



# PLAN FOR INDIGENT REPRESENTATION IN TENNESSEE

## **Background:**

The challenges the Tennessee Court System faces in providing indigent representation and the challenges the Administrative Office of the Courts (“AOC”) faces in administering the program were addressed in the 2017 Indigent Representation Taskforce Report, *“Liberty & Justice for All.”* The Report recognized, among other things, that best efforts have been used by all to fulfill the obligation of government to secure the right to counsel in Tennessee. However, more could be done to improve accountability and enable better cost control.

This Plan for Indigent Representation in Tennessee (“the Plan”) seeks to provide additional management and oversight to the program to ensure representation is available when needed. It will allow the work of the AOC, the courts, the District Public Defenders, the District Attorneys General, and the private attorneys accepting appointments to be more efficient and effective as the need for indigent legal representation continues to grow in both the criminal and juvenile justice systems.

As Tennessee works to ensure the court system has the support needed to administer justice, the lack of experienced and qualified attorneys willing to take indigent representation appointments requires continued focus. In the 2024 Court System Performance Audit, the Comptroller identified the Indigent Representation Program as a “Matter for Consideration.” The report noted that the Tennessee Court System continues to face challenges in providing representation to indigent individuals who are constitutionally or statutorily entitled to the appointment of counsel. The two main issues identified by the Comptroller were 1) low attorney compensation rates and 2) a lack of private attorneys willing to accept and work these cases. The Comptroller concluded that the Indigent Representation Program compensation plan may impact the state’s ability to provide representation to citizens who have a constitutional or statutory right to counsel, and the private attorney fee structure should be analyzed.

During last year’s effort to increase the attorney compensation to a rate within the range recommended by the Taskforce Report, specifically \$75-\$125/hour, the AOC was encouraged to consider other alternatives. After researching other states, engaging with the Comptroller for the

above-mentioned 2024 Court System Performance Audit, and discussions with many Tennessee stakeholders, the AOC is presenting this Plan for Indigent Representation in Tennessee (“the Plan”) designed to ensure the State can continue to meet its obligations under the law.

### **Indigent Representation Program Oversight and Operations**

Tennessee and Florida are the only states with a non-unified elected public defender (“PD”) system. In 2007, because of the burgeoning cost of indigent legal services and the inability to predict or manage the year-to-year expenses of their system, the Florida legislature created the Offices of Criminal Conflict and Civil Regional Counsel (RCC) to handle criminal conflicts and civil appointments. Using this Florida system as the model, the Tennessee Supreme Court would establish an “Office of Indigent Conflicts and Civil Counsel” (“the Office”) with oversight by an “Indigent Representation Commission”. The Commission would be governed by Tennessee Supreme Court Rule and provide oversight for those aspects of indigent representation that presently rests largely with the courts.

The concept of a commission with responsibility for oversight of indigent representation is not new. The 2017 Taskforce Report recommended a similar approach. By establishing a Commission to oversee the operations of indigent representation, the State can 1) ensure adequate representation of eligible adults and juveniles through employed attorneys, 2) contract for representation with individual private attorneys or through arrangements with law firms, 3) set attorney compensation rates based on case-types, 4) develop case type specific training for attorneys, and 5) enforce performance standards for the representation. The Commission will function similarly to the Board of Professional Responsibility and it will provide guidance for policies and fiscal accountability. The Commission will consider policies to further verify the financial status of individuals claiming indigence to ensure eligibility for appointed counsel. In addition to an affidavit of indigency, it may be possible to conduct random audits or spot checks to verify that individuals who have claimed indigency are not hiding income or assets.

The Commission would oversee the Office to ensure qualified legal representation is available when the District Public Defender has a conflict or in juvenile matters that fall outside of the jurisdiction of the District Public Defenders. Today, the responsibility to obtain legal representation in these instances falls to the judges presiding over the cases. The Office would provide for the appointments in all indigent conflict cases, which accounts for approximately 1/4 of criminal cases and those cases where the District Public Defender’s office does not provide representation (e.g. child welfare cases). Judges presiding over these cases will no longer be tasked with appointing attorneys in these cases. By doing so, the Office will eliminate any potential or perceived conflict by removing judges from appointing counsel.

The Office would be organized as follows: one executive director to oversee the program; and three divisional attorneys - one in each grand division – to provide oversight and management in the grand division and provide representation in several cases. The executive director will provide statewide executive function for the Office; manage the budget; employ attorneys, experts, and investigators; develop training and education for attorneys; coordinate with the AOC for fiscal, information technology, and human resources support to carry out the purposes of the Office; and

provide oversight for attorneys under hourly contracts where the divisional attorney is conflicted out in a case.

Based on FY23 indigent claims data, the Office would manage an estimated 76,000 cases each year. Each divisional attorney will manage the workload in the division by employing up to two additional full-time attorneys or up to four part-time attorneys. All attorneys will maintain a caseload, including the divisional counsel. The divisional counsel will complement the work of his/her office by contracting with attorneys and/or law firms. The strategic use of various types of contracts based on the type of case will be more effective and efficient than the current process of auditing claims for compliance and paying claims as they arise. The types of contracts will include retainer agreements which outline the scope of the representation and set a compensation rate, flat fee contracts which guarantee a certain fee regardless of time or scope, and hourly rate contracts which may include a total number of hours and set a specific rate of compensation per hour. The divisional attorneys will work with judges and the legal community in their grand division to identify and manage the process of obtaining attorneys willing to contract for services.

The development, transition, and implementation of this Office would likely take 2 to 3 years, which will evolve in phases focusing on areas of greatest need first.

### **Indigent Representation Program Cost**

Currently, the AOC receives recurring funding for indigent representation equal to \$64.4M (\$11.0M Guardian ad Litem and \$53.4M for Indigent Defendants' Counsel). Historically, the Indigent Program expends approximately 99% of all funds appropriated in claims paid to attorneys, experts, and investigators. The nature of a claims-based payment system is the inability to predict expenditures. The Plan will enable controls over costs through employment and contracting and enable a greater ability to manage costs.

The implementation of the Plan will require an additional recurring appropriation of \$17 million. The additional funding will be used to organize, employ staff, purchase software to manage cases and begin contracting with attorneys. As the Plan matures, dollars used today to pay claims will be available to expand the contracting options incrementally. Likewise, as the Plan matures, positions currently dedicated to auditing and paying claims can be transferred to meet the needs of the Office of Indigent Conflict and Civil Counsel.

### **Expected Outcomes**

- **Increase the number of attorneys willing to accept appointments.** The Plan will increase the availability of legal counsel for appointment to cases where the Public Defender's Office is conflicted out of a case or the representation is beyond the scope of that office (e.g. child welfare cases). The strategic use of retainer, flat fee, and hourly rate contracts is attractive to attorneys and will increase the number of qualified attorneys willing to accept appointments. As set out in the Tennessee Comptroller's 2024 Performance Audit Report, attorneys have indicated that under the current system, they do not seek appointments because of the low rates and length of time it takes to receive compensation (i.e., claims cannot be filed until the conclusion of the case and then must go

through a review process that takes between 30-45 days for payments to be remitted). The contract model will address that by providing compensation on a more regular basis. Increasing the number of attorneys willing to take these cases will resolve delays in court proceedings due to the unavailability of attorneys willing to accept the representation.

- **Enhance the quality of representation by providing training and mentorship for attorneys, particularly in more complex matters.** Concerns over the quality of representation are frequently communicated to the AOC (e.g., 2017 *Indigent Representation Task Force Report*). The Office will develop case-type specific training and continuing education to support the quality of indigent representation. The Office will also encourage mentorship-type relationships by compensating attorneys when they provide such help.
- **Adopt a targeted approach to focus on complex cases and smaller rural communities to build capacity.** The AOC has been encouraged to address the needs of smaller and rural communities by contracting with attorneys. The proposal gives the Office the flexibility and stability to focus on those areas as well as other areas requiring tailored solutions.
- **Create an organizational structure to enable better management of costs.** The current system lacks budgetary management closer to the trial level where costs are generated, essentially leaving the AOC with the role of reviewing compliance with court rules and policies. Despite recent efforts in the last six years, the AOC continues to be challenged by the need to increase attorney compensation for the representation of individuals who are constitutionally or statutorily entitled to the appointment of legal counsel and the inability to manage or budget for the expenditures.
- **Eliminate the use of judge time to find attorneys to appoint to cases.** Today, the responsibility to obtain legal representation in criminal conflict cases and child welfare cases falls to the judges presiding over those cases. In the Plan, judges will rely on the Office to secure representation and will no longer be tasked with finding attorneys to appoint. By doing so, the Office will eliminate any potential or perceived conflict by removing judges from appointing counsel.
- **A study of possible methods to double-check indigency determinations.** Determining indigency is inherently variable, as it requires assessing an individual's income, assets, and debts while also taking into account the complexity and demands of the future case. Further, the appointing court must weigh the balance of court efficiency with the state's interest. With this in mind, the Commission will consider possibilities to verify indigency beyond the affidavit of indigency.