciting the specific facts supporting the court’s finding that a case is complex and extended or make sure to upload the written motion that does recite the facts.
- In non-capital first degree murder cases, the default cap is \$6,000. If attorneys desire to have the Director consider waving the cap as set out in R. 13, Sec. 2(e)(3)(E), the C&E order **must demonstrate that extraordinary circumstances exist and *failure to waive the maximum would result in hardship.***

### **Denial of Claims**

- If certain claims are denied or substantially reduced, the attorney may seek to have the denial in those limited circumstances transmitted to the Chief Justice for review. The limited circumstances are:
  - Where payment for complex and extended claim is denied (Tenn. Sup. Ct. R. 13, Sec. 2(e)(2))
  - Where payment for an expert or investigator is denied (Tenn. Sup. Ct. R. 13, Sec. 5(e)(5))
  - Where the director (AOC) denies a claim in whole or in substantial part (Tenn. Sup. Ct. R. 13, Sec. 6(b)(5))
- **Claims reduced or denied by the Administrative Office of the Courts because they are requests for payments that are clearly not permitted by Tenn. Sup. Ct. R. 13, will not be transmitted to the Chief Justice.** (IST Policy #06-005-2024) (*see* Tenn. Sup. Ct. R. 13, Sec. 6(b)(5): “. . . **Reductions** made during the process of auditing a fee claim which are due to mathematical miscalculation or **result from requests for payments not permitted by this rule shall not be forwarded to the chief justice for review.**”)

### **Over Claim Audits**

- For several years, the AOC has been required by the Comptroller’s Office to scrutinize claims for potential overbilling. To effectuate that process, ACAP is set to trigger an “over claim” when an attorney claims more than 8 hours of in court time in one day or more than 12 hours total in one day. The trigger does not mean the claim is rejected, it means a more comprehensive review must be conducted and supporting documents and/or an affidavit from the attorney must be submitted for the AOC to approve the claims. (IST Policies #06-001-2023 and #06-002-2023).

- The AOC Compliance Officer will send an email notice to the attorney requesting the additional support information within two weeks (ten business days) of the notice. The response affidavit may be a simple explanation or lengthier document sent with a number of supporting documents depending on the circumstances.
- Attorneys who fail to respond by the deadline set by the Compliance Officer will receive a final notice from the Lead Attorney stating that a response must be received within 30 days from date of the final notice or the claims will be denied. If the claim is denied and the attorney requests the review of her/his claim by the Chief Justice as set out in R. 13, Sec. 6(b)(5), that request must be received within 10 days of the notice of denial, or the review is waived. (IST Policy #06-002-2023). The Chief Justice will only review the claim as entered into ACAP and the supporting records submitted by the attorney up to the issuance of the denial, no additional documents or arguments from the attorney will be transmitted to the Chief Justice. The decision of Chief Justice is final.