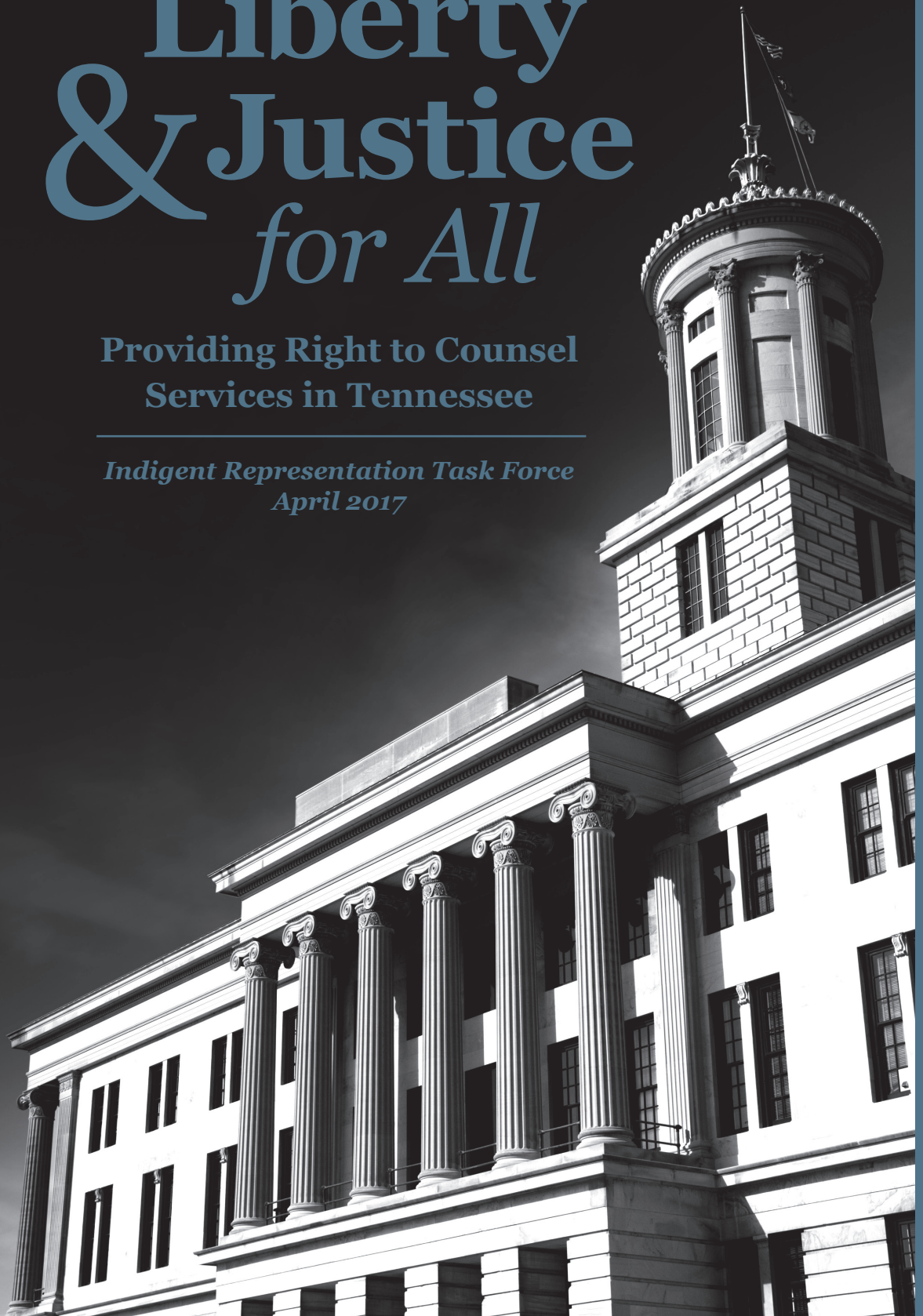


Liberty & Justice *for All*

Providing Right to Counsel
Services in Tennessee

*Indigent Representation Task Force
April 2017*



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Introduction

Tennessee’s programs providing legal assistance to eligible adults and children touch the lives of thousands of Tennesseans every day. Not only do they protect the liberty of persons accused of crime, but, by doing so, they protect the interests of their families. They protect children whose futures are clouded by delinquency or whose well-being is undermined by neglect, abuse, and abandonment. They protect those facing involuntary hospitalization or the loss of their children. In short, these programs reflect our collective belief that all Tennesseans should be treated fairly when the government seeks to interfere with their most fundamental rights and liberties.

The Tennessee Supreme Court created the Indigent Representation Task Force in October 2015. The Court requested the Task Force review the current manner in which Tennessee is fulfilling its legal obligation to ensure that eligible adults and children receive appropriate representation. Noting the dual demands for effective representation and for accountability to the public, the Court requested the Task Force to submit findings regarding the manner in which counsel is currently being provided and to recommend specific steps to buttress and improve the current system while ensuring eligible adults and children receive appropriate legal representation in the future.

Since its creation, the Task Force has held nine public meetings in Nashville and has conducted lengthy listening sessions in eight urban and rural locations throughout Tennessee. During these meetings and listening sessions, the Task Force has received information from lawyers, judges, court clerks, elected officials, legal and judicial organizations, and members of the public. In addition, it has reviewed prior studies and reports concerning the manner in which Tennessee has provided legal representation to eligible adults and juveniles. The Task Force has also considered reports of similar task forces in other states, as well as standards and recommendations developed by national organizations with experience and expertise regarding the provision of legal services.

The members of the Task Force are grateful to all who have participated in its meetings and listening sessions and to those who have otherwise submitted information for our consideration. We are particularly grateful for the many contributions of the members of our Advisory Council – and the U.S. Department of Justice, Bureau of Justice Assistance, National Training and Technical Assistance Center, for providing research and consulting services through the Sixth Amendment Center.*

Indigent Representation Task Force
April 2017

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Preface

For the signers of the Declaration of Independence, “liberty” reflected their belief that all persons should be able to live their lives free from unreasonable government interference. In fact, the framers of the United States Constitution believed that “liberty” is so central to American democracy that they created our Bill of Rights as a bulwark against encroachment by the government.

Preeminent in the Bill of Rights is the principle that the government must use fundamentally fair procedures when it seeks to take away any person’s liberty. The right to a jury composed of ordinary persons, the protection against self-incrimination, and the right to be represented by a lawyer are all essential ingredients of American justice enshrined in the Bill of Rights.

The drafters of the Constitution of Tennessee were equally committed to protecting liberty from government encroachment. Since 1796, our constitution has explicitly recognized the right to a jury trial, the protection against self-incrimination, and the right of persons accused of crime “to be heard by himself and his counsel.”³

In 1881, the Tennessee Supreme Court construed the Constitution of Tennessee to require that lawyers be given sufficient time to prepare their client’s case.⁴ Later, while recognizing the importance of punishing persons who commit crimes, the Tennessee Supreme Court emphasized the “transcendent importance that the basic principles of justice and the constitutional right to a fair trial be observed, including the timely right to representa-

tion by counsel, without unreasonable interference or limitation.”⁵

In 1963, the United States Supreme Court decided in *Gideon v. Wainwright* that the Sixth Amendment requires the government to provide a lawyer to persons facing criminal charges who cannot afford to hire a lawyer.⁶ In later decisions, the Court emphasized that government-provided lawyers must have the time, training, and resources to be able to represent their clients effectively.⁷ The scope of Tennessee’s constitutional protection of the right to effective assistance of counsel is the same as the scope of the protection afforded by the Sixth Amendment.⁸

The obligation for complying with the requirements of the Sixth Amendment and Article I, Section 9 of the Tennessee Constitution falls on the State of Tennessee.⁹ This does not mean that the State must shoulder this burden alone or that local governments have no responsibility for securing the right to counsel. However, even when local governments take on part of the responsibility for providing counsel, the State retains the obligation to see to it that they are in fact doing so.

The stakeholders in Tennessee’s criminal and juvenile justice systems – the courts, the District Public Defenders, the District Attorneys General, appointed private counsel, and law enforcement authorities – understand and respect the requirements of the Sixth Amendment and Article I, Section 9. There is no question that all of them are using their best efforts to fulfill their professional obligations as effectively and efficiently as possible.

However, their ability to continue to do their work effectively and efficiently is not sustainable without receiving additional resources. The current circumstances are not the result of deliberate indifference on the part of Tennessee's decision-makers. Rather, they reflect the dramatic increase in the ratio of cases to the justice system's capacity during the 20th century. Among the causes for this increase are:

- ◆ The increase in the number of new criminal offenses without the provision of new resources to process the new cases;
- ◆ The changes in federal law increasing the number of parents and children caught up in dependent and neglect and termination of parental rights proceedings;
- ◆ The judicial system's slowness to employ new technologies to streamline the process;
- ◆ The circumstances and pressures of modern life that have generated more crime in many communities;
- ◆ The increased formality and complexity of judicial proceedings caused by the constitutional requirements of fairness and due process; and
- ◆ The policymakers' continued focus on the needs of the individual stakeholders rather than the needs of the judicial system as a whole.

When *Gideon v. Wainwright* was decided in 1963, guilt or innocence was determined by a jury following a trial in which both sides presented their evidence and a judge saw to it that the proceedings were fair. Today's reality is different. Because of their large caseloads, prosecutors and defense attorneys have a strong incentive to plead out their cases as quickly as possible with only minimal judicial oversight. As a result, 94% of the convictions in state courts nationwide are the result of guilty pleas.¹⁰ These proceedings often resemble "an assembly line in which defendants are processed as quickly and as cheaply as possible."¹¹

The Task Force understands that Tennessee's multi-million dollar programs providing legal assistance to eligible adults and children require effective management and oversight. The public has the right to expect that these services are being provided as efficiently and cost-effectively as possible. In addition to maintaining and improving the quality of these services, the recommendations in this report will result in more transparency and accountability, thereby improving the ability to control costs.

As noted by the Tennessee Supreme Court over 70 years ago, Tennessee's justice system recognizes the "transcendent importance" of the constitutional right to a fair trial and the right to counsel. The recommendations in this report are intended to provide Tennessee's policymakers with a road map which, if followed, will enable Tennessee to continue to provide, in the lofty words of the Pledge of Allegiance, "liberty and justice for all."

Executive Summary

Tennessee’s programs providing legal assistance to eligible adults and children touch the lives of thousands of adults and children every day. At times when these persons are most vulnerable, they protect their liberties from unreasonable governmental interference. By leveling the playing field, these programs ensure that judicial proceedings are fundamentally fair.

Historically, the responsibility for administering these programs has been divided among several independent state and local government agencies. This division of responsibility has (1) introduced complexity in the management, coordination, and oversight of these programs, (2) frustrated the consistent application of statewide rules and procedures, and (3) blunted the programs’ ability to obtain funding.

Over the past 18 months, the Task Force held meetings around the state to obtain first-hand information from those who work in Tennessee’s criminal, juvenile justice, and child welfare programs. There is no doubt that these persons – the judges, the prosecutors, the public defenders, the appointed private counsel, and the law enforcement officials – are using their best efforts to fulfill their professional obligations as effectively and efficiently as possible.

The information gathered by the Task Force established that there has been a dramatic increase in the ratio of cases to the justice system’s capacity during the past 20 years. While the system has used its best efforts to manage the increasing caseload, its ability to continue

doing so is not sustainable without additional resources.

This report not only contains recommendations regarding much-needed additional resources but also recommendations that, if adopted, will (1) promote statewide uniformity in the programs providing legal assistance; (2) improve the quality of legal assistance being provided; and (3) enhance the management and oversight of these programs. These recommendations include:

- ◆ Completing a statewide data and reporting system to ensure the availability of timely and complete information required to manage and oversee the programs;
- ◆ Seriously considering the creation of an independent central commission to oversee all programs providing legal representation to eligible adults and children and transferring current programs to the new commission;
- ◆ Developing and implementing uniform statewide criteria and procedures for determining eligibility for services;
- ◆ Amending Tenn. Sup. Ct. R. 13 to eliminate the distinction between out-of-court and in-court compensation rates, to eliminate case caps and the “complex and extended” designation procedure, and to increase the rate paid to appointed private counsel to an hourly rate not less than \$75 nor more than \$125;

- ◆ Enacting a statutory requirement that public defenders be appointed to represent eligible parties in criminal and delinquency proceedings unless the public defender has a conflict of interest;
- ◆ Appropriating sufficient funds to the District Public Defenders to enable them to represent as many defendants in criminal proceedings and children in delinquency proceedings as possible;
- ◆ Considering alternatives to appointing private counsel in cases where the District Public Defender has a conflict of interest; and
- ◆ Adjusting Tenn. Sup. Ct. R. 13's caps on compensation paid to experts to market rates.

During the course of its work, the Task Force received information regarding six issues that did not fall directly within the scope of its charge, but nonetheless could have significant impact on Tennessee's ability to continue to provide effective

representation to eligible adults and children. These issues include:

- ◆ Digitalization of court records;
- ◆ Incarceration for failure to pay fines and fees;
- ◆ Children waiving their right to counsel;
- ◆ Pretrial release and the reliance on commercial bail bondsmen;
- ◆ Sentencing reform; and
- ◆ Issues relating to the funding of representation services, including (a) the heavy reliance on fees and taxes to fund the courts, (b) the allocation of state funding among the District Public Defenders, and (c) the respective funding responsibilities of the state and local governments.

The Task Force has described these issues and recommends that the State's policymakers address them in another forum.



1

Does Tennessee currently have in place a uniform system for reporting the caseload, caseflow, workload, and other information necessary to fund and manage a statewide program to provide legal representation to eligible adults and children?

Legal Background

For over 20 years, the Administrative Office of the Courts (AOC) has had the statutory duty to gather and publish uniform statistical information regarding the caseloads in Tennessee’s courts.¹² Despite this mandate, the AOC has been unable to put a statewide recordkeeping system in place due to the following impediments: (1) the diffusion of authority and accountability caused by shared state and local control and funding of the courts; (2) inadequate funding; and (3) the use of proprietary, incompatible systems by the stakeholders and clerks.

In 1999, consultants retained by the Comptroller of the Treasury (Comptroller) noted “the existence of four different case-tracking systems and the lack of uniform case-tracking practices and procedures throughout the state [that] made the task of compiling annual caseload statistics difficult.”¹³ Stressing the programmatic importance and potential cost savings that could result from collaborative approaches to caseload reporting, the consultants recommended (1) that the 31 District Public Defenders offices should adopt a uniform case-tracking system rather than maintaining incompatible systems; (2) that the District Public Defenders’ case-tracking system should be integrated into the AOC’s case-tracking system; and (3) that the case-tracking systems of the courts,

the prosecutors, and the District Public Defenders should be consolidated.¹⁴

Thereafter, the General Assembly created and funded the Tennessee Court Information System (TnCIS) to provide an integrated case management and accounting system for the clerks of the general sessions, chancery, circuit, and juvenile courts.¹⁵ The expressed purposes of TnCIS were to address the statutory responsibilities of the clerks and to provide statewide reporting and data transfer capabilities for the AOC.¹⁶

In 2001, the Comptroller declined to update the 1999 District Public Defenders’ weighted caseload study because “Tennessee lacks standard caseload data from general sessions courts.”¹⁷ To address this issue, the Comptroller recommended (1) creating a data repository to collect general sessions caseload data statewide and (2) requiring the general sessions courts to report caseload data to the AOC using a standard definition of a case.

Legislators and general sessions courts questioned the Tennessee Supreme Court’s authority to require general sessions courts to report caseload information to the AOC. In 2001, after the Attorney General and Reporter confirmed that the Supreme Court could require general sessions courts to report caseload information,¹⁸ the General Assembly:

- ◆ Directed the AOC to “collect, develop, and maintain uniform statistical information relative to court caseloads in Tennessee;”¹⁹
- ◆ Empowered the AOC “to develop, define, update, and disseminate standard uniform measures, definitions, and criteria for collecting statistics pertaining to the court system;”
- ◆ Directed that “all courts throughout the state” would be required to adhere to these standards;²⁰
- ◆ Enacted standard definitions of “criminal case”²¹ and “civil case” applicable to all courts except juvenile courts;²² and
- ◆ Directed the general sessions courts and municipal courts exercising general sessions jurisdiction to collect and provide caseload data to the AOC, beginning on July 1, 2003 or sooner if practicable.²³

In January 2007, the Comptroller’s Office of Research and Education Accountability issued an updated District Public Defenders’ weighted caseload study for the 2005-2006 fiscal year. This report noted that the courts continued to lack a uniform information system to collect disposition data and that the information systems used by the public defenders in Tennessee’s four most populous counties and by the Tennessee Council of Juvenile and Family Court Judges were not integrated with TnCIS.²⁴ The report again recommended the integration of the District Public Defenders’ caseload tracking systems with TnCIS.²⁵

In a memorandum to the Lieutenant Governor and Speaker of the House dated March 26, 2015, the Comptroller again declined further attempts to update the District Public Defenders’ weighted caseload study. Stating that weighted caseload studies require “accurate estimates based on current circumstances and comparable case load data,” the memorandum pointed to the “lack of accurate and consistent General Sessions criminal case data” and the “lack of a consistent case definition for reporting criminal cases.”²⁶

The Comptroller returned to the lack of a statewide, uniform caseload management system in its 2015 audit of Tennessee’s courts. The audit noted that the implementation of such a system would:

- ◆ Improve the accuracy of the data collected by the AOC;
- ◆ Enable the Comptroller to complete the weighted caseload studies;
- ◆ Provide the General Assembly with more accurate information; and
- ◆ Enable the courts to better manage the current caseloads.²⁷

The Tennessee Supreme Court and the AOC concurred with the Comptroller’s assessment of the value of a uniform caseload reporting system and the creation of a data repository for all general sessions courts. Noting the expense and complexity of the undertaking, they committed to “proceed[ing] expeditiously, with the appropriate amount of precision” to put a data collection system in place that “delivers the necessary results for the Judiciary, the General Assembly, and all policymakers in this arena.”²⁸

Summary of Information Obtained by the Task Force

Tennessee's duty to protect constitutional rights by providing legal representation to eligible adults and children is a complex undertaking. It cannot be effectively managed and its costs cannot be controlled or predicted without empirical, evidence-based data. Timely and accurate data:

- ◆ Helps identify deficiencies in the system;
- ◆ Provides funders with the quantitative data to support budget requests;
- ◆ Tracks caseloads; and
- ◆ Helps identify trends and develop appropriate responses.²⁹

With regard to the internal management of District Public Defender offices, data can be used internally to:

- ◆ Conduct intake and perform conflicts checks;
- ◆ Continuously monitor and manage workload;
- ◆ Track outcomes;
- ◆ Document the work done for clients;
- ◆ Develop and apply workload standards;
- ◆ Track attorney and other case-handlers' time; and
- ◆ Develop clear expectations and performance measures.³⁰

All of the speakers who addressed the need for a statewide, uniform caseload reporting system stressed the importance of the system and emphatically supported putting it in place. They agreed that uniform data would enable the stakeholders to manage their caseloads more effectively and would also enable them to provide current, accurate information to the policymakers regarding their ability to provide legal representation to eligible adults and children. They recognized that the cost of a reporting system presented a significant challenge, but they were hesitant to address how the system would be funded.

Several speakers pointed out the lack of enforcement mechanisms to ensure that caseload data is provided in a timely and accurate manner. Currently, the only explicit sanction to the failure to provide timely and accurate information to the AOC is notification of non-compliance; reporting of non-compliance to the Senate and House Judiciary Committees; the District Attorneys General Conference, and the District Public Defenders Conference; and refusal to accept additional data until the non-compliance is resolved.³¹ In addition, Tenn. Code Ann. § 16-1-117(a) mentions depriving clerks of fees for non-compliance but does not identify the fees at issue or the manner in which these fees would be suspended.

The AOC provided information regarding the status of the project to develop a statewide General Sessions Data Repository. In the 2013-2014 fiscal year, the AOC received \$1.25 million in non-recurring funds to conduct a study to determine the requirements for the repository. It formed the Tennessee General Sessions Data Group, and this group de-

veloped a precise definition of “criminal case” which was codified by the General Assembly in 2014.³²

The AOC contracted with the National Center for State Courts (NCSC) to develop a plan for the General Sessions Data Repository. The NCSC presented its final report in March 2015. In its August 2015 update, the NCSC projected a June 30, 2018 completion date for the project, assuming adequate funding, adequate staffing, and the timely completion of the design. The NCSC cautioned that “[i]f full resources are not provided, the plan and the schedule must be reworked.”

For FY 2015-2016, the General Assembly appropriated to the AOC an additional \$1.6 million for the General Sessions Data Repository. With these funds, the AOC plans to complete the development phase of the project, to begin testing at the first pilot site in September or October of 2017, and to begin the statewide rollout in December 2017 or January 2018.

In its 2017 report, the Tennessee General Assembly’s Juvenile Justice Realignment Task Force also recognized the importance of “more accurate, current, standardized, and comprehensive data across all sectors of the juvenile justice system.”

³³ The task force strongly emphasized the need for improvements in juvenile justice data collection. In three of its eight recommendations, the task force recommended: (1) creating a data working group;³⁴ (2) creating a data pilot project;³⁵ and (3) replacing the loss of federal funding of the AOC’s Court Improvement Program’s statewide data collection and court systems training initiatives.³⁶

Task Force Findings

The Task Force finds that Tennessee’s programs to provide legal representation to eligible adults and children cannot be managed effectively without a uniform statewide system for reporting caseload, case flow, workload, and other relevant information.

Recommendations

- 1. Design and installation of a statewide caseload management system, including the General Sessions Data Repository, should be completed as quickly as possible.**
- 2. The statewide caseload management system should incorporate uniform definitions and data elements to ensure that the data being collected is consistent and easily transferrable.**
- 3. In addition to the Comptroller’s audit power, the AOC should have clear authority to monitor and audit for compliance with the statewide data collecting and reporting standards.**
- 4. Specific statutory procedures and sanctions, including the forfeiture of fees, should be enacted to ensure compliance with the statewide data collecting and reporting standards.**



Is Tennessee efficiently and effectively overseeing its complex, multi-faceted system that provides the required legal representation to eligible adults and children?

Legal Background

Tennessee does not centrally administer the programs providing legal representation to eligible adults and children. As these programs have grown and matured, the responsibility for their oversight has been distributed among various state and local officials and agencies. Currently,

- ◆ The Administrative Office of the Courts (AOC) administers the program to compensate private counsel appointed under Tenn. Sup. Ct. R. 13;
- ◆ The District Public Defenders Conference independently oversees the state funding of the 31 District Public Defender offices;
- ◆ District Public Defenders have broad discretion over the administration of their office, including the services they provide;
- ◆ Certain county legislative bodies, mostly in urban counties, independently oversee the funding for the District Public Defenders; and
- ◆ State and local trial courts exercise wide discretion over eligibility determinations and appointments of counsel that has resulted in inconsistent local practices.

Summary of Information Obtained by the Task Force

The information provided to the Task Force reflects long-standing concern that (1) the lack of uniform policies and the uniform administration of these policies has impaired and continues to impair Tennessee's ability to provide appropriate representation services in an efficient, cost-effective, and accountable way; (2) the lack of a uniform voice regarding the needs of the entire system has left the various stakeholders with no option other than to compete with each other for available resources; and (3) the often-times competing funding requests have undermined efforts to obtain needed funding and resources. While the courts, the prosecutors, and the District Public Defenders work diligently to fulfill their professional obligations, their continued ability to do so will not be sustainable without additional resources.

Many other states have and are experiencing the same challenges that Tennessee faces. Information obtained by the Task Force shows that a majority of the states have addressed the need for a unified voice in setting policy, seeking funding, and overseeing programs by creating independent and accountable commissions that are responsible for managing right-to-counsel services. Indeed, thirty-four states have a commission in place. A summary describing each of these commissions is included in Appendix C to this report.³⁷

The composition of each of these commissions reflects each state’s unique legal culture and priorities. However, all of them endeavor to balance the essential constitutional right to independent counsel³⁸ and the public’s right to hold government programs accountable. Unlike other government employees, public defenders must exercise independent judgment on their clients’ behalf. They are not subject to direction by administrative superiors³⁹ or by the courts.⁴⁰ That is not to say that public defense providers must be left alone to do whatever they please without any accountability to the taxpayers. Many states have found that following the American Bar Association’s *Ten Principles of a Public Defense System*⁴¹ is an appropriate way to accommodate the goals of independence and accountability.

The scope of the duties and responsibilities vested in these commissions reflects the state’s needs and priorities. Twenty-one of the states have vested all the responsibility for representation services in a single agency. The duties and responsibilities customarily entrusted to these commissions include the obligation to:

- ◆ Direct provision of representation to eligible adults and children through their own attorneys and support staff;
- ◆ Contract for representation services with third parties, including individual attorneys and legal services organizations;
- ◆ Formulate uniform income and asset-based standards for the right to appointed counsel;
- ◆ Set compensation rates for appointed private counsel and experts and process their claims for payment;

- ◆ Set eligibility standards and certify private lawyers seeking appointments to represent eligible adults and juveniles;
- ◆ Develop and administer uniform training and performance standards;
- ◆ Set budgets and advocate for resources required to provide adequate representation of eligible adults and juveniles; and
- ◆ Maintain audit authority over all entities providing legal representation to eligible adults and juveniles.

The 13 remaining states have vested varying degrees of authority in their commission or board.

The concept of an independent commission with statewide responsibility is not new to Tennessee. Forty years ago, a study commissioned by the Executive Secretary of the Tennessee Supreme Court recommended the creation of an “organized defender agency.”⁴² Twenty years ago, an Indigent Defense Commission convened by the Tennessee Supreme Court recommended the creation of a Commission on Public Advocacy to oversee “all components of the indigent defense system.”⁴³ This report included detailed suggestions regarding the structure of the commission, its staffing and resources, and the scope of its duties and responsibilities.

In 2004, responding to the Tennessee Supreme Court’s invitation to comment on proposed amendments to Tenn. Sup. Ct. R. 13, the Tennessee Bar Association, the Tennessee District Public Defenders Conference, the Office of the Post-Conviction Defender, and the Tennessee Association of Criminal Defense Lawyers

filed joint comments addressing the need for a central commission.⁴⁴ They characterized Tennessee’s existing administrative framework as a “rules-based, locally administered, ad hoc non-system for administration of indigent defense services.”

Because they believed that the “significant issues relating to the administration and operation of a complex and ever-growing system of indigent representation are not within the power of the [District Public Defenders] Conference to resolve” and that a “far preferable system is one ... which brings active standards-based management and resources to the problem,” these organizations “strongly believe[d] that establishing a centralized administrative agency was crucial to the proper final resolution of many concerns ... presumably animating the proposed Rule 13.” They also stated:

The independent body approach ... 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.

In an attachment to their joint response, these organizations provided a proposed rule creating the Office of Tennessee Indigent Representation Services in the

Judicial Department. Section 2 of the draft rule stated the Office’s purpose was to:

- ◆ Enhance the oversight of delivery of counsel and related services provided at state expense;
- ◆ Improve the quality of representation and ensure the independence of counsel;
- ◆ Establish uniform policies and procedures for the delivery of services;
- ◆ Generate reliable statistical information in order to evaluate the services provided and funds expended; and
- ◆ Deliver services in the most efficient and cost-effective manner without sacrificing quality of representation.

The recommendations for the creation of an independent and accountable commission mirrored the admonishment in the Commission on the Future of the Tennessee Judicial System’s report that “[t]omorrow’s judicial system must be governed by strong, clearly defined and accountable management that will command public and legislative respect through effective use of public resources.”

The Tennessee Supreme Court responded to the request to exercise its rule-making authority to create an independent commission in an order filed on June 1, 2004. The Court observed that, at that time, six states had already established commissions by legislation and that these commissions “appear to be a creative and flexible solution to the difficult and complex issues raised by the need to administer indigent funding.” However, the Court also noted that the Tennessee District At-

torneys General Conference opposed the creation of a commission on the grounds that similar commissions' efficacy and legality were untested.

After noting that the commissions in other states had been created through a legislative process and that several of these commissions were new and untested, the Court declined to exercise its rule-making authority to establish an independent commission "at this time." However, the Court also stated that it would "begin a study of the commission approach" and that it would "invite the assistance of the Executive and Legislative Branches where appropriate."

Task Force Findings

The Task Force finds that the challenges relating to the provision of legal representation to eligible adults and children identified in the 2004 joint comments by the Tennessee Bar Association, the Tennessee District Public Defenders Conference, the Office of the Post-Conviction Defender, and the Tennessee Association of Criminal Defense Lawyers continue to exist today. Tennessee currently lacks:

- ◆ Uniform criteria or procedures for determining eligibility for representation by either a public defender or appointed private counsel;
- ◆ Statewide standards to ensure the quality of the legal representation being provided, including performance standards or uniform standards requiring certification of lawyers desiring to accept appointed cases;
- ◆ Uniform standards for determining when a conflict of interest arises;

- ◆ Uniform training and continuing legal education standards; and
- ◆ A unified approach to address all programs' funding needs.

Direct Provision of Appellate Representation

The attorneys employed by District Public Defenders currently represent their clients in both the trial and the appellate courts. The appellate work draws personnel and resources away from the trial court. Relieving the District Public Defenders of responsibility for appellate work will increase the personnel and resources available to represent clients in the trial court.

For approximately 50 years, the responsibility for representing the State in criminal proceedings has been divided between the District Attorneys General and the Attorney General and Reporter. The District Attorneys General have represented the State at trial, and the Attorney General and Reporter has represented the State on appeal. In 2015, the Attorney General and Reporter represented the State in 1,086 cases in the appellate courts. Twenty-two lawyers were responsible for this work.

Dividing responsibility in this way has enabled the District Attorneys General to focus on trial work and has promoted the development of a group of attorneys employed by the Attorney General and Reporter who have special expertise in appellate work. As a result, the appellate work is being done more efficiently and effectively than it would be if it were distributed among the 31 District Attorneys General.

The Task Force finds that a similar division of responsibility would benefit the District Public Defenders' representation of adults. Vesting the responsibility for appellate work in lawyers employed by the commission has three benefits. First, it would allow the District Public Defenders to reduce their trial caseloads by redeploing the personnel and resources currently allocated to appellate work to trial work. Second, it would result in the creation of a group of appellate lawyers who focus on representing persons accused or convicted of crimes. Third, it would provide a more effective and cost-efficient way to provide this representation. In addition, consideration should be given to providing additional lawyers employed by the commission to provide representation on appeal to adults who were represented by appointed private counsel rather than continue to employ private counsel who may not possess specialized appellate skills.

Developing Income & Asset-Based Eligibility Standards

As discussed in more detail in Issue 3, Tennessee lacks uniform standards and processes for determining whether persons seeking appointed counsel are entitled to be represented by an attorney provided by the state.

Appointed Private Counsel Compensation & Claims Processing

As discussed in more detail in Issue 4, the responsibility for determining the compensation rate for appointed private counsel and for processing requests for payment rests with the Tennessee Supreme Court and the AOC. Likewise, the sole authority to appropriate funds to re-

imburse appointed private counsel rests with the General Assembly.

The rate of compensation for appointed private counsel has not been changed since 1997. In an effort to control expenditures, the Tennessee Supreme Court has placed caps on the maximum amount of compensation in each case and on the total number of hours a lawyer is permitted to request compensation for on an annual basis. The combined effect of the stagnation of compensation rates for the past 20 years and the Court's additional compensation limitations has resulted in compensation rates that are currently below the market rate for similar legal services.

Screening & Compensation of Experts

As discussed in more detail in Issue 6, trial courts have the responsibility for determining whether expert witnesses are warranted in a particular case. When the accused is represented by appointed counsel (a public defender or appointed private counsel), Tenn. Sup. Ct. R. 13, § 5 requires appointed counsel to demonstrate a particularized need for the expert and requires the court to conduct an ex parte hearing to determine that there is a particularized need for the expert and that the requested hourly rate is comparable to rates charged for similar services. Tenn. Sup. Ct. R. 13, § 5(d)(1) sets the maximum compensation rates for many of the expert services sought in criminal cases.

Training & Performance Standards

Tennessee currently lacks uniform criminal defense training standards. While the District Public Defenders Confer-

ence provides training opportunities for its attorneys, the substance, extent, and scheduling of the training remains in the discretion of each of the 31 District Public Defenders. As a result, the amount and quality of the training received by public defenders is not uniform. The private criminal defense bar also offers formal and informal training opportunities and mentoring. There is little coordination with regard to training between the private criminal defense bar and District Public Defenders Conference.

While many national organizations have adopted criminal defense performance standards, Tennessee has not developed standards by which the adequacy of a lawyer's work can be measured. Creating and adopting performance standards for all attorneys defending persons accused of crime in Tennessee will improve the quality of the criminal defense practice in Tennessee and, over time, will have the effect of minimizing the number of convictions that are reversed on the grounds of ineffective assistance of counsel.

Establishing & Certifying Eligibility to Serve as Appointed Counsel

Many who addressed the Task Force complimented the quality of representation currently being provided by many appointed private counsel. However, many also expressed a concern about the increasing frequency with which appointed private counsel lack the experience or the skill to provide adequate representation. Particular concern was expressed by attorneys and judges alike about the small number of competent counsel available to accept appointments to represent children in delinquency proceedings and in dependency and neglect proceedings.

Many who appeared before the Task Force favored establishing a certification process similar to the one currently used in Tennessee's federal courts to select, appoint, and evaluate private counsel. These federal panels, composed of experienced attorneys, employ a formal shadowing and mentoring program; a standardized, tiered approach to qualifications for representing clients based on the seriousness of the alleged crime; and a performance evaluation process. Many states have also incorporated certification into their appointment process, although the organization and structure of these processes differ.

In the absence of a uniform, statewide certification process, general sessions judges and state trial court judges use independent, ad hoc standards to identify the lawyers appointed to cases in their courts. The lack of uniformity has resulted in inconsistent and occasionally conflicting appointment decisions. Several who appeared before the Task Force recounted instances where attorneys appointed in general sessions courts were relieved and replaced by state trial judges when the case reached their courts. The lack of uniformity has also resulted in reliance on appointment criteria unrelated to the lawyer's skill or ability. Attorneys and judges who addressed the Task Force reported that appointments were being made based on the judge's personal acquaintance with the lawyer, the judge's desire to help new lawyers gain experience, or the judge's unilateral desire to ease the District Public Defender's caseload.

The Task Force sees great merit in establishing a uniform, statewide certification process for lawyers seeking appointments in criminal and juvenile proceedings. The certification criteria and evaluation process should not be managed by the judiciary.

However, the judiciary should be consulted in the development of the certification criteria, and input from local judges should be part of the certification process.

Juvenile Court Services

Juvenile court jurisdiction encompasses two distinct systems. Dependency and neglect and termination of parental rights proceedings require lawyers for indigent parents and an attorney to serve as guardian ad litem for the child.⁴⁷ Delinquency proceedings require representation for an accused child. Because of the lack of statewide uniformity in the courts exercising juvenile jurisdiction, the Task Force believes that a commission should be granted the authority to set standards for and to administer all children's services, including both the policies and procedures relating to the provision of counsel in delinquency proceedings and the policies and procedures relating to the provision of guardians ad litem and counsel in dependent and neglect, termination of parental rights, and contempt for non-payment of child support proceedings. This commission should also be responsible for developing and enforcing standards relating to the certification and training of lawyers desiring appointments as a guardian ad litem or to represent children and adults in all proceedings in juvenile court. If these responsibilities are assigned to a central commission, the personnel and resources currently allocated by the AOC to this work should be transferred to that commission.

Budget Preparation & Administrative Oversight

The responsibility to manage Tennessee's multi-million dollar programs providing legal representation services to eligible

adults and children lacks transparency, accountability, and coordination because it is distributed among several offices and agencies.

The AOC is responsible for managing and overseeing the legal representation services for appointed private counsel in criminal proceedings and children's proceedings. On the other hand, the Tennessee District Public Defenders Conference is responsible for the state funding for the District Public Defenders. However, each District Public Defender is solely responsible for the management of his or her office's state and local funding.

The allocation of state funding to the various District Public Defender offices is influenced by the amount of local funding these offices receive. Only thirteen offices receive local funding, and of these, only two of these offices receive more than 50% of their funding from their local government. The manner in which state funding has been apportioned over time has resulted in significant funding disparities. State funding for the District Public Defender offices ranges from \$19.20 per capita to \$3.27 per capita. The statewide funding average is \$8.76 per capita.

Similar disparities exist when all-right-to-counsel funding is considered. Total funding for right to counsel services ranges from \$7.89 to \$24.93 on a per capita basis. The state average per capita funding for all right to counsel services is \$14.82, compared with a national average of \$17.15.

Over the decades, the lack of unified annual requests for state funding has resulted in competing funding requests and has hampered the efforts to determine and obtain the funding needed to meet the de-

mands of increasing caseloads. Adequately supported unified funding requests for all legal representation services would enable the Executive and Legislative Branches to better understand the needs of the entire program and to make informed appropriation decisions. The Task Force believes that such a unified approach is best accomplished by giving a single commission responsibility for preparing and presenting legal representation funding requests. If a commission were given this responsibility, the personnel and resources currently allocated to the AOC and the Tennessee District Public Defenders Conference to do this work should be transferred to that commission.

Data Gathering & Audit Authority

The Task Force has found it difficult to obtain current, accurate, and complete data regarding the operation of the programs providing legal representation to eligible adults and children. This experience echoes that of the Comptroller of the Treasury in its periodic efforts to collect data. Many who appeared before the Task Force expressed frustration regarding the inability to obtain the consistent and reliable data needed to manage legal representation programs. The Comptroller of the Treasury has declined to update weighted caseload studies because of the lack of accurate caseload data. If the responsibility to manage legal representation services were united in a single commission, that commission should have the authority to require information from and to audit and inspect the records of entities involved in the provision of representation services, including the courts, the trial and appellate clerks, the District Public Defenders, the local governments providing funding for representation

services, and the private attorneys who have been appointed to represent eligible adults and children. This authority should serve as a bolstering mechanism – not supplant the Comptroller’s audit power.

Office of Post-Conviction Defender

The Office of the Post-Conviction Defender was created in 1995. Its exclusive function is to represent persons convicted of capital offenses in proceedings to collaterally challenge the legality of their judgment and sentence in state court.⁴⁸ The Office of the Post-Conviction Defender may also, in limited circumstances, and in the interest of justice, represent a person on direct appellate review of a conviction or sentence.⁴⁹ If a central commission to manage representation programs is created, the Task Force finds that it would be appropriate to transfer the personnel and resources of the Office of the Post-Conviction Defender to the central commission and to abolish the commission created in Tenn. Code Ann. § 40-30-203(a) (Supp. 2016). However, it will be necessary to require appropriate screening mechanisms to avoid the conflicts of interest that could arise from ineffective assistance of counsel allegations.

Recommendations

- 1. A multi-branch task force should be convened as soon as possible to carefully consider creating an independent commission to oversee the administration and operation of the programs providing legal representation to eligible adults and children. In the process, the task force should address (a) the composition of the commission and the selection**

- of its members, (b) the scope of its duties, and (c) the process for transferring existing resources and personnel to the commission.
2. The commission's duties could include, but should not necessarily be limited to:
 - a. Providing the appellate representation currently being provided by the Office of the Post-Conviction Defender.
 - b. Providing appellate representation to eligible persons convicted of crimes in state courts on direct appeal and on appeal from collateral challenges to their conviction.
 - c. Developing uniform income and asset-based standards to determine eligibility for appointed counsel services.
 - d. Setting the compensation rates for appointed private counsel and process the claims for compensation.
 - e. Setting the compensation rates for expert witnesses, investigators, and translators and process the claims for compensation.
 - f. Developing and administering uniform training and performance standards for public defenders and appointed private counsel.
 - g. Providing or arranging for the provisions of continuing legal education programs and other training to maintain and improve the quality of services being provided.
 - h. Creating and administering a uniform certification program for lawyers desiring to be appointed to represent eligible adults and juveniles.
 - i. Providing standardization, training, and oversight of juvenile justice and child welfare programs through a separate children's services division.
 - j. Preparing and managing a single annual budget for all activities related to the provision of legal representation to eligible adults and children.
 - k. Obtaining and publishing data regarding the provision of legal representation to eligible adults and children.
 3. To the extent that the new independent commission will be assuming duties currently being performed by other offices, agencies, and commissions, the personnel and resources used by these offices and agencies should be transferred to the commission.



Do the current criteria for determining indigency, the process for determining indigency, and the manner in which counsel is selected in Tennessee provide adequate safeguards to ensure only those in need of representation receive it?

Legal Background

Criteria for Determining Eligibility for Appointed Counsel

Any discussion of “indigency” for the purposes of the right to appointed counsel must begin with the understanding that “[i]ndigency in the sense of ability to employ competent counsel is not necessarily equitable with destitution. Indigency is a relative concept, and must be defined with reference to the particular right asserted. One able to employ counsel to defend a minor misdemeanor charge may be unable to afford counsel to defend a serious felony charge.”⁵⁰ Additionally, family members cannot generally be compelled to provide funds to hire counsel.⁵¹ The guiding question is whether someone “is financially unable to obtain adequate representation without substantial hardship to himself or his family ... [W]hen one lacks the financial resources which would allow him to retain a competent criminal lawyer at the particular time he needs one, he is entitled to appointed counsel.”⁵²

The law defines an indigent person for purposes of representation as “one who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney”⁵³ in criminal prosecutions, juvenile delinquency proceedings involving a possible deprivation of liberty, in a habeas corpus, or post-conviction proceeding.⁵⁴ Both Tenn. Sup. Ct. R. 13 and the applicable

statutes⁵⁵ have substantially similar provisions regarding the criteria to be considered in an indigency determination. Persons facing an involuntarily hospitalization as a result of a court proceeding are also entitled to the appointment of counsel, although the statute does not reference a requirement of indigency.⁵⁶ If the defendant does not employ an attorney, the court is required to appoint counsel.⁵⁷ However, Tenn. Sup. Ct. R. 13 suggests that counsel will be appointed only if an indigency determination is made.⁵⁸

The vehicle for obtaining the information required by Tenn. Sup. Ct. R. 13 and Tenn. Code Ann. § 8-14-102 is the Uniform Affidavit of Indigency.⁵⁹ The affidavit requests information such as:

- ◆ Income, such as governmental assistance, wages, alimony, social security;
- ◆ Property ownership, including real estate, automobiles, bank accounts;
- ◆ Financial information such as balances on bank accounts, debts;
- ◆ Assets owned within the last six months; and
- ◆ Whether the party has posted bond, and if so, how much and paid by whom.

The affidavit also requires acknowledgement that it is a Class A misdemeanor to

misrepresent or falsify information required in the affidavit.

In criminal cases, if the court determines that the accused can afford to defray a portion of his representation, the court can then enter an order directing the defendant to pay money to the clerk, and payment of this amount can be a condition of probation.⁶⁰ This statute can also be invoked if the court determines that the defendant can pay the entire cost of representation.⁶¹

Process for Determining Indigency

Tenn. Sup. Ct. R. 13 and the related statutes outline analogous processes for making indigency determinations. The court must conduct a “full and complete hearing as to the financial ability of the accused to obtain the assistance of counsel” and to make a finding as to indigency.⁶² In criminal proceedings, if the judicial district is served by a social service agency, the court must order the agency to investigate the accused’s financial affairs if the court has reasonable cause to believe that the accused has the financial resources to employ counsel.⁶³

Tenn. Sup. Ct. R. 13 enumerates the cases in which the court shall advise the party of the constitutional right to counsel. With few exceptions (mental health law, guardianships, or juvenile delinquency), persons desiring appointed counsel must complete and submit an Affidavit of Indigency Form.⁶⁴ More than one judicial district has created its own affidavit of indigency.

Tenn. Code Ann. § 40-14-202, which applies to felony prosecutions, requires that

similar facts be considered in an indigency determination. The court’s determination of indigency must be reduced to writing,⁶⁵ and the court must enter an order appointing counsel unless the indigent party rejects the offer of appointment of counsel with an understanding of the legal consequences of the rejection.⁶⁶

Tenn. Code Ann. § 40-14-202(c) directs the court, when making a finding as to the indigency of an accused, to take into consideration:

- ◆ The nature of the services to be rendered;
- ◆ The usual and customary charges of an attorney in the community for rendering like or similar services;
- ◆ The income of the accused regardless of source;
- ◆ The poverty level income guidelines compiled and published by the United States Department of Labor;
- ◆ The ownership or equity in any real or personal property;
- ◆ The amount of the appearance or appeal bond, whether the party has been released by making bond, and, if the party obtained release by making bond, the amount of money paid and the source of the money; and
- ◆ Any other circumstances presented to the court which are relevant to the issue of indigency.

Manner in which Counsel is Selected

In criminal prosecutions and delinquency proceedings where the right to coun-

sel has not been waived, “the court shall make and sign an order appointing the district public defender, or such other appointed counsel as provided by law, to represent the person.”⁶⁷ Tenn. Sup. Ct. R. 13 emphasizes that courts “shall appoint the district public defender’s office, the state post-conviction defender’s office, or other attorneys employed by the state for indigent defense ... if qualified pursuant to this rule and no conflict of interest exists, unless in the sound discretion of the trial judge appointment of other counsel is necessary.”⁶⁸

Additionally, Tenn. Sup. Ct. R. 13 outlines various conflicts that would compel the court to make an appointment other than the public defender.⁶⁹ Private counsel may decline to accept an appointment by making a clear and convincing showing that adding the appointment to his or her current workload would prevent counsel from rendering effective representation.⁷⁰ In criminal matters and juvenile delinquency proceedings, in addition to representations that may be prohibited by law,⁷¹ the lawyer may not represent more than one client in the same matter unless “the lawyer demonstrates to the tribunal that good cause exists to believe that no conflict” exists or is likely to exist,⁷² and the lawyer must also receive informed consent from each affected client.⁷³

Attorneys have an ethical obligation to provide “competent representation” to their clients.⁷⁴ In the most general sense, rendering competent representation requires “the legal knowledge, skill, and preparation reasonably necessary for the representation.”⁷⁵ With the exception of capital cases, Tenn. Sup. Ct. R. 13 does not establish standard, statewide qualifications for appointed counsel.

Other than the admonition to give priority to appointing a public defender or other state-paid attorney, the statutes and rules pertaining to appointment of counsel provide the courts with little guidance regarding the appointment of counsel.⁷⁶ While Tenn. Sup. Ct. R. 13 directs courts exercising criminal jurisdiction to “maintain a roster of [private] attorneys from which appointments will be made,”⁷⁷ no direction is provided for determining how attorneys become qualified to be included on the list. Tenn. Sup. Ct. R. 13 also gives courts broad discretion to bypass the roster.⁷⁸

In juvenile court proceedings other than delinquency, both children and adults may be entitled to legal counsel in a variety of circumstances.⁷⁹ In certain civil matters outside of juvenile court, litigants also have the right to court-appointed counsel. These matters include when a person is facing involuntary hospitalization as a result of judicial order⁸⁰ and when contempt actions are brought from an alleged failure to pay child support, among others.⁸¹ There appear to be no clear requirements with respect to ensuring the training and experience of counsel in those circumstances.

Summary of Information Obtained by the Task Force

The consensus of those who addressed the Task Force was that the volume of cases and the imperative to process these cases quickly do not permit a “full and complete hearing” into the financial background of those seeking appointed counsel. However, the judges, public defenders, and prosecutors also observed that, in their experience, a great majority of persons receiving appointed counsel

are, in fact, eligible and that the cost of establishing a more elaborate screening system could easily be greater than the potential savings. Additionally, it appears that, in many instances, the hearings to determine eligibility do not occur soon enough to ensure that a party's rights are adequately protected.

Significant differences currently exist with regard to both the nature and scope of the information persons seeking appointed counsel are required to furnish and the procedure for determining eligibility. Despite Tenn. Sup. Ct. R. 13's Uniform Affidavit of Indigency, a number of judges have created their own affidavits seeking information other than that requested on the uniform affidavit. It was reported that, in some jurisdictions, persons are required to provide their social security numbers, driver's license numbers, and other sensitive personal information.

Rather than conducting a "full and complete hearing" regarding the eligibility of persons seeking appointed counsel, many hearings consist of little more than the court reviewing the affidavit and asking the person who completed it if the information in the affidavit is correct. Some judges defer to the public defender's interpretation of the information provided on the affidavit. Judges of general sessions courts, in particular, noted that the demands and case volumes of a docket limit the amount of time that can be spent on an inquiry into the claimed status of indigency. The Task Force was provided with no information regarding the existence of the social service agencies mentioned in Tenn. Code Ann. § 40-14-202(d) or the extent to which courts call upon them to investigate the financial background of persons seeking appointed counsel.

Public comments noted that the perception sometimes voiced by courts that "if you can make bail, you can afford a lawyer" disregards that resources available to the person seeking appointed counsel might have been used to secure a bail bond; that family members are more willing to make voluntary contributions to obtain a bail bond than to obtain counsel; and that too heavy of a reliance on the inquiry into whether the accused was able to post a bond forces the accused to choose between two constitutional rights: the right to bond and the right to counsel.

There appears to be great variation in the application of the statutes requiring the appointment of the public defender. As a practical matter, at the time of appointment it is not always possible for the public defender to complete a conflict check. There may also be variation among individual District Public Defender offices as to the interpretation of when, under the rules, there is a conflict between the interests of potential, current, and past clients.

There is currently a lack of uniformity among the general sessions and state judges regarding the procedure for appointment of counsel. Comments from judges and counsel indicated that, given the limited number of public defenders available in each courtroom, the appointment of private counsel is sometimes necessary in order that the docket can be addressed in a timely manner.

Additionally, the Task Force heard accounts of judges appointing private counsel even when a public defender was available. The justifications for these appointments included: a public defender was not physically present at the time; concern that the

public defenders were overworked; or a preference for private counsel. There were also accounts of state courts relieving attorneys appointed in the general sessions court when the public defender stated a willingness to provide representation. The Task Force also heard reports of judges who limited their appointments to attorneys in their personal acquaintance or who appointed inexperienced attorneys to enable them to gain experience.

There is also a lack of uniformity in the criteria that must be demonstrated to the court in order for a private attorney to undertake work as appointed counsel. Some courts and local bars have developed procedures for ensuring that attorneys demonstrate some measure of knowledge and skill prior to taking appointments. This is sometimes a formal, court-run credentialing process (such as the process in Davidson County for criminal appointments in general sessions and guardian ad litem appointments in probate court) and is sometimes a mentoring experience where attorneys accompany an established member of the bar for a period of time before taking on cases themselves.

A 2015 audit by the Comptroller found that “[c]ourts across the state do not consistently apply Supreme Court rules and Tennessee Code Annotated provisions involving indigent defense, increasing the risk of unequal application of the law.”⁸² The Comptroller recommended “that the Supreme Court and General Assembly work together to: (1) enhance Tennessee Code Annotated and Supreme Court rule so that the two match and comply with recent U.S. Supreme Court decisions;” and (2) “provide more detailed guidance and procedures for the indigency determination process, with

specific instructions for verifying information submitted by applicants and for maintaining all relevant documentation related to the determination.”⁸³

The Tennessee Supreme Court concurred with the Comptroller’s recommendations in part, agreeing that, while most judges apply the proper indigency guidelines, “there should be more uniformity in application.”⁸⁴ In an effort to accomplish that end, the Supreme Court agreed to review and make necessary changes to Tenn. Sup. Ct. R. 13 to ensure compliance with federal rulings and make such information available to the General Assembly. Additionally, the Court agreed to inform the trial judges about the necessity for consistent indigency guidelines. The Court also agreed to establish a task force to study representation for those unable to afford legal counsel with a focus on indigency determination by judges.

Task Force Findings

The current volume of cases and the expectation that these cases will be addressed in a timely manner do not permit conducting the “full and complete hearings” required by Tenn. Code Ann. § 40-14-202(b). Because no intake procedure currently exists requiring the clerk’s office, court staff, or the public defender to obtain information relevant to determining eligibility, these determinations are often made on a cursory review of the Uniform Affidavit of Indigency prepared by the person seeking counsel.

Despite the adoption of the Uniform Affidavit of Indigency, a number of jurisdictions are requiring persons seeking counsel to provide personal information other than the information required on the affi-

davit. There is currently no requirement for preserving the information considered in making eligibility determinations.

Local customs regarding the appointment of public defenders vary. In some jurisdictions, a public defender is not being appointed even when one is available. The extent of this practice cannot be precisely determined because judges are not currently required to state in orders appointing private counsel their reasons for not appointing a public defender.

No uniform standards currently exist for ascertaining the qualifications of attorneys seeking appointments under Tenn. Sup. Ct. R. 13. Judges employ their own ad hoc standards which are not necessarily based on the lawyer's education, training, and experience.

Based on the information it has received, the Task Force concurs with the conclusion in the Comptroller's 2015 audit that the courts across the state are not consistently applying the statutes and rules governing the appointment of counsel for eligible adults and children.

Recommendations

- 1. Clear criteria for the entitlement to appointed counsel should be developed, including certain presumptions for eligibility, such as income thresholds or other qualifying metrics, such as eligibility for public assistance.**
- 2. While judges should retain the discretion to determine eligibility for appointed counsel, they should be relieved of the responsibility to conduct the screening**

and to obtain the information needed to make the determination.

- 3. Judges should be expressly required to appoint the public defender in a criminal proceeding unless the public defender has represented in writing that it cannot provide representation because of an ethical conflict of interest or a reason satisfactory to the court. All orders appointing private counsel should state specific reasons for not appointing a public defender.**
- 4. While trial courts should retain the discretion to appoint private counsel when the public defender cannot be appointed, appointment decisions should be based solely on uniform criteria based on education, training, experience, and demonstrated competency.**
- 5. A process should be established for certifying lawyers seeking appointments under Tenn. Sup. Ct. R. 13 based on their education, training, experience, and demonstrated competency.**
- 6. There should be a continuation of the currently existing claw-back mechanism whereby costs of counsel can be recovered against a defendant if it is discovered that the party was ineligible for appointed counsel.**



4

*A*re attorneys currently being fairly compensated under Tenn. Sup. Ct. R. 13?

Legal Background

Appointed private attorneys are “entitled to reasonable compensation for their services” and are entitled to reimbursement for reasonable and necessary expenses.⁸⁵ Compensation for attorneys in most appointed cases is governed by Tenn. Sup. Ct. R. 13, which was first promulgated in 1981.

The current hourly rates for appointed counsel in a non-capital case are \$40 per hour for out-of-court work and \$50 per hour for in-court work.⁸⁶ The current hourly rate for appointed counsel in capital cases ranges from \$60 to \$100 per hour depending on the attorney’s role in the case.⁸⁷ A table showing the history of compensation rates is included in Appendix F.

Tenn. Sup. Ct. R. 13 also sets maximum amounts payable to attorneys in a particular case. These limits range from \$500 to \$2,500. In addition, attorneys are subject to an annual hourly cap of 2,000 hours of appointed representation, although occasional exceptions can be made by the director of the Administrative Office of the Courts (AOC).⁸⁸ Exceptions to these caps can be requested by petitioning the trial court to characterize the case as “complex and extended.”⁸⁹

All claims for payments of \$200 or more must be signed by the judge that presided over the final disposition of the case.⁹⁰ In most cases, claims will not be considered

until a case has reached its conclusion.⁹¹ Tenn. Code Ann. § 40-14-208(d) required that claims for payment must be accompanied by a certified copy of the order fixing the compensation and that the AOC review the order and claim prior to payment.⁹²

A patchwork of other code provisions provides for the appointment and compensation of counsel and reimbursement of costs in criminal, juvenile, and civil proceedings.⁹³ Rules with respect to other proceedings, such as reimbursement for costs in mental health proceedings,⁹⁴ and appointment and compensation of counsel in parole revocation hearings,⁹⁵ provide that Tenn. Sup. Ct. R. 13 governs claims for reimbursement. Tenn. Sup. Ct. R. 13 sets compensation for guardians ad litem in most circumstances. But Tenn. Sup. Ct. R. 40A provides that, in custody cases, the guardian ad litem “shall be compensated for fees and expenses in an amount the court determines is reasonable.”⁹⁶

In a 2001 amendment to Tenn. Sup. Ct. R. 13, the Tennessee Supreme Court authorized the AOC to enter into contracts with attorneys, law firms, or associations of attorneys in certain civil practice areas (i.e., involuntary judicial hospitalization proceedings, child support enforcement proceedings, dependent and neglect proceedings, and termination of parental rights proceedings).⁹⁷ The AOC currently contracts for legal representation in involuntary judicial hospitalization pro-

ceedings in six counties and child support enforcement proceedings in one county.

Summary of Information Obtained by the Task Force

There is a strongly held belief in the legal community that attorneys do not receive reasonable compensation when representing clients as counsel appointed by the State. The Task Force was repeatedly reminded that, in almost every trial situation, the attorney for the defendant will be paid less than every other person with the trial associated in a professional capacity – less than the testifying experts, the investigators, and interpreters.

Attorneys and judges from across the state, in a variety of different roles and stages of their careers, as well as other officials and experts in the field were overwhelmingly in favor of increasing the compensation for attorneys in appointed cases. Concern regarding compensation is not new. It was raised in 2004 in joint comments to proposed amendments to Tenn. Sup. 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. The issue of attorney compensation was again raised in 2010, when the Tennessee Association of Criminal Defense Lawyers petitioned the Tennessee Supreme Court for amendments to Tenn. Sup. Ct. R. 13.

Many attorneys who appeared before the Task Force stated that they did not file claims for all the hours they worked because they knew they would not be compensated due to the cap on compensation. Several other attorneys expressed con-

cern about delay in receiving payments, and others stated that they intentionally submitted claims below \$200 even though they were entitled to a greater fee because they knew they would be paid more quickly.

The AOC reported that online claims filing is now required and that it processes approximately 120,000 claims each year. Properly prepared claims are paid within four to six weeks after they are filed. Processing a claim will be delayed when the claim is incomplete. The most frequent reasons for delaying a claim are: (1) a missing or unsigned appointment order; (2) missing receipts; (3) use of the wrong claim form; (4) billing more than eight in-court hours or more than 12 total hours in a single day; and (5) billing in-court time on Sunday or a legal holiday.

The AOC also explained that three systems are currently being used to process payment claims but that it is in the process of combining these into one system that will improve retrieval of information from the State's accounting system. Once completed, this new system will be more user friendly and will improve the ability of attorneys to track the status of their claims. It will accommodate multiple billing methodologies (hourly, docket, or flat fee) and will enable better messaging among attorneys, judges, and the AOC staff.

There is consensus that the combination of the low hourly rate with the cap on reimbursable hours results in inadequate pay for attorneys. The Task Force heard repeatedly during the listening tour that Legal Aid Services contracts with attorneys at \$75 per hour, the Tennessee Bar Association recommends a rate of \$100

per hour, and appointed attorneys are paid \$129 in federal courts. The Bureau of Labor Statistics inflation calendar calculates that \$60.52 in 2017 dollars matches the buying power of \$40 in 1997 (the last time the rates were raised). For \$50, it would be \$75.65 in 2017.⁹⁸

Tennessee's Post-Conviction Defender addressed the Task Force and noted that Tenn. Sup. Ct. R. 13 standards for capital cases do not speak to the quality of representation of counsel, provide oversight of the representation, or allow for early intervention in capital cases — guidelines recommended by the American Bar Association for defense counsel in capital cases.⁹⁹

The attorneys who addressed the Task Force regarding compensation agreed that using flat fees is commonplace in their practice. While they expressed concern about contracting for legal services on a flat fee basis when Tenn. Sup. Ct. R. 13 was amended in 2001, they conceded a properly managed contracting process could be both cost effective for the state and fair to the attorneys while also maintaining quality representation. There was a consensus that soliciting competitive bids for legal services and awarding contracts to the lowest bidder would be inappropriate but that a properly managed process could both increase the availability of qualified providers and provide an effective way to manage the costs of legal services.

Task Force Findings

The manner in which private appointed counsel are currently being compensated under Tenn. Sup. Ct. R. 13 does not provide reasonable compensation for the work performed. The current rates

of compensation, which have remained unchanged since 1997, do not reflect the current market rate in Tennessee for similar services, the impact of inflation, or a legal practice's reasonable overhead.

In addition to the impact of the below market compensation rates, the caps imposed on the amount of compensation in each case have resulted in the lawyer's receiving fees that do not compensate them for their overhead. Tenn. Sup. Ct. R. 13's current limitations on when requests for compensation can be made also create cash flow difficulties for lawyers who accept significant numbers of appointments.

The combined impact of the low compensation rates, the per case payment caps, and the restrictions on submitting claims for payment has negatively impacted the number of experienced lawyers willing to accept appointments to represent eligible adults and children and has also affected the quality of the legal representation being provided.

The costs incurred to compensate private appointed counsel under Tenn. Sup. Ct. R. 13 will moderate or decrease when public defenders are provided the resources to represent more adults and children because fewer appointments of private counsel will be necessary.

Even though some attorneys are now being compensated based on flat fees, the compensation of a vast majority of the attorneys receiving compensation under Tenn. Sup. Ct. R. 13 continues to be based on fixed hourly rates. Greater use of appropriate flat fee arrangements should result in an improved ability to manage the cost of providing legal representation to eligible adults and children.

Recommendations

1. The distinction between payment for in-court and out-of-court time should be eliminated.
2. The current caps on the amount paid in a single case should be eliminated, along with the current process for designating a particular case as “complex and extended.”
3. The compensation rate for private counsel appointed under Tenn. Sup. Ct. R. 13 should be increased to between \$75 and \$125 per billable hour and corresponding adjustments in the amount of claims exempt from judicial approval should be made.¹⁰⁰
4. An annual 2,000-hour cap on compensable billable hours should be retained. However, a mechanism should be established to extend the cap where necessary to ensure that the client of a lawyer who is approaching the cap is not negatively impacted by the inability of his lawyer to be paid.
5. The current requirements with respect to limitations on when claims may be submitted based upon the status of a pending matter should be changed to permit interim billing.
6. The Administrative Office of the Courts should complete the project to update and improve its online claims processing system and should provide effective training in the use of the system.
7. New opportunities to contract for legal services on a flat fee basis should be explored and implemented.



Are the District Public Defenders receiving sufficient resources to enable them to provide effective representation to their clients?

Legal Background

There are 31 District Public Defender’s offices in Tennessee — one based in each judicial district. The chief District Public Defender is popularly elected in all districts except Shelby County where the chief District Public Defender is appointed by the mayor. Longstanding public policy of the state is that the public defender system is the provider of first choice for the criminally accused who are entitled to appointed counsel.

The various District Public Defenders offices are administratively coordinated by the Tennessee District Public Defender’s Conference (TDPDC), which is supported by an executive director elected by a majority vote of the 31 chief defenders.

Among its duties, the TDPDC submits budget requests to the state, administers the financial accounts relating to the offices of the District Public Defenders and generally serves as liaison to all branches of state government. Local jurisdictions are also authorized to make additional contributions to their District Public Defender’s offices,¹⁰¹ but only a minority of jurisdictions do so.

In the cases of Davidson, Hamilton, Knox, and Shelby counties, the public defender offices received a significant portion of their funding from their local government.

Summary of Information Obtained by the Task Force

Caseload Effects on Funding

Many District Public Defenders and the executive director of the TDPDC attended one or more of the Task Force’s listening tour sessions and meetings. The Task Force has benefitted from their candid comments, as well as the information they have provided. All of them share a deep commitment to provide effective representation to their clients. While they may disagree on several substantive issues, they agree on far more.

As noted earlier in this report, the ratio of cases to the justice system’s capacity has increased significantly over time. The allocation of resources to the courts, the prosecutors, and the public defenders has not kept pace with the increased caseloads. Even though the growth in caseloads in some categories of crimes has moderated, these decreases have not offset the net caseload increase during the past thirty years. Representatives of the courts, the prosecutors, and the public defenders were united in their belief that their ability to continue to do their jobs in a professional and efficient manner is not sustainable without additional resources.

While many persons who addressed the Task Force noted the longstanding difficulty obtaining funding for indigent representation services, no consensus

regarding the reason for this difficulty emerged. Some attributed it to the unpopularity of funding programs that assist persons accused of crime. Others pointed to the public defenders' lack of success in making a convincing case for additional resources. Still others attributed it to the fact that several public defenders receive substantial funding from local governments.

The representatives of the District Attorneys General Conference shared with the Task Force their belief that the justice system serves the public interest best when both sides – the prosecution and defense – are equipped to perform their jobs efficiently and effectively. However, the District Attorneys General Conference did not offer an opinion regarding the adequacy of the District Public Defenders' current funding.

The increase in caseloads without commensurate funding has forced the District Public Defenders to find ways to put more attorneys in the courtroom. While some District Public Defenders have been able to secure local funding for additional attorneys, most have not. Accordingly, many have hired attorneys into positions classified as support positions. Without these staff positions, the work that had been done by the staff is now being done by the attorneys or is not being done at all. Thus, while more attorneys have been hired, more of the attorneys' time is being used to perform tasks that support staff are better equipped to perform.

The public defenders also consistently stated that they need more treatment services available to their clients in order to represent them effectively. They point out that plea negotiations, the availability

of probation, or the length of sentences many times hinge on securing the defendant access to social services such as counseling and treatment for alcohol or substance abuse. These services are not readily available in many parts of the state, so having non-lawyer trained staff to address these needs and find assistance for their clients is helpful.

Allocation of State Funds

The public defenders expressed different views regarding the adequacy of state funding and the manner in which this funding has been distributed. Public defenders in urban areas expressed greater concern regarding the amount of state funding and the current process for distributing this funding. For example, the District Public Defender for the Twentieth Judicial District pointed to Tenn. Code Ann. § 8-14-110 that excludes Shelby and Davidson County from the District Public Defenders Conference's budgeting process and instead ties their allocations to changes in the consumer price index.

Conflicts of Interest

Generally, ethical standards present two circumstances that would prevent the District Public Defender from representing a client entitled to appointed counsel: ethical conflicts related to the representation of other clients and caseload conflicts.

Ethical conflicts of interest arise most frequently for public defenders in cases involving multiple defendants who are entitled to appointed representation. They can also arise in other circumstances, such as when the public defender is already representing or has represented in

the past one of the witnesses expected to be called in a potential client’s case. Currently, when a public defender decides that a conflict exists, the only alternative is to appoint private counsel.

Comments received by the Task Force reflect a broad agreement that a conflict of interest necessarily arises in cases involving multiple defendants because the same District Public Defender’s office cannot ethically represent more than one defendant. However, the Task Force also received comments reflecting a lack of agreement regarding whether other circumstances create a conflict of interest. Some District Public Defenders may decide that a conflict exists in circumstances where others do not.

Ethical rules prevent attorneys from representing clients if they do not have adequate time and experience levels to devote to each case, and District Public Defender offices in the state have occasionally cited these rules as reasons their offices were unavailable to take on a case.

The invocation of “caseload conflicts” has proved to be controversial and, on at least one occasion, resulted in litigation. While several persons appearing before the Task Force defended the use of caseload conflicts as a means to control caseloads in response to insufficient resources, there was also broad agreement that caseload conflicts will be unnecessary and inappropriate when District Public Defenders have adequate staffing and resources.

Task Force Findings

The Task Force strongly supports Tennessee’s longstanding policy that public defenders should be the attorneys of

first choice for persons accused of crime who are entitled to appointed counsel. This reliance on public defenders enhances the State’s ability to provide effective representation in the most cost-effective way.

For the past several decades, the shortfalls in funding the District Public Defenders have caused increased reliance on private counsel appointed under Tenn. Sup. Ct. R. 13. The increased appointments under Tenn. Sup. Ct. R. 13 have driven up the expenditures for appointed private counsel in criminal proceedings to the point that the Tennessee Supreme Court was required to place limits on compensation under Tenn. Sup. Ct. R. 13. In many cases, these caps have had the effect of reducing the compensation of private counsel far below the current market rate for similar services.

The Task Force finds that increasing the capacity of the District Public Defenders to represent more eligible persons will, over time, decrease the number of appointments of private counsel under Tenn. Sup. Ct. R. 13. Because District Public Defenders should be able to provide effective legal representation less expensively than appointed private counsel, placing greater reliance on the District Public Defenders will eventually moderate the State’s expenditures for providing legal representation – either by a public defender or appointed private counsel.

The tactic of eliminating support positions has enabled some District Public Defenders to hire more attorneys. However, the unintended consequence is that the attorneys are now required to perform staff functions. This decreases the

amount of time the attorneys can devote to the tasks they are trained to do and, more troublingly, requires attorneys to perform tasks they are not trained to do – tasks which could be done more efficiently and effectively by appropriately trained (and presumably lower-salaried) staff. Accordingly, the Task Force finds that the lack of adequate support staff makes it more difficult for attorneys employed by District Public Defenders to provide the services they are trained to provide as effectively and efficiently as possible. The Task Force also finds that providing appropriate staff resources will not only increase the effectiveness of the attorneys, it will also be less costly than adding additional attorney positions.

The Task Force believes that appropriate funding of the District Public Defenders will obviate the need for “caseload conflicts.” It also believes that no system will eliminate the need to appoint private counsel when the public defender has a conflict of interest. However, in its research, the Task Force discovered that other states and cities have adopted several viable alternatives to the appointment of private counsel. These alternatives include: (1) establishing multiple independent public defenders’ offices in areas where conflicts of interest frequently arise; (2) requiring public defenders to request interchange with a public defender from another judicial district; and (3) using counsel employed by the commission to serve as trial counsel when local District Public Defenders are disqualified.

Recommendations

- 1. The District Public Defenders should be provided sufficient resources to enable them to effectively represent as many eligible persons as ethically possible.**
- 2. In the process of identifying the resources that would enable the District Public Defenders to continue providing effective and economical representation, priority should be given to adding support staff positions in offices where doing so is appropriate.**
- 3. Consider implementing alternatives to appointing private counsel when a public defender has a conflict of interest, including: (a) establishing multiple public defenders offices in urban locations; (b) requiring public defenders to obtain representation from a non-conflicted public defender in another district; or (c) using counsel employed by a central office to serve as trial counsel.**



6

Are children and parents currently receiving adequate representation in delinquency, parental neglect, and termination of parental rights proceedings?

Legal Background

As a general matter, children involved in delinquency proceedings, and children and parents involved in dependency and neglect and termination of parental rights proceedings have a right to a fundamentally fair proceeding and to an attorney whose representation does not undermine the proceeding's fairness.¹⁰²

Juvenile Court Structure & Organization

There are currently 98 juvenile courts in Tennessee. Of these courts, 17 are designated as "Private Act" courts; while the remaining 81 courts are general sessions courts exercising juvenile jurisdiction. With the exception of the courts in Bristol and Johnson City, each court is administered by the county in which it is located.

All judges with juvenile jurisdiction are members of the Council of Juvenile and Family Court Judges.¹⁰³ In 2005, the Council became part of the Administrative Office of the Courts (AOC). The AOC staff supports the Council, assists in the drafting of the Tennessee Rules of Juvenile Procedure, which must be approved by the Tennessee Supreme Court, and collects data and publishes the Council's annual report. With the AOC's assistance, the Council provides training and technical assistance to the juvenile and family court judges and their staff.

Representation by Counsel – Children

All juveniles alleged to be delinquent are entitled to be represented by counsel.¹⁰⁴ They also have the right to appointed counsel if their parents cannot provide one.¹⁰⁵

Tennessee law is ambiguous regarding the obligation of District Public Defenders to represent juveniles in delinquency proceedings. On one hand, the text of Tenn. Code Ann. § 8-14-105 (2016) and Tenn. Sup. Ct. R. 13, § 1(e)(4)(A) states that local District Public Defenders should be the default choice of counsel in delinquency proceedings. On the other hand, Tenn. Code Ann. § 40-14-202 (2012) appears to limit appointment of counsel to felony proceedings, and Tenn. S. Ct. R. 13's explanatory comment, without mentioning Tenn. Code Ann. § 8-14-105, suggests that Section 1(e)(4)(A) refers to the appointment of the public defender in criminal proceedings.

Private attorneys appointed to represent children in delinquency proceedings are compensated in accordance with Tenn. Sup. Ct. R. 13.

Representation by Counsel – Parents

Parents and putative parents named as parties in dependent and neglect, termination of parental rights, contributing to

the delinquency or unruly behavior of a child, contributing to the dependency and neglect of a child, contempt, child abuse, and compulsory school attendance proceedings, as well as for non-payment of child support are entitled to appointed counsel if they cannot afford one.¹⁰⁶ Private attorneys appointed to represent parents in these proceedings are compensated in accordance with Tenn. Sup. Ct. R. 13.

Guardians Ad Litem

The appointment of guardians ad litem for children in child welfare cases is required by state and federal law. Tenn. Code Ann. § 37-1-149(a)(1) requires the appointment of a guardian ad litem at any stage of a proceeding when a child has no parent, guardian or custodian appearing on his or her behalf or if that person has a conflict of interest with the child. Similarly, the federal Child Abuse Prevention and Treatment Act of 1974 requires states receiving federal funds for child welfare programs provide for the appointment of a guardian ad litem in every case of suspected child abuse and neglect.

To complement the statutory mandates to provide guardians ad litem in child welfare proceedings, Tenn. Sup. Ct. R. 40 contains detailed guidelines defining the purpose and duties of guardians ad litem in juvenile court abuse, neglect, and dependency proceedings. These guidelines make clear that a guardian ad litem has an attorney-client relationship with the child¹⁰⁷ and that the guardian ad litem must represent the child until “formally relieved by court order.”¹⁰⁸

When families are indigent, Tenn. Code Ann. § 37-1-150(a)(3) requires the State

to compensate the guardian ad litem. Tenn. Sup. Ct. R. 40(A) requires that guardians ad litem be compensated in accordance with Tenn. Sup. Ct. R. 13.

Summary of Information Obtained by the Task Force

Juvenile Court Structure & Organization

While the Tennessee Rules of the Juvenile Practice and Procedure have introduced a degree of uniformity in juvenile proceedings, the Task Force received many comments highlighting significant differences among juvenile courts. These comments mirrored the Tennessee Council of Juvenile and Family Court Judge’s characterization of Tennessee’s juvenile court on its website: “There is little standardization in juvenile court size, case management procedures, and court administrative practices. This means that the systems and practices in Tennessee’s juvenile and family law courts vary widely and tend to reflect the needs and preferences of the people living in that particular community.”¹⁰⁹

Representation by Counsel – Children

Throughout the Task Force’s listening tour and public meetings, many judges and attorneys expressed concern about the number of children without representation in delinquency proceedings. While comprehensive data regarding representation in delinquency proceedings is unavailable, there is a widely held belief that many children in Tennessee are not represented in delinquency proceedings, notwithstanding their constitutional and statutory right to counsel.

This belief is substantiated by an informal survey conducted by the Tennessee District Attorney Generals Conference. This survey comprised 2,916 cases statewide. The survey showed that in 1,061 cases (36%), the child was represented by private appointed counsel; that in 1,041 cases (35%), the child was not represented; that in 502 cases (17%), the child was represented by a public defender; and that in 284 cases (less than 1%), the child was represented by retained counsel.

Either because of the legal ambiguity regarding the obligation of the District Public Defenders or the lack of resources, many public defenders have either ceased representing children in delinquency proceedings or have significantly reduced the number of delinquency cases they accept. This accounts for the fact that over one third of the children in delinquency proceedings are currently being represented by private appointed counsel.

Many judges and lawyers who addressed the representation of children in delinquency proceedings expressed concern over the small number of lawyers who are available to represent children and the effectiveness of the representation many children are receiving. They emphasized the differences between representing children and adults and that specialized training is necessary in order to represent children effectively.

The Task Force also noted that Tenn. Sup. Ct. R. 13 does not authorize the payment of counsel after an adjudication of delinquency in cases where the child becomes a ward of the State. Persons commented to the Task Force that these children often need legal assistance with regard to health and education issues. If

these children are fortunate enough to find a lawyer to assist them, the lawyer must represent them on a pro bono basis. In contrast, children who are wards of the state following a dependency and neglect or termination of parental rights proceeding are entitled to the services of their guardian ad litem until the guardian ad litem is relieved by the court.

Representation by Counsel – Parents

No state or local agency or legal services organization currently represents adults named as parties in dependency and neglect proceedings, termination of parental rights proceedings, or similar child welfare proceedings. Accordingly, the statutory obligation to provide legal representation to these parents or putative parents is being met by providing them with appointed private counsel.

In a 2005 study, Tennessee's Court Improvement Program (CIP) determined that custodial parents were initially represented in 89% of the cases, while non-custodial parents were represented in 58% of the cases. In permanency hearings required after a child has been in foster care for twelve months, custodial parents were represented in 67% of the cases, while non-custodial parents were represented in 35% of the cases. In termination of parental rights proceedings, custodial parents were represented in 79% of the proceedings, while non-custodial parents were represented in 49% of the cases.¹¹⁰ The coordinator of the CIP reported that parents involved in dependent and neglect or termination of parental rights matters are currently being represented in 90% of the cases. This sharp increase in the number of

people represented is due in large part to the efforts of the CIP.

It is now accepted practice in termination of parental rights cases to name multiple putative fathers as defendants. Until parentage is conclusively established, all persons named as a putative father are entitled to separate counsel.

Guardians Ad Litem

No state or local agency or legal services organization is currently providing guardian ad litem services. Accordingly, the statutory obligation to provide guardians ad litem is being met by appointing private attorneys. In its 2005 survey, the Tennessee CIP found that a guardian ad litem was being appointed in 85% of the child welfare cases and these guardians ad litem were still representing the child at the required permanency hearing twelve months later. The survey also determined that a guardian ad litem was being appointed for children in 71% of termination of parental rights cases.¹¹¹ The CIP coordinator informed the Task Force that guardians ad litem are currently being appointed in 90% of these proceedings.

The judges who appoint and the lawyers who serve as guardians ad litem consistently emphasized that dependency and neglect proceedings and termination of parental rights proceedings are complex and lengthy. They also note that the duties of guardians ad litem prescribed by Tenn. Sup. Ct. R. 40 are very time-consuming. Multiple court appearances and appearances before state agencies are common place, and in many circumstances the legal obligation to provide this representation can continue until the child's eighteenth birthday.

The cumulative effect of the potential length of the representation, the extent of the duties, and the low compensation is that few qualified lawyers currently practice in this area, and even fewer have the training and experience to provide this representation effectively. Accordingly, there is currently a very small number of qualified lawyers who are willing to accept appointments as a child's guardian ad litem. The low compensation rates are further complicated by the practice of compensating guardians ad litem based on predefined "phases" of the case, which results in lengthy delays in receiving compensation.

Task Force Findings

The Task Force agrees with the Council of Juvenile and Family Court Judges observations that "[t]here is little standardization in juvenile court size, case management procedures, and court administrative practices" and that "the systems and practices in Tennessee's juvenile and family law courts vary widely."

A significant number of children involved in delinquency proceedings are currently not represented by counsel. In addition, there are very few attorneys available with the qualifications and experience to represent these children.

There is currently a shortage of qualified attorneys to accept appointments as guardians ad litem in dependency and neglect and termination of parental rights cases. The small number of attorneys seeking these appointments is influenced by the low compensation rate and complexity and duration of these appointments.

Children found delinquent do not have the same access to legal representation regarding medical, educational, and related matters that children involved in dependent and neglect and termination of parental rights proceeding are provided.

The exclusive method for providing counsel to adults involved in dependent and neglect and termination of parental rights proceeding is the appointment of private counsel in accordance with Tenn. Sup. Ct. R. 13.

Recommendations

- 1. The District Public Defenders should be required to represent eligible children in delinquency proceedings and should receive the additional resources needed to enable them to represent these children effectively.**
- 2. Children found to be delinquent should be provided legal representation with regard to medical, educational, and related matters as long as they are wards of the State.**
- 3. While the informality and flexibility of children's proceedings should be preserved, juvenile courts should be required to adopt uniform standards with regard to training and certification of lawyers representing children and adults or acting as guardians ad litem.**
- 4. Consideration should be given regarding options for providing children guardians ad litem other than appointing private counsel. These options could include contracting with a legal services organization or creating a governmental agency to provide these services.**

IN GOD WE TRUST



Does Does Tenn. Sup. Ct. R. 13 provide the proper framework for appointed attorneys to secure experts to participate in mounting a defense for their clients?

Legal Background

In addition to providing regulations for the appointment and compensation of counsel, Tenn. Sup. Ct. R. 13¹¹² and Tenn. Code Ann. § 40-14-207(b), provide for investigators and subject-matter experts who can participate in ensuring “that the constitutional rights of the defendant are properly protected.”¹¹³ Specifically, Tenn. Sup. Ct. R. 13 states that one of its purposes is to “to provide for the appointment and compensation of experts, investigators, and other support services for indigent parties in criminal cases, parental rights termination proceedings, dependency and neglect proceedings, delinquency proceedings, and capital post-conviction proceedings.”¹¹⁴ The rule specifically prohibits expert services in non-capital post-conviction cases.

The statute requires approval from a court to secure the services of an expert or investigator. That approval is sought in an ex parte procedure, in which only the party seeking the services presents the request to the judge.

Tenn. Sup. Ct. R. 13 lists the necessary information to be included in any motion seeking funding for experts, investigators, or similar services. This information includes name, address, qualification, and licensure status of any requested service provider, as well as rates, itemized costs or anticipated expenses for the services.¹¹⁵ The Rule also requires that every effort be

made to secure an expert whose business is within 150 miles of the court where the case is pending.

If the court determines the services are necessary, it “may grant prior authorization for these necessary services in a reasonable amount to be determined by the court.”¹¹⁶ Rule 13 emphasizes that there must be a particularized need for services in order to gain approval for the services and appointed counsel must secure expert services at hourly rates that do not exceed the established maximum hourly rates.¹¹⁷

Summary of Information Obtained by the Task Force

Lawyers and judges appearing before the Task Force stated that the current rates for paying certain experts under Tenn. Sup. Ct. R. 13 are below the market rate. Accordingly, it is becoming difficult to find experts in a number of fields who will agree to serve as expert witnesses. They also stated that the experts charge on a case-by-case basis and that there has been little effort to contract with experts to provide services within a defined geographical area or a fixed time period.

Defense lawyers and prosecutors, as well as several judges, also expressed concern regarding the cumbersome process and the ex parte hearings required by Tenn. Sup. Ct. R. 13, § 5 and Tenn. Code Ann.

§ 40-14-207(b) when indigent parties desire to retain expert witnesses. In addition to pointing out that proceedings in criminal courts are presumed to be on the record, the attorneys expressed concern that these hearings were held without the prosecution being present and that they risked requiring counsel to disclose defense strategies or other confidential information to the judge who would preside over the trial.

Task Force Findings

It has become difficult to retain experts in certain fields because the approved rates for these experts in Tenn. Sup. Ct. R. 13, § 5(d)(1) are lower than the prevailing market rate for their services.

The current ex parte hearings required to retain experts run the risk of requiring defense counsel to disclose defense strategies or other confidential information to the judge who would preside over the trial.

There also does not exist a deadline by which experts are required to submit invoices requesting payment for their services, unlike those imposed upon attorneys. The Administrative Office of the Courts recommended to the Task Force that a deadline structure similar to the one used for attorneys be implemented for expert services.

Recommendations

- 1. Payment for experts should be adjusted to market rates.**
- 2. The burden of the administrative aspects of the appointed expert system (such as need, qualifications, and approval of payment) should be lifted from the trial courts.**
- 3. A system should be implemented for which general classes of cases will receive the entitlement to expert services, with specification as to which types of experts are available in which circumstances.¹¹⁸**
- 4. A time limit should be introduced to mandate the point at which an invoice for expert services must be received.**



Related Issues Requiring Additional Attention

During its listening tour and meetings, the Task Force received comments and suggestions regarding a number of issues affecting the State’s ability to provide counsel for eligible adults and juveniles that do not relate directly to the manner in which these services are provided. The Task Force believes that these issues are beyond the scope of its work. However, because of their significant impact, the Task Force deems it appropriate to call attention to these issues and to commend them to the Tennessee Supreme Court, the General Assembly, and Executive Branch for further study and action.

1. Digitalization of Court Records

During its listening tour, many public defenders and private counsel pointed out that they were able to work more efficiently and effectively in counties where court records had been digitalized and were available online. They explained that their travel time and their staff’s travel time was greatly reduced when they were not required to travel to a clerk’s office to obtain hard copies of their client’s file. They also stated that being able to access records outside of regular business hours provide additional flexibility and efficiency.

While some counties have digitalized their records and are able to provide online access to these records, many counties, primarily rural ones, have not. The Task Force recommends that counties should be encouraged to digitalize their records and that serious consideration should be given to provide funding incentives do so.

2. Incarceration for Failure to Pay Fines and Fees

The Task Force heard many accounts and descriptions of what is referred to by some as “Tennessee’s debt penalty.” This refers to the debt amassed in fines, fees, court costs, incarceration costs, restitution obligations, and litigation taxes by persons convicted of crimes. Indigent persons convicted of criminal offenses do not have the financial resources to pay this debt, and their inability to do so can (1) affect the length of their incarceration or probation, (2) result in the loss of their driver’s license, and (3) affect their credit score which, in turn, can affect their ability to find or retain housing and employment, and to support their families.

The Tennessee Advisory Commission on Intergovernmental Relations (TACIR) recently reported that “collecting fees and taxes can be problematic, especially in criminal cases.”¹¹⁹ Collecting these fees and taxes is more difficult in criminal cases because “convicted criminals, even if

they are motivated to pay, often cannot because they are indigent, homeless, disabled, or incarcerated.”¹²⁰ This difficulty is reflected in a report prepared by the Administrative Office of the Courts regarding the collection of fines, fees, and costs during the 2011-2012 fiscal year. This report showed that while 71.79% of the fines, fees, and costs were collected in civil cases, only 29.95% of these costs were collected in criminal cases.¹²¹ In Davidson County, 83.95% of the fines, fees, and costs were collected in civil cases, compared to 20.93% in criminal cases.¹²² In Shelby County, the ratio was 94.39% to 21.95%.

In 2011, responding to criticism of their collection rates, the court clerks convinced the General Assembly to enact a statute requiring the revocation of driver’s licenses for non-payment of litigation taxes, court costs, and fines within one year of the disposition of a criminal case.¹²³ Court clerks in Tennessee are now commonly using this statute as a collection tool. Since 2011, 191,089 persons have had their driver’s licenses revoked.¹²⁴

Driving on a suspended or revoked license is a criminal offense.¹²⁵ Accordingly, an arrest for driving on a suspended or revoked license triggers a criminal prosecution and the accused’s right to counsel. In conjunction with the Task Force’s listening session in Memphis, members of the Task Force observed proceedings in the Criminal Division of the Shelby County General Sessions Court. On this occasion, both the prosecutors and public defenders assigned to the court reported that a great deal of their time and resources were being devoted to prosecuting and defending persons charged with driving on a revoked or suspended

license. They also pointed out that they had not been provided additional resources or personnel to prosecute and defend these cases and, as a result, their caseloads had increased significantly. Prosecutors and public defenders in other parts of the state expressed similar concerns.

Because criminalizing the non-payment of fines, fees, and costs triggers the right to counsel, adds significantly to the courts’ caseload, requires attention by the prosecutors and public defenders, and places persons who lack the resources to pay “into a negative cycle of debt,”¹²⁶ the Task Force recommends either that driving on a revoked license be treated as a civil matter or that additional resources be provided to the courts, prosecutors, and public defenders to process these cases more efficiently and fairly.

3. Children’s Waiver of the Right to Counsel

The right to counsel for children was established in *In re Gault*, 387 U.S. 1 (1967). It is now codified at Tenn. Code Ann. § 37-1-126 (2014). In delinquency proceedings, judges have the statutory duty to ensure that children are aware that they have the right to counsel and the counsel will be appointed for them if they cannot afford to retain a lawyer.¹²⁷ Children who are being “represented” by their parent, guardian, guardian ad litem, or custodian are not entitled to separate counsel unless a conflict of interest exists.¹²⁸ Tenn. R. Juv. P. 205 permits juveniles to waive their right to counsel and other procedural rights.

During its listening tour and at its business meetings, the Task Force received many comments regarding a significant

number of children who were not represented by counsel in delinquency proceedings. The lack of counsel was, among other reasons, caused by the District Public Defender's decision not to represent children in delinquency cases or by the child's decision to waive the right to counsel. Tenn. R. Juv. P. 205(2)(A) requires that the child's waiver of the right to counsel be "knowing and voluntary," and Tenn. R. Juv. P. 205(b)(3) requires the child to consult with a knowledgeable adult who has no interest adverse to the juvenile. Neither Tenn. R. Juv. P. 205 nor the applicable statutes prescribes specific criteria for determining whether a juvenile's waiver is knowing and voluntary. Because of the substantial differences between the decision-making abilities of juveniles and adults, the Task Force recommends that consideration be given either to define more specifically the criteria for determining whether a juvenile has knowingly and voluntarily waived his or her right to counsel or to prohibit juveniles charged with delinquent acts from waiving their right to counsel.

4. Pretrial Release

Persons accused of a crime have a constitutional and statutory right to bail.¹²⁹ However, pretrial release need not be conditioned on posting bail. Persons may be released on their own recognizance without being required to post a bond with or without other conditions.¹³⁰ In fact, Tenn. Code Ann. § 40-11-116(a) requires courts to impose the "least onerous conditions reasonably likely to assure the defendant's appearance in court."

Unnecessary pretrial detention is detrimental to the accused, costly to the de-

taining authority, and counterproductive with regard to its impact on future criminal behavior.¹³¹ Pretrial release decisions should not be determined by factors such as a person's gender, race, ethnicity, or financial resources. Rather, they should focus on protecting against the risk that the person will fail to appear for a scheduled court date and on protecting against the risks to the safety of specific persons or the community.¹³² These decisions should be based on reliable information about the potential risks posed by a person's release and on an understanding of the community resources available to address or minimize the risks of non-appearance or danger to the community.¹³³

Tennessee statutory standards for releasing persons on their own recognizance and for setting bail require courts to consider factors relevant to the likelihood that the person will appear for scheduled court dates and to the risk to public safety if the person is released.¹³⁴ While the Task Force did not receive information that the trial courts are failing to follow these standards, concern was expressed that Tennessee's slowness to adopt successful new pretrial release procedures being employed in other states may be having the effect of increasing the number of persons unnecessarily detained prior to trial.

Many persons who addressed the Task Force expressed concern regarding the fairness and efficacy of Tennessee's current commercial bail bond system. While there was substantial agreement that requiring bail is a proper way to ensure appearance and protect the safety of the public in appropriate cases, there was substantial unanimity among the prose-

cutors, public defenders, private defense counsel, and representatives of the law enforcement community that the current reliance on commercial bail bondsmen should be revisited.

The criticisms of the current commercial bail bond system focused on two shortcomings. First, many persons who have been arrested, fearing lengthy pretrial incarceration, exhaust their personal, and often their family's, financial resources to obtain a bond from a commercial bondsman. Had these resources not been used to make bail, they could have been used to retain a lawyer, thereby eliminating the need to appoint a public defender or private counsel. Second, commercial bondsmen provide little, if any, practical assistance to the courts or law enforcement. In the relatively rare instances when an accused fails to appear for a court date, he or she is most often apprehended by law enforcement agencies and returned to custody without the commercial bondsman's assistance.

The nationwide costs to communities stemming from the reliance on commercial bail bond systems are staggering. It is estimated that 450,000 persons are detained before trial on any given day in the United States. They account for approximately 63% of the total jail population, and the aggregate daily cost to the taxpayers for keeping them in jail is greater than \$38 million.¹³⁵ In addition to the cost to the taxpayers, the amount of money pocketed by private bondsmen is substantial. For example, a recent study in Maryland found that from 2011 to 2015, the total amount paid to obtain bonds exceeded \$256 million. The study also determined that \$75 million of these payments were made by persons whose

charges were eventually dropped or who were found not guilty.¹³⁶

Concerns about the fairness and efficacy of Tennessee's heavy reliance on commercial bail bonds is not new. In 1996, the Commission on the Future of the Tennessee Judicial System, characterizing commercial bail bonds as "the judicial system's tawdry embarrassment" and identified significant problems similar to those presented to the Task Force.¹³⁷ These shortcomings included:

- ◆ Opportunities for corruption;
- ◆ Unnecessary detention for minor offenses;
- ◆ Exhaustion of personal resources requiring appointment of public defenders or private counsel; and
- ◆ The release of dangerous prisoners who have access to money.¹³⁸

Because of its concerns regarding Tennessee's commercial bail bond system, the Commission concluded that "the judicial system would be better served by its own bonding system."¹³⁹ A state-administered bonding system could generate significant revenue to fund the programs providing counsel to eligible adults and children.

The Task Force recommends the creation of a separate task force to study the standards and procedures for making pretrial release decisions and the fairness and efficacy of the commercial bail bond system. In addition, the Task Force also recommends that the study include examination of pretrial release programs in other jurisdictions, particularly the reforms adopted by Kentucky and Mary-

land, which have substantially reduced the incarceration rates and the associated costs. The Task Force also recommends establishing pilot projects to evaluate the efficacy in Tennessee of the pre-trial release reforms that have proved successful in other states.

5. Sentencing Reform

The last thorough examination and revision of Tennessee's criminal code occurred in the context of the drafting of the Sentencing Reform Act of 1989. Over the last twenty-eight years, the General Assembly has created new criminal offenses and determined their punishment. The General Assembly has also increased sentences for particular offenses.¹⁴⁰ The Task Force recommends that serious consideration should be given to creating a new task force with a composition similar to the Tennessee Sentencing Commission that worked between 1986 and 1994 to revise Tennessee's criminal code. The Task Force recommends that among this task force's goals should be the revision of the statutory severity of less serious offenses to make them eligible for warnings, citations, pre-booking diversion, or non-financial release prior to trial.

6. Funding of Right to Counsel Services

The Task Force reviewed recent reports and received comments raising significant concerns regarding the heavy reliance on fees, taxes, and costs to fund the judicial system and the manner in which funding for right to counsel services are allocated.

In January 2017, TACIR published a report stating that 245 separate state and

local fees and taxes ranging from \$.50 to \$3,000 are currently being imposed in Tennessee.¹⁴¹ Of these fees and taxes, 104 apply only to Knox County, while 87 apply to all counties. Of the 141 fees and taxes not limited to Knox County, 55 fees and 31 taxes are earmarked for various programs, funds, and agencies. Of the 55 fees, 30 are earmarked for court purposes only.¹⁴² Only 30% of the 11 state litigation tax revenues are used to fund indigent representation services.¹⁴³

TACIR noted the lack of reliable statewide collections data.¹⁴⁴ It also noted concern that the combined amount of these fees, taxes, and costs could potentially limit access to justice in civil cases¹⁴⁵ and that the accrued fees, taxes, and costs in criminal cases could lead to overwhelming uncollectable debt.¹⁴⁶ Because of these concerns, TACIR suggested that Tennessee could create a committee to: (1) analyze the court costs, how they are earmarked, and how they accumulate; (2) make recommendations regarding legislation that would change these costs; and (3) examine all the statewide taxes and fees to determine whether changes should be made in their amount or in the way they are earmarked.¹⁴⁷

The Task Force also heard comments reflecting intramural tension among the members of the District Public Defenders Conference regarding the way state funds have been allocated among the judicial districts and the statutory restraints on the Conference's ability to use state funds where they are most needed. The three issues precipitating this tension involve (1) the difference in the way state funds are appropriated to Davidson and Shelby Counties;¹⁴⁸ (2) the impact of local funding on the amount of state

funding; and (3) the significant variation in funding among the judicial districts.

Data presented to the Task Force shows that during the past 25 years, state funding for the District Public Defenders in Davidson and Shelby Counties increased by less than 50%, while funding for the remaining public defenders increased over 200%. Thus, Davidson and Shelby counties currently receive 18% of the total annual state funding to the District Public Defenders, even though these two counties account for approximately 30% of the new criminal cases opened each year.

District Public Defenders in 18 judicial districts receive no local funds and must rely exclusively on state funds. Thirteen District Public Defenders receive local funds; however, the amount of these funds ranges from modest in rural districts¹⁴⁹ to substantial in urban districts.¹⁵⁰ Only one District Public Defender receives funding from federal grants and other sources in addition to state and local funds.¹⁵¹ The annual state funds received by the two District Public Defenders receiving the largest amounts of local funding – Davidson and Shelby Counties – are statutorily capped.¹⁵²

There is a significant variance in state per capita funding among the Judicial Dis-

tricts. The Twenty-Ninth Judicial District (Dyer and Lake counties) receives \$19.20 per capita, the highest rate of funding. The Twentieth Judicial District (Davidson County) receives \$3.27 per capita, the lowest rate of funding. The Thirtieth Judicial District (Shelby County) receives \$5.42 per capita. The statewide average per capita allocation of state funding is \$8.76.

A similar variance in per capita funding exists when all right to counsel funding is considered.¹⁵³ The Fourteenth Judicial District (Coffee County) receives \$24.93, the highest per capita total funding rate. The Sixteenth Judicial District (Cannon and Rutherford Counties) receives \$7.89, the lowest per capita funding rate. The statewide average per capita allocation of all funding for right to counsel services is \$14.82, compared with the national per capita average per capita funding rate of \$17.15.

The Task Force concurs in TACIR's recommendation to appoint a committee to address the amount of the court costs, fees, and taxes and how they are allocated with particular emphasis on the funding of right to counsel services. The Task Force also recommends that this committee address the manner in which state funding for right to counsel services is allocated and the appropriate roles of the State and the local governments in funding these services.

Endnotes

- 1 The Advisory Council’s biographical information is included in Appendix A of this report.
- 2 Ms. Waller was originally appointed to the Task Force in 2015. She fully participated in the Task Force’s meetings and listening sessions. Because of the limitations placed on attorneys employed by agencies funded by the Legal Services Corporation, Ms. Waller requested to transition her role from that of a Task Force member to a member of the Advisory Council. Accordingly, Ms. Waller did not participate in the approval of the Task Force’s final recommendations.
- 3 Tenn. Const. art. XI, § IX (1796), now found at Tenn. Const. art I, § 9.
- 4 *State v. Poe*, 76 Tenn. (8 Lea) 647, 654, 1881 WL 4469 at *4 (1881).
- 5 *Poindexter v. State*, 191 S.W.2d 445, 446 (1946).
- 6 *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963).
- 7 For example, the Court has observed that “[w]hile a criminal trial is not a game in which the participants are expected to enter the ring with a near match of skills, neither is it a sacrifice of unarmed prisoners to gladiators.” *United States v. Cronin*, 466 U.S. 648, 657 (1984).
- 8 *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975).
- 9 *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963).
- 10 *Missouri v. Frye*, 566 U.S. 133, 143 (2012).
- 11 Thomas Giovanni & Roopal Patel, *Gideon at 50: Three Reforms to Revive the Right to Counsel*, Brennan Ctr. for Justice 2013, [www.brennancenter.org/publication/gideon-50-three-reforms-
revive-right-counsel](http://www.brennancenter.org/publication/gideon-50-three-reforms-revive-right-counsel).
- 12 Tenn. Code Ann. §§ 16-1-117(a), 16-3-803 (Supp. 2016).
- 13 The Spangenberg Group, *Tennessee Public Defenders Case-Weighting Study 64*, Tenn. Comptroller of the Treasury, 1999 (Spangenberg Report), www.comptroller.tn.gov/Repository/RE/publdef.pdf
- 14 Spangenberg Report, at 72-73.
- 15 Tenn. Code Ann. § 16-3-803(h).
- 16 *Id.*
- 17 Denise Denton, *The Need for Standardized Caseload Data in Tennessee Courts 3* (2001), www.comptroller.tn.gov/Repository/RE/judcase2001.pdf.
- 18 Tenn. Op. Att’y Gen. No. 01-054 (2001), [https://www.tn.gov/assets/entities/attorneygeneral/
opinions/op01-054.pdf](https://www.tn.gov/assets/entities/attorneygeneral/opinions/op01-054.pdf).
- 19 Tenn. Code Ann. § 16-3-803(i).
- 20 *Id.*
- 21 The General Assembly amended the definition of “criminal case” in 2002 and again in 2014. Act of May 22, 2002, ch. 791, § 3, 2002 Tenn. Pub. Acts; Act of Mar. 31, 2014, ch. 673, § 1, 2014 Tenn. Pub. Acts.
- 22 Tenn. Code Ann. § 16-1-117(a).
- 23 *Id.* at (a)(3).
- 24 Office of Research and Education Accountability, *FY 2005-2006 Tennessee Weighted Caseload Study Update: District Public Defenders iii* (Tenn. Comptroller of the Treasury 2006) (“Weighted Caseload Study Update”), available at [www.comptroller.tn.gov/Repository/RE/final%20pd%20re
port%202005.pdf](http://www.comptroller.tn.gov/Repository/RE/final%20pd%20report%202005.pdf)
- 25 *Id.* at iv.
- 26 Letter from Justin P. Wilson Comptroller of the Treasury to Ron Ramsey, Speaker of the Senate (Mar. 26, 2015), [www.comptroller.tn.gov/Repository/RE/2014%20Final%20DA%20PD%20
Memo.pdf](http://www.comptroller.tn.gov/Repository/RE/2014%20Final%20DA%20PD%20Memo.pdf).
- 27 Div. of State Audit Risk-Based Performance Section, *Tennessee Court System: Performance Audit Report 30-31 (2015)* (“2015 Performance Audit”), available at [www.comptroller.tn.gov/repository/
SA/pa14049.pdf](http://www.comptroller.tn.gov/repository/SA/pa14049.pdf).
- 28 *Id.* at 32.
- 29 Marea Beeman, *Using Data To Sustain and Improve Public Defense Programs 3* Justice Management Institute Aug. 31, 2012 (“Justice Management Institute Report”), [texaswcl.tamu.edu/
reports/2012_JMI_Using_Data_in_Public_Defense.pdf](http://texaswcl.tamu.edu/reports/2012_JMI_Using_Data_in_Public_Defense.pdf).
- 30 *Id.* at 3-4.
- 31 Tenn. Code Ann. § 16-1-117(a)(5).
- 32 Tenn. Code Ann. § 16-1-117(a)(1).
- 33 Juvenile Justice Realignment Task Force, *Final Report 10*, Jan. 23, 2017, [http://tncourts.gov/
node/4738798](http://tncourts.gov/node/4738798) (“Juvenile Justice Report”).

34 Juvenile Justice Report, at 11.
35 Juvenile Justice Report, at 10.
36 Juvenile Justice Report, at 19.
37 David Carroll, *Right to Counsel Services in the 50 States – An Indigent Defense Reference Guide for Policymakers*, Mar. 2017.
38 See, e.g., *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).
39 *Polk County v. Dodson*, 454 U.S. 312, 321 (1981).
40 *Powell v. Alabama*, 287 U.S. 45, 61 (1932).
41 American Bar Ass’n, *Ten Principles of a Public Defense Delivery System* (Feb. 2002).
42 Nat’l Legal Aid & Defender Ass’n, *Tennessee Court System: Defense System Study* 78-80 (Office of the Executive Sec’y, Tenn. Sup. Ct. 1997), available at www.tsc.state.tn.us/node/3993149.
43 Indigent Defense Comm’n, *Report of the IDC to the Supreme Court* 5-6 (1997), available at www.tncourts.gov/sites/default/files/docs/september_1997_indigent_defense_committee_report.pdf.
44 In re Proposed Amendments to Tenn. Sup. Ct. R 13, Joint Comments on the Proposed Amendments to Tenn. Sup. Ct. R. 13 by the Tennessee Bar Ass’n, the Tennessee Public Defender Conference, the Tennessee Post-Conviction Defender, and the Tennessee Ass’n of Criminal Defense Lawyers 2-4 (filed Jan. 23, 2004) (2004 Joint Comments)
45 2004 Joint Comments, Exhibit A.
46 Comm’n on the Future of Tennessee Courts, *To Serve All People* 15 (June 1996) (“To Serve All People”), www.tsc.state.tn.us/sites/default/files/docs/report_of_future_of_tn_judicial_system.pdf.
47 Termination of Parental Rights can also be filed in circuit or chancery court. Tenn. Code Ann. § 36-1-113. In appeals, the same rights to counsel applies. Tenn. R. App. P. 18(a).
48 Tenn. Code Ann. § 40-30-206(a).
49 *Id.* at (b).
50 *State v. Gardner*, 626 S.W.2d 721, 725 (Tenn. Crim. App. 1981)(internal quotations omitted).
51 *Id.*
52 *Id.*
53 Tenn. Code. Ann. § 8-14-101.
54 *Id.* at (1)-(2).
55 Tenn. Code Ann. §§ 8-14-101, 105-106; 40-14-201 to -202.
56 Tenn. Code Ann. § 33-3-503(c)(1).
57 *Id.*
58 Tenn. S. Ct. R. 13 § 1(d)(1)(F)
59 A copy of the Uniform Affidavit of Indigency appears in Appendix E.
60 Tenn. Code. Ann. § 40-14-202(e). *See also* Tenn. Code. Ann. § 8-14-105.
61 *Id.*
62 Tenn. Code Ann. § 40-14-202(b).
63 *Id.* at (d).
64 Appendix E.
65 *Id.* at (c)(1)-(7).
66 Tenn. Sup. Ct. R. 13 § 1(e)(3).
67 Tenn. Code Ann. § 8-14-105(d); *see also* Tenn. Code Ann. § 40-14-202(a)(providing that, in felony cases, the court shall appoint “either the public defender, if there is one for the county, or, in the absence of a public defender, a competent attorney”); Tenn. Code Ann. § 37-1-126(a)(3)(addressing appointment of counsel in matters relating to juveniles).
68 Tenn. Sup. Ct. R. 13 § 1(e)(4)(A).
69 *Id.* at 1(e)(4)(B); *see also* Tenn. Sup. Ct. R. 8, RPC 1.7 (a)(1)-(2)(stating that an attorney may not take on representation if “the representation of one client will be directly adverse to another client” or if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”)
70 *Id.* at § 1(e)(4)(D).
71 See Tenn. Sup. Ct. R. 8, RPC 1.7(b)(2)(prohibiting such representations as an ethical matter).
72 Tenn. Sup. Ct. R. 8, RPC 1.7(c)(1).
73 *Id.* at (c)(2).
74 Tenn. Sup. Ct. R. 8, RPC 1.1.

75 *Id.*
76 *See, e.g.,* Tenn. Code Ann. § 40-14-202(a), which applies in all felony cases, provides that, in the
absence of the public defender, the court is to appoint a “competent attorney” and that the court
“may call upon any legal aid agency operating in conjunction with an accredited college of law to
recommend attorneys for appointment.”
77 Tenn. Sup. Ct. R. 13, § 1(b).
78 *Id.*
79 Tenn. Code Ann. § 37-1-126(a)(1)-(4).
80 Tenn. Code Ann. § 33-3-503(c)(1).
81 Tenn. Sup. Ct. R. 13 § 1(d)(1)(B).
82 Tennessee Court System Performance Audit Report, 13-16 Tenn. Comptroller of the Treasury July
2015, www.comptroller.tn.gov/repository/SA/pa14049.pdf
83 *Id.* at 16.
84 *Id.*
85 Tenn. Code Ann. § 40-14-207(a).
86 Tenn. Sup. Ct. R. 13 § 2(c)(1).
87 *Id.* at § 3(K).
88 *Id.* at § 2(g).
89 *Id.* at § 2(e)(1).
90 *Id.* at § 6(a)(1).
91 *Id.* at § 6 (a)(5).
92 Tenn. Code Ann. § 40-14-208(d).
93 *See, e.g.,* Tenn. Code Ann. §§ 8-14-205; 33-3-503(c); 37-1-150; 40-14-207; *see also* Tennessee Court
System Performance Audit Report 14 Tenn. Comptroller of the Treasury July 2015, <http://www.comptroller.tn.gov/repository/SA/pa14049.pdf> (explaining that the Code lacks the categories
identified by Tenn. Sup. Ct. R. 13 because the Rule is more easily and regularly updated to reflect
decisions made by the U.S. Supreme Court involving indigent determination and the types of cases
for which individuals are guaranteed legal counsel).
94 Tenn. Sup. Ct. R. 15.
95 Tenn. Sup. Ct. R. 16.
96 Tenn. Sup. Ct. R. 40A, § 11(a).
97 Tenn. Sup. Ct. R. 13, § 7.
98 Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm
99 American Bar Association, *Guidelines for the Appointment and Performance of
Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003).
100 Task Force member Dwight Tarwater, who serves as counsel to Tennessee Governor Bill Haslam, did
not participate in the decision regarding the recommended change in the hourly rate.
101 Tenn. Code Ann. § 40-14-210(d).
102 *See In re Carrington H.*, 483 S.W.3 507, 536 (Tenn. 2016).
103 Tenn. Code Ann. § 37-1-501.
104 *In re Gault*, 387 U.S. 1, 37 (1967); Tenn. Code Ann. § 37-1-126 (Tenn. 2014).
105 *In re Gault*, 387 U.S. at 41 (1967); Tenn. Code Ann. § 37-1-126.
106 Tenn. Code Ann. § 37-1-126(a)(2)
107 Tenn. Sup. Ct. R. 40(c)(1), (f)(3); Tenn. Sup. Ct. R. 13 § 1 (d), (e).
108 *Id.* at (c)(3).
109 Administrative Office of the Courts, Juvenile & Family Courts,
<https://www.tncourts.gov/courts/juvenile-family-courts>.
110 Tennessee Court Improvement Program, *A Re-Assessment of Tennessee’s Judicial Process in Foster
Care Cases*, 69-74 (2005) (“Tennessee Court Improvement Program Report”), [www.tncourts.gov/
ites/default/files/docs/reassessment_of_tn_judicial_process_in_foster_care.pdf](http://www.tncourts.gov/sites/default/files/docs/reassessment_of_tn_judicial_process_in_foster_care.pdf).
111 *Id.* at 64.
112 Tenn. Sup. Ct. R. 13 § 5(a)(1).
113 Tenn. Code Ann. §40-14-207 (b).
114 Tenn. Sup. Ct. R. 13 § 1(a)(1)(E).
115 *Id.* at § 5(b)(2)-(3).
116 *Id.* at § 5(a)(1).
117 *Id.* at § 5(c)(1)-(4).

118 The judge would maintain the ability to determine whether certain cases that do not meet those
guidelines should nonetheless have expert testimony. This will have the dual effect of eliminating the
conflicts associated with placing a defendant in the position of having to reveal confidential
information to his judge and also eliminate unnecessary court time spent on hearings.

119 Tenn. Advisory Comm'n on Intergovernmental Relations, *Tennessee's Court Fees and Taxes:
Funding the Courts Fairly* 6 (Jan. 2017) ("TACIR Report"), [www.tn.gov/assets/entities/tacir/
attachments/2017_CourtFees.pdf](http://www.tn.gov/assets/entities/tacir/attachments/2017_CourtFees.pdf)

120 TACIR Report, at 7.

121 *Id.* at 149-63.

122 *Id.* at 151.

123 Tenn. Code Ann. § 40-24-105(b)(1).

124 TACIR Report, at 4.

125 Tenn. Code Ann. § 55-50-504.

126 TACIR Report, at 4

127 Tenn. Code Ann. § 37-1-126(a)(3).

128 Tenn. Code Ann. § 37-1-126(a)(4).

129 Tenn. Const. art. I, § 15; Tenn. Code Ann. § 40-11-102.

130 Tenn. Code Ann. §§ 40-11-104(a), -115(a).

131 William F. Dressel & Barry Mahoney, *Pretrial Justice in Criminal Cases: Judges' Perspectives on
Key Issues and Opportunities for Improvement* 4 Nat'l Judicial Coll., May 2013 ("Pretrial Justice in
Criminal Cases"), <https://www.judges.org/wp-content/uploads/pretrial-whitepaper0513.pdf>.

132 Tenn. Code Ann. § 40-11-118(b).

133 Pretrial Justice in Criminal Cases, at 2.

134 Tenn. Code Ann. §§ 40-11-115(b)(1)-(8), -118(b).

135 Pretrial Justice Institute, *Pretrial Justice: How Much Does It Cost?* 2 (2017) ("How Much Does It
Cost?"), <https://university.pretrial.org/viewdocument/pretrial-justice-how-much-does-it>.

136 *Id.* 4.

137 To Serve All People, at 34.

138 *Id.* at 32-34; see also Pretrial Justice Institute, *Where Pretrial Improvements Are Happening* 1
(Jan. 2017), <https://university.pretrial.org/viewdocument/where-pretrial-improvements-are-hap-2>.

139 To Serve All People, at 33.

140 Vera Institute of Justice, *Final Report to the Tennessee Governor's Task Force on Sentencing and
Recidivism: Recommendations for Criminal Justice Reform in Tennessee* 8 (Sept. 2015), [https://
www.vera.org/publications/final-report-to-the-tennessee-governors-task-force--on-sentencing-and-
recidivism](https://www.vera.org/publications/final-report-to-the-tennessee-governors-task-force--on-sentencing-and-

recidivism).

141 TACIR Report, at 1-2.

142 TACIR Report, at 5.

143 According to TACIR, 3.8% of the funds are earmarked for indigent defendants services; 7.8% for civil
legal representation of indigents; and 19.3% is allocated to the public defenders program. TACIR
Report, at 23.

144 TACIR Report, at 35-36.

145 TACIR Report, at 1.

146 TACIR Report, at 3.

147 TACIR Report, at 5.

148 For the past 25 years, Tenn. Code Ann. § 8-14-110 (2016) has required the use of a formula for the
state funding of the District Public Defenders in the Twentieth and Thirtieth Judicial Districts that is
different than the funding for the remaining 20 Judicial Districts.

149 Local funds in the Fourteenth Judicial District (Coffee County) amount to .26% of the District Public
Defender's annual budget. In the Nineteenth Judicial District (Montgomery & Robertson Counties),
local funds amount to .46% of the District Public Defender's annual budget.

150 Local funds amount to 69% of the District Public Defender's annual budget in the Twentieth Judicial
District (Davidson County) and 59% of the District Public Defender's annual budget in the Thirtieth
Judicial District (Shelby County). Local funds amount to 26% of the District Public Defender's annual
budget in the Eleventh Judicial District (Hamilton County).

151 Local and other funding amounts to 38% of the District Public Defender's annual budget in the Sixth
Judicial District (Knox County).

152 Tenn. Code Ann. § 8-14-110.

153 Right to counsel funding includes funding from all sources to the District Public Defenders and state
payments to private appointed counsel under Tenn. Sup. Ct. R. 13.

A

APPENDIX

Indigent Representation Task Force

Member Biographies

Justice William C. Koch, Jr., (Ret.), Chairperson

Task Force Chairperson President and Dean – Nashville School of Law

William C. Koch, Jr. is a well-respected champion for education and judicial leadership. He is the President and Dean of the Nashville School of Law. Dean Koch received his B.A. in English from Trinity College (Hartford, CT), his J.D. from Vanderbilt University School of Law, and his LL. M. in Judicial Process from the University of Virginia School of Law (Charlottesville, VA). He has served in the Tennessee judicial system as a former Tennessee Supreme Court Justice, a past Presiding Judge for the Middle Section of the Tennessee Court of Appeals, and as a former judge for the Tennessee Court of Appeals, Middle Section. He was appointed Counsel to Governor Lamar Alexander and Commissioner of Personnel for the State of Tennessee. Within the Office of the Tennessee Attorney General and Reporter, Dean Koch served as Assistant Attorney General, Senior Assistant Attorney General, and Deputy Attorney General. Currently, he is a member of the American Bar Association, the Tennessee Bar Association, and serves on the Board of the Directors for the Nashville Bar Association. He is also a member of the Lawyers Association for Women, the Napier-Looby Bar Association, Tennessee Association for Justice, Tennessee Bar Foundation, Nashville Bar Foundation, the United States Supreme Court Historical Society, and the Tennessee Supreme Court Historical Society. For the past 35 years, he has served on the Board of Trustees for the United Way of Metropolitan Nashville. In the academic arena, Dean Koch has been appointed as Instructor in Constitutional Law at the Nashville School of Law, an Adjunct Instructor and Professor in State Constitutional Law for Vanderbilt University School of Law, and Adjunct Professor for Belmont University School of Law.

Lela Hollabaugh, Esq.

Partner – Bradley Arant Boult Cummings LLP

Lela M. Hollabaugh has served as the lead trial lawyer in more than a dozen jury trials, as well as more than two dozen bench trials, arbitrations and administrative hearings. Hollabaugh has served in several leadership positions in legal, industry, and government organizations. She currently heads the firm's business litigation group. She is general counsel to the Nashville Bar Association and a trustee of the Nashville Bar Foundation. She is a past-president of the Nashville Bar Association and is a past member of the International Association of Defense Counsel's Board of Directors. Lela is a past Chair of the Tennessee Board of Professional Responsibility. Hollabaugh is also listed on the American Arbitration Association's (AAA) Roster of Neutrals for Commercial Litigation. She holds a J.D. and B.S. (with honors) from the University of Tennessee. Her distinctions include: Listed in The Best Lawyers in America®; Commercial Litigation, 2015-2016; Eminent Domain and Condemnation Law, 2014-2016; Energy Law, 2010-2016; Mass Tort Litigation/Class Actions-Defendants, 2016; Product Liability Litigation-Defendants, 2016; "Lawyer of the Year," Nashville, Energy Law, 2014; Listed in Benchmark Litigation, "Future Star," Tennessee, 2015; Listed in The International Who's Who Legal; Products Liability Defense Lawyers, 2012-2015; Listed in Nashville Business Journal, "Best of the Bar," 2013-2015.

Judge Deanna Bell Johnson

Circuit Court Judge – 21st Judicial District

In nearly 25 years of private practice, Deanna Johnson honed her experience in both civil and criminal matters. Over the course of her career, she represented large and small corporations, family businesses, insurance companies and government entities, and across a spectrum of industries - communications, transportation, entertainment, distribution, media, retail and manufacturing, to name a few. Governor Bill Haslam pointed to that depth of experience in November 2014, when he appointed Johnson to the Circuit Court bench in Tennessee's 21st District, which includes Williamson, Hickman, Lewis, and Perry counties. Since that time, Judge Johnson has become known as a fair jurist, compassionate yet tough, reasonable yet relentlessly focused on enforcing the laws of our state. Prior to her appointment, Johnson was in private practice in Franklin, having previously served as an associate at the law firms of Spicer, Flynn & Rudstrom and King & Ballow, respectively, both located in Nashville. She received her law degree from DePaul University in Chicago in 1991 and a bachelor's degree in political science at the University of Illinois in 1988. She has practiced in state courts in more than 20 counties throughout Tennessee as well as in federal court, including the Middle District of Tennessee and the Sixth Circuit Court of Appeals. Johnson has been a small business owner, including the Leiper's Fork Market in Franklin, the Duck River Market in Duck River, Tenn., and the Pinewood General Store in Nunnely, Tenn. She is married to state Senator Jack Johnson, and is mother to their three children: Mackenzie, Trevor and Walker.

Professor Susan L. Kay

Associate Dean for Clinical Affairs and Clinical Professor of Law – Vanderbilt Law School

Sue Kay has headed the law school's clinical and experiential legal education program since 2001, having joined the clinical faculty in 1980. In addition to teaching in the Criminal Practice Clinic, Dean Kay supervises the Trial Advocacy courses and student externships, and teaches courses on Professional Responsibility, Criminal Law and Evidence. She is active in many professional and service activities and has served as president of the Clinical Legal Education Association, a national association that represents more than 600 law faculty, and as president of the board of the Tennessee Alliance for Legal Services and the Legal Aid Society of Middle Tennessee and the Cumberland. She currently chairs the board of the American Civil Liberties Union of Tennessee. Dean Kay is a member of the Standards Review Committee of the ABA's Section on Legal Education and Admission to the Bar. Within the clinic, she has conducted major public law litigation concerning jail overcrowding, inmates' rights, and juvenile justice. In 2007, she completed an assignment as a court-appointed monitor in federal litigation challenging the state's compliance with its responsibilities to children enrolled in the TennCare program. In 2005, Dean Kay was co-reporter on the Tennessee Bar Association Criminal Justice Section's study of effectiveness of counsel in death penalty cases.

Representative William Lamberth

State House District 44

William Lamberth represents the 44th District in the Tennessee House of Representatives, which encompasses a portion of Sumner County. The District includes the communities of Hendersonville, Gallatin, Portland, Westmoreland, and New Deal. William is a fifth generation resident of Sumner County and has dedicated his life to serving this community. Before being elected State Representative, William served as an Assistant District Attorney General in Sumner County and is a graduate of Portland High School. He received his Bachelor's degree in Political Science from the University of Tennessee at Knoxville and earned his Juris Doctor from the College of William and Mary. In addition to his work as State Representative, William is heavily involved in the daily life of the community. He currently serves as Chairman of the Portland Community Education Foundation, is on the board of Children Are People, Inc. and Historic Rock Castle, and is a former President of both the Gallatin Rotary Club and Sumner County Bar Association. In addition, Representative Lamberth currently serves as Chairman of the Criminal Justice Committee and has championed legislation to impose stricter penalties for those who commit the most heinous of crimes, while at the same time allowing for rehabilitation programs for those who sincerely seek to reform their lives by rejoining society in a positive way.

Susan Mattson (non-voting member)

Principle Legislative Research Analyst – Tennessee Comptroller of the Treasury

Susan Mattson is a Principal Legislative Research Analyst with the Tennessee Comptroller's Offices of Research and Education Accountability. She has a B.A. in Economics and Urban Studies from Rhodes College in Memphis, Tennessee, and a Master's in Public Administration from the University of Kentucky. She has over 25 years of experience as a public policy analyst. Policy areas of research have included criminal justice and the courts, transportation, and education. She has been involved with the Tennessee judicial, district attorneys, and public defenders weighted caseload studies and data systems since 2006.

Mark A. Mesler II, Esq.

Attorney – Rosenblum & Reisman Law Firm

Mark A. Mesler is recognized by his peers as one of the top criminal defense attorneys in the Memphis area and has been named one of the Top 8 Criminal Lawyers by the Memphis Business Quarterly. He is known for his diligent representation of clients in Shelby County criminal courts for more than a decade. Mark appears periodically on Fox 13 Morning News as part of the "Ask the Attorney" segment where he shares his expertise in the areas of Criminal Law, Personal Injury Law, Real Estate Law and Workers' Compensation Law. He is regularly asked to serve as a special judge in a number of the local courts. He received his B.S. in Business Administration from the University of Florida, and his J.D. from the Cecil C. Humphreys School of Law, Memphis, Tennessee. He served on the Memphis Bar Association's Young Lawyer's Board of Directors from 1997 to 1999, served on the Moot Court Board as an Associate Justice, and was a member of the University of Memphis Law Review. Mark is currently a member of the Memphis Bar Association, the Tennessee Association of Criminal Defense Lawyers, the National Association of Criminal Defense Lawyers, and the American Bar Association.

Judge Loyce Lambert Ryan

Shelby County General Session Court

Loyce Lambert Ryan is the presiding Judge of General Sessions Criminal Court Division XV. Prior to her election on August 2000, Judge Lambert Ryan was known as a skilled trial attorney in the legal community. She has also distinguished herself as the first female selected as a member of the Shelby County Public Defenders Capital Defense Team and the first female supervisor of the unit. Judge Lambert Ryan was the first female president of the Ben F. Jones Chapter of the National Bar Association and received its highest award, the A. A. Latting Award for outstanding Legal Services in 1995. Judge Lambert Ryan is a 1980 graduate of Clark Atlanta University and a 1983 Juris Doctorate recipient from the University of Iowa College of Law. She also attended the National Criminal Defense College in Macon, Georgia in July 1989. She served as a Reginald Heber Smith Community Lawyer Fellow through Legal Services Corp. of America in 1983-85 and was employed with the Department of Justice in 1985. Judge Lambert Ryan is a Charter member of the Clark Atlanta University Alumni Association Memphis Chapter, a member of the University of Iowa Alumni Association, and a member of the Tennessee General Sessions Judges Conference along with several other organizations. She has also served on the Tennessee Judicial Conference Bench/Bar Relation Committee and was a member of the Governor's Task Force on Criminal Sentencing Guidelines. She was recently appointed by the National President of the National Bar Association, Inc. to the Judicial Selection Committee of the NBA, Inc. She currently presides over the Compulsory Attendance Court, which attempts to address parents whose children are habitually absent from school. Judge Lambert Ryan is married, has one child, and is an active member of the Parkway Gardens United Presbyterian Church.

Judge Vicki S. Snyder

Henry County General Sessions Court

Judge Vicki Shepherd Snyder is a graduate of the University of Tennessee at Martin and Cecil C. Humphreys School of Law, Memphis, Tennessee. She clerked with the Shelby County Criminal Court Judges from 1985-86. Judge Snyder worked in the private practice of law and also served as an Assistant District Attorney General and Assistant District Public Defender for the 24th Judicial District of Tennessee before being elected Henry County General Sessions and Juvenile Court Judge in 2006. She is a member of Plus Endowment Henry County, the Henry County Literacy Board, past president and member of the Henry County Bar Association, a member of the Tennessee Bar Association, and the Anne Schneider Chapter of the Lawyer's Association for Women. In 2008, she was selected as Honorary Chairman for the Salvation Army. She is also a member of Lakeway Kiwanis Club and was elected Kiwanian of the Year in 2009. As a founding member of the Real Hope Youth Center, she continues to serve the organization as a volunteer. Judge Snyder is a member of the Tennessee General Sessions Judges Conference and serves on its Education Committee. She is the Conference Vice President, the Chairman of the Education Committee, and is a member of the Executive Committee for the Tennessee Council of Juvenile and Family Court Judges. In 2016, she was presented with the McCain-Abernathy Memorial Award by the Tennessee Council of Juvenile and Family Court Judges for her exceptional service in advancing juvenile justice. She represents the judicial branch through her service with the Three Branches Institute and serves on the Tennessee Domestic Violence State Coordinating Council. As a member of the Sulphur Well Church of Christ, she works with the Sulphur Well Youth Ministry.

Judge Barry A. Steelman

Criminal Court Judge – 11th Judicial District

Barry Steelman is a graduate of Carson-Newman College and the University of Tennessee College of Law. He was admitted to the Tennessee Bar in 1989 and was employed by the law firm of Spears, Moore, Rebman and Williams where he practiced in civil litigation. In 1995, Steelman was hired as an Assistant District Attorney and was later promoted to serve as Executive Assistant District Attorney in the 11th Judicial District. His jury trial experience was extensive and included capital cases. In 2006, he was elected Criminal Court Judge, Division I, in Hamilton County where he continues his service to the judiciary. He has served the legal community as President and Board member of the Chattanooga Bar Association. He is a Fellow of the Chattanooga Bar Foundation, a member of the Ray Brock Chapter of American Inns of Court and serves on the Executive Committee of the Tennessee Judicial Conference. Judge Steelman extends his involvement into local his community by coaching youth sports teams and through his leadership within his church. He previously served on the Carson-Newman University Alumni Executive Committee and is a University Trustee.

Senator John Stevens

State District 24

John Stevens was elected to the State Senate in 2012 and represents Obion, Weakley, Henry, Gibson, Carroll and Benton Counties in Northwest Tennessee. Sen. Stevens is the first Republican to ever represent Obion and Weakley counties in the State Senate. While in Nashville, Mr. Stevens serves on the Judiciary and Finance Ways and Means Committees. He is past chairman of the Corrections Sub-Committee of State and Local Government Committee. Mr. Stevens is a practicing attorney with Rabalais Law, which is a multi-state Estate Planning law firm. He is a 1992 graduate of Gallatin High School. Sen. Stevens graduated from UT-Martin in 1996 with a BS in Political Science. He received his law degree from the University of Memphis in 2002. He worked for the Honorable Judge Don A. Ash upon graduating from law school and before going out into private practice. In 2014, Governor Bill Haslam appointed Sen. Stevens to the Governor's Task Force on Sentencing and Recidivism. In 2010, Mr. Stevens was selected by Governor Bill Haslam to participate in the Delta Leadership Institute Executive Academy which targets community leaders throughout the Delta Region. Sen. Stevens is a 2014 graduate from the Henry Toll Fellows program, which is a leadership training academy made up of select-members of the three branches of government from around the nation. Sen. Stevens was honored as a Champion of Commerce by the Tennessee Chambers of Commerce in 2014 and Legislator of the Year in 2013 by the Tennessee Association of Assessing Officers.

Dwight E. Tarwater, Esq.

General Counsel – Tennessee Office of the Governor

Dwight E. Tarwater joined Governor Haslam's senior team as general counsel in December of 2014. Tarwater, a founding partner of the Knoxville firm Paine, Tarwater & Bickers, LLP, received his undergraduate degree in 1977 from the University of Tennessee, where he was elected a Torchbearer, the University's highest honor. He received his law degree from the University of Tennessee College of Law in 1980 and served as law clerk to the Honorable Houston M. Goddard of the Tennessee Court of Appeals. Tarwater has vast courtroom experience, having tried cases locally, across the state of Tennessee, and in

several other states. On appeal, he has represented clients before the Tennessee Court of Appeals, the Tennessee Supreme Court and in the United States Courts of Appeals for the Fourth, Sixth, Tenth, and Eleventh Circuits. He has held numerous leadership positions in the Knoxville and Tennessee Bar Associations and Legal Aid of East Tennessee. His former firm was honored with the Pro Bono Law Firm of the Year Award in 2010, 2012, and 2013. He was a member of the 2002 Class of Leadership Knoxville and a former Board Member of the East Tennessee Foundation. In 2006, he became a fellow in the American College of Trial Lawyers. He has been an invited guest lecturer at the University of Tennessee College of Law and asked to speak at various meetings of his professional colleagues.

Advisory Council

Jason Gichner, Esq.

Attorney, Morgan & Morgan Law Firm

Jason Gichner has more than 13 years of experience as a litigator, practicing both general civil litigation and criminal law. Jason received his undergraduate from Colgate University. He received his law degree from Vanderbilt University Law School. After law school, Jason joined the Office of the Metropolitan Nashville Public Defender. As a senior trial attorney and Team Leader, he represented thousands of clients and tried numerous jury cases to verdict. Jason is an attorney with the law firm of Morgan & Morgan (Nashville) and currently serves as an adjunct Professor of Trial Advocacy at Vanderbilt University Law School. He has also served as a Professor of Clinical Studies in Criminal Law at Vanderbilt University Law School and as an Associate Editor of The Tennessee Tort Letter. Attorney Gichner is a graduate of the Tennessee Bar Association Leadership Law Program, is a member of the Harry Phillips American Inn of Court, and has previously served on the Criminal Justice Act Panel for the Middle District of Tennessee.

Professor Victor S. (Torry) Johnson III

Visiting Professor of Law, Belmont University College of Law

Victor S. (Torry) Johnson III served as the elected District Attorney General of Metropolitan Nashville and Davidson County, Tennessee for more than 26 years before retiring at the conclusion of his third full term in August of 2014. Torry currently serves as a Visiting Professor, Belmont University College of Law. He received his undergraduate degree from Hamilton College and returned to Nashville to attend Vanderbilt University Law School. After graduation, he was a law clerk to the Hon. William E. Miller of the United States Court of Appeals for the Sixth Circuit. He then joined the District Attorney's Office in Nashville where he spent six years handling a wide variety of criminal cases. He established and headed up the Special Prosecution Unit that focused its efforts on the arrest and conviction of career offenders. During his career as District Attorney, he held leadership positions with the National District Attorneys Association and the Tennessee District Attorneys General Conference and was a member of the Board of Directors for the Tennessee and Nashville Bar Associations. He served on the American Bar Association's Task Force on the Federalization of Criminal Law and has been a part of other task forces and commissions dealing with various topics of criminal law and sentencing.

DarKenya W. Waller, Esq.

Managing Attorney – Legal Aid Society of Middle Tennessee and the Cumberland

DarKenya W. Waller joined the Legal Aid Society in 2008 and has been the Managing Attorney of the Nashville office since 2010. Her legal practice is focused on family law. She is a graduate of the University of Mississippi - School of Law and earned a Masters of Business Administration from Belhaven University. She is a member of the Mississippi, Tennessee and American Bar Associations. Before her move to Tennessee, Mrs. Waller was a solo practitioner in Jackson, Mississippi, where she specialized in domestic law and real estate. Mrs. Waller established and ran a Technology and Communications company that represented clients such as the City of Atlanta and the National Conference of Black Mayors. Mrs. Waller is a 2011 member of the Tennessee Bar Association's Leadership Law Program. She serves on the Board of Directors for the Nashville Bar Association, the YWCA and the Nashville Coalition Against Domestic Violence where she is the board chair. She is a fellow of the Nashville Bar Foundation and has been recognized as a 2016 Woman of Influence by the Nashville Bar Journal, is an Athena Award Nominee and the 2015 Outstanding Advocate by the NCADV. Mrs. Waller is a member of the Napier-Looby Bar Association and has held leadership positions with the Lawyers Association for Women – Marion Griffith Chapter, the Williamson County Bar Association and the Nashville Alumnae Chapter of Delta Sigma Theta Sorority, Inc. She has served on the Tennessee State Domestic Violence Coordinating Counsel, the Tennessee Bar Association Family Law Code Committee and the Board of Directors of the Minerva Foundation, Inc. She is most proud of her work initiating the Civil-Legal Advocate Program, which provides free legal representation to victims of Domestic Violence on the Order of Protection dockets.

Professor Christina A. Zawisza

Professor and Director of the Child and Family Litigation Clinic, Cecil C. Humphreys School of Law

Christina A. Zawisza is a nationally recognized expert and practitioner in the field of children's law. She currently serves as Professor of Clinical Law and Director of the Child and Family Litigation Clinic at the Cecil C. Humphreys School of Law. Professor Zawisza was a Founder and Director of Children First (now Florida's Children First), an innovative statewide law reform project to enhance children's legal rights by taking into consideration their medical, educational and social needs. She has represented children at all levels of the court system from administrative to the United States Supreme Court and has practiced extensively before the Florida Legislature on behalf of children and families. Most recently, Professor Zawisza developed and delivered a Juvenile Court Practice Series on behalf of the Tennessee Administrative Office of the Courts. Professor Zawisza received her undergraduate degree from State University of New York at Albany, her M.A. in Public Policy from the University of Wisconsin, and her J.D. degree from the University of Virginia.

B

APPENDIX

History of Indigent Representation in Tennessee¹

Tennessee has long recognized that the promise of justice includes the right to legal counsel. The state's first constitution provided "[t]hat in all criminal prosecutions, the accused hath a right to be heard by himself and his counsel."² The right to counsel clause was expanded in Tennessee's Constitution of 1835 to read:

That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself.³

The phrase "heard by counsel" has historically enjoyed broad interpretation:

A party is entitled, by our bill of rights, when accused, to be heard by counsel. This means more than a simple argument before a jury. It guaranties, that in the preparation of his defense, he is entitled to the advice and assistance of counsel that his defense may be properly shaped, so that his innocence may be made to appear, if the facts shall so warrant. It would be a cruel mockery to follow the letter, and give counsel for mere argument, when, for want of that counsel's assistance, there may be no case to argue, and the argument be a useless ceremonial.⁴

To complement the constitutional recognition of the right to counsel, as early as 1858, the Tennessee General Assembly codified the right to appointed counsel in criminal matters for persons who could not afford to retain their own lawyer.⁵ Despite the early constitutional and statutory recognition of the right to counsel, the manner in which Tennessee has protected and advanced this right has been uneven at best.

The Right to Counsel in Criminal Matters

During the 19th century and the first half of the 20th century, lawyers were expected to represent persons accused of crime without compensation. Accordingly, when a person accused of crime could not afford a lawyer, the judge presiding over the case would simply appoint a member of the local bar to represent the accused, and the lawyer would provide his services at no charge. Over time, this all-volunteer approach to securing the right to counsel proved unworkable both in terms of the quality of the representation being provided and the willingness of lawyers to represent clients without compensation.

The idea of creating a government office to provide defense services was first articulated by Clara Shortridge Foltz, a California attorney, in a speech at the 1893 Chicago World's Fair. Twenty years later, Los Angeles County became the first jurisdiction to create a public defender's office.⁶ In 1915, a Memphis lawyer's service as an appointed lawyer precipitated the creation of a public defender's office in Shelby County.

Samuel O. Bates, a 33-year-old Shelby County attorney and former state representative, accepted an appointment to defend an African-American man charged with murdering a white woman. Mr. Bates was convinced that his client was innocent and spent \$500 of his own money to fund an investigation. This investigation produced evidence that the woman had been murdered by her own husband. As a result, Mr. Bates' client was exonerated.⁷

Mr. Bates was later elected to serve as a state senator representing Shelby County. When he returned to the General Assembly, he introduced legislation to create a publicly funded office in Shelby County to represent persons accused of crime who could not afford their own lawyer. This legislation was enacted, and in 1917, Memphis became home to the third public defender's office in the nation.⁸

Other Tennessee counties were slow to follow Shelby County's lead, and for four decades indigent persons accused of crime in the rest of Tennessee continued to be represented by appointed private counsel who worked without compensation. However, as caseloads grew, so did the interest in considering other ways to provide right to counsel services. One of the first systematic surveys of criminal caseloads in Tennessee examined the years 1947 and 1948.⁹

In 1959, the Tennessee General Assembly directed the Legislative Council Committee to study the trial court system. The Council's 1960 report provided the first insights regarding the bench and bar's perception of the adequacy of the manner in which indigent representation was being provided.¹⁰

The report stated that more than one half of the persons charged with serious crimes in Shelby County could not afford to hire a lawyer¹¹ and that Shelby County's public defender's office, consisting of three part-time attorneys,¹² was currently providing representation for 56% of the criminal indictments in Shelby County. In contrast, the report stated that in Davidson County, persons who could afford bail were denied appointed counsel,¹³ essentially forcing them to choose between their constitutional right to bail and their constitutional right to counsel. The report also stated that appointments of counsel in Davidson County were usually made five to ten minutes before trial, although on some occasions they were made the day before trial.¹⁴ In one capital case, counsel was appointed two days before trial.¹⁵

The Council's report included comments from judges and attorneys across the state that reflected varying opinions about the efficacy of the appointed counsel system. Some insisted that counsel should be paid for their efforts both because many lawyers lacked the independent financial means to work for free and because it would encourage the same

level of zealous representation found in cases where attorneys were compensated.¹⁶ Others argued strongly against the idea of compensation and against the idea of expanding the public defender system.¹⁷ There was a marked difference of opinion between urban and rural areas.

The Council also surveyed the states regarding their indigent representation programs.¹⁸ This survey showed that 11 states, including Tennessee, were using some form of a public defender program. Despite its concern over the lack of information relating to the costs of public defender programs,¹⁹ the Council concluded that the cost of the private appointment system greatly exceeded the cost of a public defender program. Accordingly, the Council recommended creating a limited public defender system that permitted counties to establish local public defender programs headed by a public defender appointed by the county's governing body.²⁰

In 1961, the Tennessee General Assembly enacted a private act authorizing the creation of a public defender's office in Davidson County.²¹ The first public defender was elected in 1962. In 1963, the first Charter of the Metropolitan Government of Nashville and Davidson County continued the public defender's office.

In 1963, the United States Supreme Court handed down *Gideon v. Wainwright*,²² establishing for the first time as a matter of federal constitutional law that the 14th Amendment guaranteed all persons accused of felonies the right to an attorney, including the indigent. *Gideon* was followed by a series of Supreme Court cases that further expanded the parameters of the right to counsel. *Gideon* and its progeny resulted in a renewed attention to the plight of the indigent in Tennessee's state court systems.

In 1965, Tennessee General Assembly enacted statutes authorizing reimbursement to private counsel appointed to represent indigent persons facing criminal charges and to reimburse public defender offices for costs that would have otherwise been incurred by appointing private counsel.²³ These statutes defined an indigent person as "any person who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney."²⁴

The 1965 statutes also established the process for appointing and compensating counsel. They required appointed counsel to apply to the trial court for payment and then required the trial court to forward the request to the Executive Secretary of the Supreme Court for "audit review and payment."²⁵ The Tennessee Supreme Court also adopted a rule implementing the 1965 statutes.²⁶

During this same period, the Federal Economic Opportunity Act of 1964²⁷ and later amendments provided for federal funding of community action programs including programs providing "legal services for the poor."²⁸ The federal funding resulted in expansion of existing legal aid organizations and the creation of new ones in cities throughout Tennessee. Some, but not all, of these organizations accepted criminal appointments.²⁹

Three counties undertook to create public defender's offices in 1972. After obtaining the passage of the necessary private act, Washington County established Tennessee's third public defender's office.³⁰ Later in 1972, Sumner County attempted to create a public defender's office without a private act. When the Attorney General and Reporter opined that office could not be created without a private act, the General Assembly corrected the shortcoming in 1973.³¹ Anderson County also created a public defender's office in 1972. This office, unlike the other public defender's offices was funded exclusively by grants. When the grants expired, Anderson County closed the office.³²

Between 1968 and 1974, Tennessee's statewide crime rates grew almost 60%.³³ Tennessee's indigent representation programs could not keep up. Because state funds were limited to reimbursing appointed private counsel in felony cases, the bar was required to accept appointments in misdemeanor cases without compensation.³⁴ By 1974, the annual state appropriations to compensate private counsel were insufficient to pay all the claims.³⁵ Even though attorneys were entitled to compensation computed on an hourly basis, the shortfall required them to accept payment for some services on a flat-fee basis.³⁶

The continuing funding shortfalls were exacerbated in 1975 when the Tennessee Supreme Court adopted the American Bar Association's Standards for the Defense Function in its *Baxter v. Rose* decision.³⁷ While these standards provided objective criteria for determining adequacy of representation in criminal cases, Tennessee's existing statutes and rules fell short in complying with these standards.³⁸

Little progress was made despite the growing sentiment favoring the creation of public defender's offices. In 1976, Madison County undertook to create a public defender's office without a private act; however, the Attorney General and Reporter again opined that it could not do so without enabling legislation.³⁹ Accordingly, a majority of Tennessee's counties continued to rely on an ad hoc system of appointed private counsel in which individual judges varying in their approach as to when and how counsel was appointed.⁴⁰ Some appointed from a list of all attorneys in the county; others used a list provided by their local bar association; others maintained their own list or only appointed attorneys practicing criminal law; and still others simply relied on attorneys who were present in the courtroom when an appointment was required.⁴¹

The growing discontent over Tennessee's approach to providing representation to indigent criminal defendants was reflected in the work of the 1977 Limited Constitutional Convention. The delegates approved an amendment to the Constitution of Tennessee requiring the General Assembly to establish the criteria for a statewide system of public defenders.⁴² However, this proposed amendment, along with other more controversial amendments to the Judicial Article of the Constitution of Tennessee, ultimately were not ratified by the voters.

Eventually, in 1986, the Tennessee General Assembly established public defender's offices in seven judicial districts.⁴³ Public defenders offices were created in three more districts in 1987.

In 1989, the Tennessee General Assembly created the District Public Defenders Conference.⁴⁴ At first, the public defenders in Davidson and Shelby counties were not members of the conference. However, they became members in 1990,⁴⁵ the same year as the creation of a public defender's office in Knox County.⁴⁶ Today, there are 31 public defender's offices in Tennessee — one in each judicial district. The District Public Defender in 30 judicial districts is popularly elected. In Shelby County, the District Public Defender is appointed by the Mayor of Shelby County.⁴⁷

The work of the Tennessee District Public Defenders Conference is overseen by its executive director, who is elected by a majority vote of the 31 District Public Defenders.⁴⁸ The executive director's duties include serving as a liaison to the other branches of government, submitting budgets to the General Assembly, and administering the financial accounts.⁴⁹

In 1995, the General Assembly created the Tennessee Office of the Post-Conviction Defender to provide representation to persons convicted of capital offenses.⁵⁰ The work of the Post-Conviction Defender is overseen by the Post-Conviction Defender Oversight Commission.⁵¹

Even with the statewide establishment of public defender offices, the appointment of private counsel remains necessary. In some cases, the public defenders have ethical conflicts of interest or are otherwise unavailable. Additionally, many matters that trigger the right to appointed counsel are not within the public defenders' mandate because they are essentially civil proceedings.

The Right to Counsel in Civil Matters

As a general matter, the right to appointed counsel does not exist in civil proceedings.⁵² However, because of the protections of life, liberty, and property found in the federal and state constitutions, the right to counsel has been extended beyond criminal proceedings to certain types of civil proceedings. For example, children are entitled to appointed counsel in delinquency proceedings⁵³ and to an appointed guardian ad litem in dependency and neglect and termination of parental rights (TPR) proceedings.⁵⁴

Similarly, adults are entitled to appointed counsel in cases involving failure to pay child support, involuntary hospitalization proceedings,⁵⁵ dependency and neglect proceedings,⁵⁶ TPR proceedings,⁵⁷ as well as other proceedings identified in Tenn. Sup. Ct. R. 13, § 1(d).

The Right to Counsel in Matters Involving Juveniles

The existence of a limited right to legal counsel in adversary proceedings first developed as the country wrestled with its role in securing the welfare of children. Therefore, where juveniles are concerned, the right to counsel has often been discussed alongside the public policy underlying juvenile proceedings. It is important to remember that many matters

that arise in the context of juvenile court proceedings occupy the realm of being neither fully civil nor fully criminal matters.

The development of the jurisprudence surrounding children has traveled through various eras and, during each, has viewed children through different lenses: children as property of their parents, children as welfare recipients dependent upon the state's largesse, children needing the state's benevolent protection or rehabilitation, and now children as rights-based citizens apart from their parents.⁵⁸ The court's power to adjudicate matters relating to juveniles finds its origin in the state's power to intervene in family life to take control of children.

Juvenile courts did not exist at common law.⁵⁹ Historically, in the United States, children as young as seven were generally presumed capable of criminal intent,⁶⁰ and parents had largely free rein to deal with their children as they saw fit.⁶¹ When courts chose to intervene into family life, it was typically accomplished by reliance upon the doctrine of *parens patriae*, i.e., the understanding that state is the ultimate parent in its role as "common guardian of the community."⁶² In the 19th century, as immigration and the shift to an industrialized economy began to shape American society,⁶³ courts began to see an increase in the presentation to them of both unruly and neglected children, and Progressive Era reformers began to see children as persons whose developmental needs required special considerations.⁶⁴

In 1885, Tennessee created a system to take custody of children who were found to be begging, homeless, lacking proper guardianship, or frequenting the presence of "lewd, wanton or lascivious persons in speech or behavior, or notorious resorts of bad character."⁶⁵

By the end of the 19th century, Societies for the Prevention of Cruelty to Children sprang up around the country, and a *parens patriae* jurisprudence that concerned itself with child abuse and neglect in the family continued to grow.⁶⁶ Although the Juvenile Court of Cook County, Illinois, which entertained both dependency and delinquency jurisdiction, is often credited as the first juvenile court in the United States, Massachusetts in 1874 and New York in 1892 had established separate courts for minors.⁶⁷

As with the establishment of the public defender concept, Shelby County, Tennessee, can count itself among the pioneers in the juvenile justice system. Home to one of oldest juvenile courts in the country, which opened its doors on January 1, 1910, with jurisdiction over both wayward children and orphans.⁶⁸ According to the *Commercial Appeal*, the establishment of the juvenile court was spurred by the "To Save the Young" movement that began with a Shelby County women's progressive movement in 1898.

In 1911, the Tennessee General Assembly authorized a statewide juvenile court system for dependent children lacking appropriate parental care and for children accused of crimes.⁶⁹ Its purpose was to rehabilitate the child, rather than punish the child.⁷⁰ Constitutional protections such as the right to counsel were not a feature of these early courts.⁷¹

Initially the administration of justice through the juvenile court operated with little guidance other than the *parens patriae* principle and with little-to-no legal procedure or constitutional standards. The two “sides”— matters of juvenile delinquency and matters of child welfare (also referred to as dependency and neglect) — began moving in separate directions in the mid-20th century. The delinquency side began to operate more like a criminal court subject to process and procedures, while the dependency side remained more paternalistic and social-service oriented.⁷² From this point, the histories of legal representation in juvenile courts generally developed separately.

The Right to Counsel for Parents in Child Welfare Matters

In Tennessee, when reference is made to the “child welfare side” of juvenile courts, this generally means proceedings to determine that a child is dependent and neglected and proceedings to terminate parental rights.⁷³ The right to counsel in child welfare matters is grounded in constitutional substantive and procedural due process rights under the U.S. and Tennessee constitutions. The right to family integrity implicates issues of parental rights to substantive due process, and this led to the development of the right to counsel for parents.

The right to family integrity arose as an operative constitutional principle on the dependency side of juvenile court as early as 1923 when the United States Supreme Court recognized the liberty interest of parents to control the care, conduct and upbringing of their children through the 14th Amendment in *Meyer v. Nebraska*.⁷⁴ *Meyer* addressed a parent’s right to control the education of his or her children, in this case the right to choose instruction in German in contravention of a state statute.⁷⁵ *Meyer* was followed by *Pierce v. Society of Sisters* in 1925, another case emphasizing a parent’s right to control a child’s education, here upholding a parent’s right to choose a parochial school education over a public school.⁷⁶

The Court took a different turn in 1944 when it held that parents’ rights were not absolute and could be regulated in the public interest when a child’s welfare was negatively affected. In *Prince v. Massachusetts*, the Court upheld a criminal conviction of an aunt and guardian who violated child labor laws by allowing her niece to sell magazines in the street into the night.⁷⁷

These three cases — *Meyer*, *Pierce*, and *Prince* — set the basic parameters of the relationship between parent and state. Parents have a fundamental right to family integrity and liberty in controlling the upbringing of their children, which the state may infringe only for compelling reasons and only to protect the state’s interest. It is clear, furthermore, that constitutional rights are not for adults alone, and a child’s rights are virtually coextensive with those of adults.⁷⁸ In addition to 14th Amendment liberty interests, parents and children have been found to have a privacy interest in their family unit under the 1st, 4th, 5th, and 9th amendments.⁷⁹ This framework guides to this day any legal analysis of issues pertaining to child welfare law.⁸⁰

The Tennessee Constitution provides parents and children rights that are equivalent to federal constitutional rights. Parents have a fundamental constitutional liberty interest in the care and custody of their children, although this right is not absolute and can be terminated.⁸¹ When parents have been found to be unfit, the interests of children and parents in the integrity of the family unit diverge, and the focus shifts to the best interests of the child.⁸² Privacy interests regarding freedom of choice in matters of family life are also protected under the Tennessee Constitution.⁸³

Another line of cases defining parental rights also provides guidance where the right to counsel is concerned. In a series of cases, the U. S. Supreme Court has fleshed out the rights of unwed or putative fathers to raise their children. In *Stanley v. Illinois*, the Court recognized the due process right of fathers of children born out of wedlock who have resided in an intact family unit. These fathers are entitled to be heard on their fitness before the children are removed from their custody in dependency proceedings.⁸⁴ *Lehr v. Robinson* later limited the right to be heard to fathers who had demonstrated a relationship with the child.⁸⁵

While cognizant of *Stanley* and *Lehr*, the Tennessee Supreme Court has recognized that the image of the traditional nuclear family no longer resembles the typical American family. A challenging array of family living arrangements increases the complexity of juvenile court proceedings, and today courts must be mindful of the rights of biological, legal or even putative biological fathers.⁸⁶

Although the U. S. Supreme Court had examined the right to counsel for a juvenile accused of a delinquency offense in 1967,⁸⁷ its only effort to consider an indigent parent's right to representation in a child welfare matter occurred in 1981.⁸⁸ *Lassiter v. Department of Social Services* involved a TPR proceeding. Although the Court acknowledged that personal liberty was not at stake in a TPR proceeding (a circumstance that triggers the right to counsel), the Court held that due to the "important" interest of a parent in family integrity, a parent without means was entitled to court appointed counsel at state expense on a case-by-case basis.

The *Lassiter* Court applied a balancing test: comparing the private interests at stake, the government's interest, and the risk of an erroneous result. About the parent's interest in family integrity, the Court held that it is "important," but did not label it fundamental. Further, the government shares the parent's interest in a correct decision, while having a relatively weak interest in the cost of appointed counsel, according to *Lassiter*. Finally, *Lassiter* found that the risk of an erroneous result could be, but would not always be, great enough to require counsel given varying complexities involved in each case.⁸⁹

The Court in *Lassiter* did point out, however, that wise public policy would require that higher standards be adopted than those minimally tolerable under the Constitution. "Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental rights termination proceedings but also in dependency and neglect proceedings as well."⁹⁰

The risk of an erroneous decision became more compelling one year later when the U. S. Supreme Court established a clear and convincing evidentiary standard for TPR proceedings in *Santosky v. Kramer*.⁹¹ In this case, the Court called the parent's interest in family integrity "commanding," the government's interest comparatively slight, and the risk of error "substantial." The Court pointed to the State's enormous advantage in being able to mount a case compared with the ability of often poor, uneducated, or disadvantaged parents, its ability to prepare medical, psychological, and family relations evidence, and its role in shaping historical events that form the basis for termination.⁹²

In 1992, the Tennessee Supreme Court instituted a rule requiring the appointment of counsel for indigent parents in TPR and dependency and neglect cases,⁹³ the Court having determined, along with a majority of states, that an absolute right to counsel saves the time and expense of litigating the issue in each case under a *Lassiter* balancing test.⁹⁴ Counsel is necessary in initial removal cases, as well as in TPR proceedings, because they present complex evidentiary issues and because they lay the factual history and predicate for future terminations of parental rights. If disadvantaged parents do not receive the benefits of counsel until their case has reached the TPR stage, it may well be too late for the representation to make a significant difference.⁹⁵

The area of child welfare law has continued to grow more complex. The federal Adoption Assistance and Child Welfare Act (AACWA) of 1980, which funds state foster care systems, required states to develop permanency plans for children in foster care, to make reasonable efforts to keep families together or to reunite families once separated. The AACWA also requires states to conduct judicial review of the status of children in foster care in return for federal funding.⁹⁶

In 1997, the AACWA was amended as the Adoption and Safe Families Act (ASFA) to make clear that the child's health and safety are paramount, to shorten the timeframe for permanency to 12 months, rather than 3 years, to add permanent guardianship as a permanency option, and to excuse reasonable efforts in cases showing "aggravated circumstances" such as severe child abuse.⁹⁷ ASFA was amended again in 2008 as the Fostering Connections to Success and Increasing Adoptions Act. This law, inter alia, authorizes a subsidized permanent guardianship program, requires transition planning for older youth, extends the age of foster care placement to 21 from 18, requires more exacting searches for relative placements, and assures educational stability for foster children.⁹⁸

Much of Tennessee's juvenile law is based on requirements of federal law.⁹⁹ Because of the specifics of the law and the state's interest in protecting the rights of parents while considering the needs of the child, the judicial processes to litigate such cases are almost always complex and long in duration. It is beyond question that learned counsel is necessary to guide parents through the intricate maze of federal and state law.

The Right to Counsel for Children in Child Welfare Matters

A guardian ad litem (GAL) is appointed by a court to appear in a lawsuit on the behalf of a minor to represent the minor's best interest.¹⁰⁰ GALs are usually, but not always, law-

yers.¹⁰¹ GALs represented children at common law, often where matters of property or inheritance were concerned.¹⁰² As American jurisprudence has developed, matters of procedural due process and laws recognizing that right have resulted in the requirement that a child involved in child welfare matters be represented by legal counsel charged with the obligation to advocate for the child's best interest.

Given Tennessee's leadership in the area of indigent defense, it was no surprise that Tennessee was a leader in the development of children's rights to counsel in matters of child welfare. The state's first modern and comprehensive juvenile code was adopted in 1970¹⁰³ and mandated the appointment of a GAL "at any stage of a proceeding" if a child had no parent, guardian or custodian appearing on his behalf or if that person had a conflict of interest with the child.¹⁰⁴ The costs of the GAL were to be charged to the county.¹⁰⁵ By 1974, Tennessee was among 19 states to have an absolute right to counsel for children in any civil or juvenile proceeding involving child abuse and one of only four states to require such counsel in *suspected* cases of child abuse.¹⁰⁶

Thus, Tennessee had already firmly established the use of GALs in child welfare cases¹⁰⁷ when the federal Child Abuse Prevention and Treatment Act of 1974 (CAPTA) made the requirement a matter of federal law. In exchange for federal funding, states are required to provide for the appointment of a GAL in every suspected case of child abuse and neglect. Under the federal law, this GAL may be a lawyer but is not required to be. CAPTA requires that GALs received appropriate training, including training in early childhood and adolescent development. The role of the GAL envisioned by CAPTA is that the GAL obtain firsthand a clear understanding of the situation and needs of the child and make recommendations to the court about the best interests of the child. The law makes clear that federal CAPTA funds can be used for improving legal preparation and representation for children.¹⁰⁸

The Tennessee Administrative Office of the Courts reports that prior to 1999, the Department of Children's Services compensated GALs, while the AOC through the Indigent Defense Fund compensated parents' attorneys. The system was imperfect, however. According to a 1998 study by the Tennessee Court Improvement Program, children and parents were represented in less than one-third of dependency and neglect proceedings and even at termination, fewer than 60% of parents and 40% of children had counsel.¹⁰⁹ Among the identified reasons for this were the paucity of attorneys in small counties; very little training; low compensation; and delays in payment of attorneys. Systemic barriers also applied. These included tensions over the role of judges in juvenile court, the fragmented nature of the Tennessee court system, the devaluing of the work of juvenile courts, dehumanizing and demeaning court practices that require all parties to appear at a single time rather than scheduling individual hearings, and inadequate funding.¹¹⁰

As a result of the court study findings, a series of changes were implemented. In 1999, the juvenile statute was amended to provide that AOC compensate GALs in a manner equal to parents' attorneys.¹¹¹ In 2001, the Tennessee Supreme Court amended Rule

13 to require the appointment of a GAL for every child who is or may be the subject of report of abuse or neglect or an investigation report.¹¹² And, in 2002, changes to Tennessee Supreme Court Rules gave specific direction with respect to the scope of a GAL's work.¹¹³

As defined by Tenn. Sup. Ct. R. 40, the duties of a GAL in a child welfare proceeding are many. Among other obligations, a GAL must conduct an independent investigation of the facts, engage and consult with professionals and experts, counsel the child in an age-appropriate manner, consult with the child before all court hearings and significant events in their lives, find social service resources, and prepare the child to testify.¹¹⁴ And, of course, there are obligations in court.¹¹⁵ GALs are to be compensated through the same mechanism as that for indigent defense counsel under Tennessee Supreme Court Rule 13.¹¹⁶

The Tennessee Court Improvement Program reassessed the juvenile court process in 2005, and, in general the rule changes had resulted in beneficial effects. According to a survey of judges, GALs appeared in adjudicatory and disposition hearing in 85% of cases, custodial parents' attorneys appeared in 89% of cases, and non-custodial parents' attorneys appeared in 58% of cases.¹¹⁷ GALs appeared at permanency hearings, mandated after a child has been in foster care for 12 months, in 71% of cases. Custodial parents' attorneys appeared in 67% of cases, and non-custodial parents' attorneys appeared in 35% of cases.¹¹⁸ GALs appeared in TPR hearings in 71% of cases, custodial parents' attorneys appeared in 79% of cases, and non-custodial parents' attorneys appeared in 49% of cases.¹¹⁹

The 2005 study identified four "survey counties" in which to conduct detailed case file readings. Results regarding representation of children in dependency proceedings varied from 99-100% in two counties to 15-20% in two other counties. Representation of mothers in dependency proceedings in the same counties ranged from 82-83% to 69% to 5%; for fathers 50%, 44%, 30%, 5%.¹²⁰

Judges were also surveyed about their perceptions of attorney preparation for hearings. They reported that 34% of DCS attorneys, 16% of GALs, and 10% of parents' attorneys were "always prepared"; 71% of parents' attorneys, 64% of GALs, and 49% of DCS attorneys were "usually prepared"; 17% of parents' attorneys, 16% of GALs, and 13% of DCS attorneys were "often prepared"; and 4% of GALs, 4% of DCS attorneys, and 2% of parents' attorneys were "occasionally prepared."¹²¹ The Court Improvement Program acknowledged the need for more attorney representation, better training, improved compensation, and enforcement of Tenn. Sup. Ct. R. 40.¹²²

A reassessment of the juvenile court systems has not occurred since 2005. Recent statistics from the Court Improvement Program indicate that 90% of parents and children are now being represented in dependency and neglect and TPR cases.¹²³

The Right to Counsel in Matters Involving Juvenile Delinquency¹²⁴

With the development of Tennessee's juvenile court system in 1911, Tennessee established formal mechanisms for addressing the matters of juveniles accused of crimes.¹²⁵ The statutes provided that any child under the age of 16 who was determined to have violated any law of the state was declared to be a delinquent child, and the juvenile courts were authorized to take a range of actions including committing the child to the state reformatory.¹²⁶ As with child welfare matters, however, constitutional protections such as the right to habeas corpus proceedings¹²⁷ or the right to counsel did not attach.

As punishment was not the stated purpose of the delinquency proceedings, they were not considered criminal matters where constitutional protections would attach. In other words, "the commission of a crime by a child may set the juvenile court in motion, but the court d[id] not try the delinquent minor for the crime. The crime being evidence of delinquency, the court undert[ook] to remedy the delinquency."¹²⁸ Then, as now, if the juvenile court determines that the juvenile could not "be reformed," then the juvenile could be remanded to criminal court for trial.

By 1925, 45 states had created delinquency courts. "Never before had so many states created entirely new court systems so swiftly, in such unison, and with such general enthusiasm."¹²⁹ The U.S. Children's Bureau called the proliferation "probably the most remarkable fact in the history of American jurisprudence."¹³⁰

Because of the essentially quasi-criminal aspect of juvenile courts where the detention of juveniles was concerned, the rights of juveniles in general (and, specifically, the right to counsel) were not always clear, and the juvenile courts operated informally.¹³¹ With the 1963 *Gideon* decision establishing the right to counsel for adults through federal due process requirements, questions regarding the right to counsel for juveniles began to rise to a head.

In the 1966 case *Kent v. United States*, the United States Supreme Court noted that the juvenile court system had created the all-too-real potential for juveniles to experience "the worst of both worlds," receiving "neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."¹³² Therefore, the Court determined that juveniles were entitled to counsel if they faced the possibility of being transferred to face trial as adult.¹³³

In 1967, the United States Supreme Court determined in *In re Gault* that if a juvenile was facing a charge that could result in "the juvenile's freedom [being] curtailed," the child and parents must be notified of many constitutional protections present in a criminal proceeding. This included the child's right to be represented by counsel and notification that counsel will be appointed in the case of indigency.

Tennessee responded shortly thereafter with its juvenile code, introducing right to counsel for accused delinquents in addition to the counsel for child welfare matters discussed above. The juvenile code enacted in 1970 included a provision for right to counsel in delinquency hearings, although the language limited appointed counsel to those cases in which a child is “not represented by his parent, guardian or custodian.”¹³⁴

The rights of juveniles continued to gain protection at both the state and federal level. In 1970, *In re Winship* required proof beyond a reasonable doubt to adjudicate a child delinquent,¹³⁵ and in 1975 the highest court decided in *Breed v. Jones* that the double jeopardy clause applied to juvenile proceedings as much as to adult proceedings, finding little to distinguish the two tribunals.¹³⁶ In 1980, the Tennessee legislature provided that court appointed counsel in felony delinquency matters should be compensated by the State. In 1981, the Tennessee Supreme Court added juvenile felonies to the list of proceedings in Tenn. Sup. Ct. R. 13 that required the appointment of counsel, and in 1986 added juvenile misdemeanors in which a child was in jeopardy of incarceration.

Also during this time studies regarding Tennessee’s approach to the representation of the criminally accused were conducted, and troubling issues with respect to the representation of juveniles came to light. In particular, it was noted that juveniles in Tennessee were routinely being shortchanged by the system — infrequently being advised of their right to counsel, infrequently receiving an appropriate opportunity for a determination of indigency, and infrequently being afforded required elements of a defense like access to investigatory or expert services.¹³⁷ Judges also were openly hostile to the idea of counsel appearing on behalf of juveniles.¹³⁸ Until 1980, judges who were not licensed attorneys were empowered to adjudicate juveniles delinquent, confine them, or otherwise deprive them of liberty. In 1980, the Tennessee Supreme Court determined that, as a matter of procedural due process, this was unconstitutional.¹³⁹

The right to counsel for juveniles accused of delinquency has now been firmly secured. The current statute requires representation by counsel at all stages of delinquency proceedings. Additionally, Tenn. Sup. Ct. R. 13 covers representation in felony and misdemeanor cases without limitation. In addition to an attorney appointed to advocate for a child, the appointment of a GAL also may be warranted. Examples might include a child with special mental health needs or a very young child. There is no provision for compensation in the rules, however.

But the right to counsel alone is insufficient to ensure adequate protection of constitutional rights. The AOC’s 2005 study of case files in four counties in Tennessee showed that judges believed delinquency counsel was always prepared 12% of the time; usually prepared 68% of the time; often prepared 16% of the time; and rarely prepared 1% of the time.¹⁴⁰ The same study found that the numbers of represented children varied in the selected counties. One county saw 100% of children represented, another 73%, a third 83% with 17% waiving counsel, and a fourth with 70% representation and 30% waivers.

In the face of Tennessee’s challenges to providing constitutionally required services to juveniles, representation of children charged with a crime took on increased complexity in the 21st century when the United States Supreme Court issued a line of decisions that focused on the fact that children are constitutionally different from adults for sentencing purposes. *Roper v. Simmons* outlawed the death penalty for juveniles.¹⁴¹ *Graham v. Florida* prohibited life without parole for juvenile non-homicide offenders,¹⁴² and *Miller v. Alabama* extended that bar to juvenile homicide offenders.¹⁴³ *Montgomery v. Louisiana* made the banned life sentences without parole retroactive.¹⁴⁴ These four cases introduce a vast body of research on developmental psychology and neuroscience into constitutional law issues for juveniles — a body of knowledge in which attorneys must be adequately trained to incorporate in their work.

Another complicating factor in juvenile representation in Tennessee is the United States Department of Justice. In 2012, the Department entered into a Memorandum of Understanding with the Shelby County Juvenile Court to reform the court processes and procedures in three areas: due process, equal protection, and community engagement.¹⁴⁵ Among its requirements is the establishment of a dedicated juvenile defender unit in the public defender’s office and a structure and resources to provide independent, ethical, and zealous representation of juveniles.¹⁴⁶

As of April 2016, the Compliance Monitor reported that the Public Defender Juvenile Unit represented 40% of cases. The Monitor, however, expressed concern about the continuing lack of independence in defender services, particularly with the Juvenile Defender Panel and Panel Coordinator. As of April, 2016, the Panel represented 60% of cases, and the Panel Coordinator directly reports to the Juvenile Court Judge.¹⁴⁷

The Right to Counsel in Other Civil Matters

The use of guardians ad litem is not limited to child welfare proceedings in juvenile courts. Tenn. Sup. Ct. R. 40A provides for the appointment of GALs for children and applies in any custody proceeding, which is described as any proceeding in which legal or physical custody of, access to, or visitation or parenting time with a child is at issue, including divorce, post-divorce, paternity, domestic violence, contested adoptions, and contested private guardianship cases.¹⁴⁸ Under Tenn. Sup. Ct. R. 40A, counsel is compensated pursuant to a court order determining whether fees are reasonable and allocating fees to one or more parties.¹⁴⁹ Additionally, if a child wants to contest the appointment of a guardian, the child will be appointed an attorney ad litem to advocate on the behalf of the child (as compared to the GALs advocacy on behalf of the child’s best interest).¹⁵⁰ The attorney ad litem is compensated under Tenn. Sup. Ct. R. 13.

Outside of the context where minors are concerned, there are other limited rights to counsel in civil matters. Persons facing an involuntarily hospitalization as a result of a court order are entitled to the appointment of counsel.¹⁵¹ This right has existed since at least 1965.¹⁵² Appointed counsel are compensated under Tenn. Sup. Ct. R. 13.

Endnotes

- 1 The Task Force is indebted to Christina A. Zawisza, Professor of Clinical Law and Director of the Child and Family Litigation Clinic at the University of Memphis Cecil C. Humphreys School of Law for her contributions to the history of the right to counsel for children, to her research assistant Brandon Woosley, and to Nashville School of Law student Will Ayers for his research assistance with respect to the history of the right to representation for the criminally accused.
- 2 Tenn. Const. of 1796, art. XI, § 9.
- 3 Tenn. Const. of 1835, art. I, § 9.
- 4 *State v. Poe*, 76 Tenn. 647, 654, 1881 WL 4469, at *4 (1881).
- 5 Code of Tenn. § 5206 (Return J. Meigs & William F. Cooper, eds., E.G. Eastman & Co. 1858). (“Code of 1858”) (as referenced in 1932 Tenn. Code, tit. 4, ch. 13, art. I, § 11734).
- 6 Jon Mosher, *Understanding Gideon’s Impact, Part 2: the Birth of the Public Defender Movement*, Sixth Amendment Center (Jan. 23, 2013), http://sixthamendment.org/understanding-gideons-impact-part-2-the-birth-of-the-public-defender-movement/#_ftn1.
- 7 Lurene Kelly & Josh Spickler, *The Promise of Gideon: 50 Years Later, Public Defenders Struggle to Make Good*, Memphis Lawyer, Feb. 2013, at 7, <https://justcity.files.wordpress.com/2013/03/mini-ba-g50.pdf>.
- 8 *Id.* at 7; 1917 Tenn. Priv. Acts ch. 69.
- 9 State of Tenn. Legislative Council Comm., *Final Report Judiciary Study*, at 15 (1960) (“1960 Judicial Report”); Elvin E. Overton, *The Judicial System and Its Administration in Tennessee: Potentialities for Reorganization and Improvement - A Comparative Study* at 29 (Univ. of Tenn. Govt. Industry Law Ctr. 1965).
- 10 1960 Judicial Report.
- 11 *Id.* at 2-3.
- 12 *Id.* at 7.
- 13 *Id.* at 2.
- 14 *Id.* at 12 (including findings from a study commissioned by the Tennessee Judicial Conferences conducted during the same time period).
- 15 *Id.* at 12.
- 16 *Id.* at 1-2, 7-8.
- 17 *Id.* at 2, 7-8.
- 18 *Id.* at 10.
- 19 *Id.* at 11.
- 20 *Id.* at 16-17.
- 21 1961 Tenn. Priv. Acts ch. 128.
- 22 *Gideon v. Wainwright*, 372 U.S. 335 (1963).
- 23 1965 Tenn. Pub. Acts ch. 217 § 10, codified at Tenn. Code Ann. § 40-2023.
- 24 Tenn. Code Ann. § 40-2014.
- 25 Tenn. Code Ann. § 40-2027.
- 26 Tenn. Op. Att’y. Gen. No. 92-20 at *2 (Mar. 4, 1992).
- 27 2 U.S.C. § 2701
- 28 William G. Haemmel, *The Poor Man Before the Bar of Justice in Tennessee -- Legal Aid and Services, Public Defenders, and the Criminal Indigent Defendant Act*, 38 Tenn. L. Rev. 33, 34 (1970).
- 29 *Id.* p. 38-40.
- 30 1972 Tenn. Priv. Acts. ch. 262
- 31 1973 Tenn. Priv. Acts. ch. 168.
- 32 Nat’l Legal Aid & Defender Ass’n for the Tenn. Sup. Ct. Exec. Secretary, Tennessee Court Study: Defense System Study, 28 (1977 Tenn. Court Study); Letter from Robert E. Kendrick, Deputy Att’y Gen., to Harry D. Mansfield, at 2 (July 27, 1976 Kendrick Letter).
- 33 Nat’l Ctr. for Defense Management, *Systems Development Study of Alternative Defense Services for Montgomery County, Tennessee*, 32 (1976 Montgomery County Report).
- 34 *Id.* at 23.
- 35 1977 Tenn. Court Study at 21.
- 36 Montgomery County Report at 22.
- 37 *Baxter v. Rose*, 523 S.W.2d 930 (1975).
- 38 1977 Tenn. Court Study at 13-19 (providing a detailed description of the perceived shortcomings of the reimbursement procedures at the time).
- 39 Kendrick Letter.
- 40 Notably, in addition to the use of appointed private counsel, indigent representation in Knox County

in civil and criminal matters (including juvenile court) was also handled by the Legal Aid Clinic of the Univ. of Tenn. Coll. of Law. Tennessee Court Study at 50-54. The clinic had first been established in 1947, and by 1970 it was staffed by 85 students who handled cases from intake through trial under the supervision of three full-time and three part-time attorneys. William G. Haemmel, *The Poor Man Before the Bar of Justice in Tennessee--Legal Aid and Services, Public Defenders, and the Criminal Indigent Defendant Act*, 38 Tenn. L. Rev. 33, 36-37 (1970).

41 1977 Tenn. Court Study at 31-32.
42 Lewis L. Laska, *The 1977 Limited Constitutional Convention*, 61 Tenn. L. Rev. 485, 563 (1994).
43 1986 Tenn. Pub. Acts ch. 910.
44 Tenn. Code Ann. § 8-14-201(a).
45 Tenn. Code Ann. § 8-14-201(b).
46 1990 Tenn. Pub. Acts ch. 964.
47 Tenn. Op. Att’y. Gen. No. 92-20 at *2-3 (Mar. 4, 1992). The public defender in Shelby County is appointed by the Mayor of Shelby County.
48 Tenn. Code Ann. § 8-14-302(a).
49 Tenn. Code Ann. § 8-14-303.
50 1995 Tenn. Pub. Acts ch. 510, § 1 (codified at Tenn. Code Ann. § 40-30-201 *et seq.*).
51 Tenn. Code Ann. § 40-30-202.
52 *See Bell v. Todd*, 206 S.W.3d 86, 92 (Tenn. Ct. App. 2005).
53 *In re Gault*, 387 U.S. 1, 37, 41 (1967); Tenn. Code Ann. § 37-1-126 (2014).
54 Tenn. Code Ann. § 37-1-149(a)(1) (2014).
55 Tenn. Code Ann. § 33-3-503(c) (2015).
56 Tenn. Code Ann. § 37-1-126(a)(2); *see also State ex rel. T.H. v. Min*, 802 S.W.2d 625 (Tenn. Ct. App. 1990).
57 Tenn. Code Ann. § 37-1-126(a)(2).
58 Donald N. Duquette, *et al.*, *Child Welfare Law and Practice* 193 (3rd ed. 2016 *Child Welfare*).
59 *State ex rel. Whitley v. Lewis*, 244 S.W.3d 824, 830 (Tenn. Ct. App. 2007).
60 ABA Division for Public Education, *Dialogue on Youth and Justice, Part I: The History of Juvenile Justice*, available at <http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf>; Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Juvenile Offenders and Victims: 1999 National Report 2* (1999).
61 *See, e.g., Johnson v. State*, 21 Tenn. 283 (1840) (“The right of parents to chastise their refractory and disobedient children is so necessary to the government of families, to the good order of society, that no moralist or lawgiver has ever thought of interfering with its existence, or of calling upon them to account for the manner of its exercise, upon light or frivolous pretenses ...”).
62 *See, Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839).
63 *Child Welfare* 193, 207-10.
64 *Id.*
65 *State ex rel. Bethell v. Kilvington*, (Tenn. 1898), 45 S.W. 433, 434 (1898).
66 *Child Welfare* at 217.
67 *Id.* at 218-19.
68 Juvenile Court Documentary, *100 Years of Juvenile Court, A Century of Service*, available at www.shelbycountyttn.gov
69 1911 Tenn. Pub. Acts ch. 111-12.
70 Chapter 58, Public Acts of 1911; *Childress v. State*, 179 S. W. 643, 644 (Tenn. 1915).
71 *State v. Bockman*, 201 S. W. 741 (Tenn. 1918), cited in April Meldrum & Laura Hash, *An Appeal for Change: Eliminating the Second Bite at the Apple in Tennessee Juvenile Cases*, 3 Tenn. J. of Race, Gender, and Social Justice 1, 10 (2014).
72 *Child Welfare* at 220.
73 Tenn. Code. Ann. § 36-1-113.
74 262 U. S. 390 (1923).
75 *Id.* at 399.
76 *Pierce v. Society of Sisters*, 268 U. S. 510 (1925); *Wisconsin v. Yoder*, 406 U. S. 205 (1972) is another case upholding parents’ liberty interest in controlling their child’s education. The Supreme Court established that parents could choose to end their children’s education in the eighth grade, rather than following state-created compulsory student attendance laws. *Id.*
77 *Prince v. Massachusetts*, 321 U. S. 158 (1944).
78 *Bellotti v. Baird*, 443 U. S. 622, 643 (1979); *Tinker v. Des Moines*, 393 U. S. 503 (1969).
79 *See, e.g., Griswold v. Connecticut*, 381 U. S. 479 (1965).
80 *Child Welfare*, at 283; *see also Moore v. City of East Cleveland*, 431 U. S. 494 (1977) (invalidating a housing ordinance prohibiting a grandchild from living in a grandparent’s home) and *Troxel v.*

Granville, 530 U. S. 57 (2000) (upholding the right of a fit parent to determine grandparent visitation).

81 *In re Carrington H.*, 483 S. W. 3d 507, 522-23 (2016); *Keisling v. Keisling*, 92 S. W. 3d 374 (Tenn. 2002); *Hawk v. Hawk*, 855 S. W. 2d 573 (Tenn. 1993).

82 *In re Audrey S.*, 182 S. W. 3d 838, 877 (Tenn. Ct. App. 2005);
In re Carrington H.

83 *Hawk*, *supra*; *In re A. M. H.*, 215 S. W. 3rd 793 (Tenn. 2007).

84 *Stanley v. Illinois*, 405 U. S. 645 (1972).

85 *Lehr v. Robertson*, 463 U. S. 248 (1983).

86 *In re Bernard T.*, 319 S. W. 3rd 586, 597-98 (Tenn. 2010).

87 *Lassiter v. Dep't. of Soc. Services*, 452 U.S. 18, (1981) citing *Gideon v. Wainwright*, *Argersinger v. Hamlin*, and *In re Gault*. Termination of parental rights proceedings are governed by Tenn. Code Ann. § 36-1-113.

88 *Id.* Termination of parental rights proceedings occur at the end of a long juvenile court process that begins with an initial adjudication of dependency and neglect. See Tenn. Code Ann. § 37-1-129 and *Davis v. Page*, 714 F. 2d 512, 528 (1983) (ruling that parents in initial dependency and neglect proceedings had a right to counsel on a case by case basis).

89 *Lassiter*, *supra* note 30.

90 *Id.* at 33-34. The Court cites six policy-setting federal entities, 33 states, and the District of Columbia that support this view.

91 *Santosky v. Kramer*, 455 U. S. 745 (1982).

92 *Id.*

93 In re: Amendment of Rule 13 of the Rules of the Tennessee Supreme Court. (May 12, 1992, effective July 1, 1991).

94 The U.S. Supreme Court has not revisited the question of appointed counsel in parental termination proceedings in the more than 30 years since *Lassiter* was decided. This may be because almost all states now provide appointed counsel in every parental termination case, either by statute, constitutional provision, or court rule, and do not condition the appointment of counsel on the outcome of the case-by-case balancing test adopted in *Lassiter*. See Susan Calkins, *Ineffective Assistance of Counsel in Parental–Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. App. Prac. & Process 179, 193 (2004). Tennessee further enforced this parental right by making it a statutory right in 2009. See *In re Carrington H.*, 483 S.W.3d 507, 527 (Tenn. 2016), *cert. denied sub nom. Vanessa G. v. Tennessee Dep't of Children's Servs.*, 137 S. Ct. 44, 196 L. Ed. 2d 28 (2016) (discussing Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii))

95 Susan L. Brooks, *Reflections on the Tennessee Court Improvement Program for Juvenile Dependency Cases*, 65 Tenn. L. Rev. 1031, 1042 (1998).

96 *Child Welfare*, *supra* note 1, at 238.

97 *Id.* at 241-46.

98 *Child Welfare*, *supra* note 1, at 254-260.

99 See, Chapter 37, Tenn. Code Ann. *In re Kaliyah S.*, 455 S. W. 3rd 533 (Tenn. 2015) references the history of these federal laws.

100 Guardians ad litem are also appointed to represent the interests of persons with a disability or otherwise under judicial supervision. See GUARDIAN, guardian ad litem, *Black's Law Dictionary* 822 (10th ed. 2014) (quoting Homer H. Clark Jr. & Ann Laquer Estin, *Domestic Relations: Cases and Problems* 1078 (6th ed. 2000)).

101 See GUARDIAN, guardian ad litem *Black's Law Dictionary* 822 (10th ed. 2014).

102 *Child Welfare*, *supra* at 200.

103 *State ex rel. Anglin v. Mitchell*, 596 S. W. 2d 779, note 4 (1980).

104 1970 Tenn. Pub. Acts ch. 600, § 48.

105 *Id.* at § 49.

106 Brian Fraser, Staff Attorney, Nat'l Ctr for the Prevention and Treatment of Child Abuse and Neglect testimony before the Select Comm. on Educ. of the Comm. on Educ. and Labor. House of Representatives, 93rd Congress, First Session (1973).

107 In Tennessee, enacting statutes and court rules generally provide that lawyers are to fill the role as guardians ad litem, likely because attorneys are considered to possess the requisite familiarity with law, the court system, and training as advocates. “[W]hile the statutory language is not clear, the distinction in the statutory provision between a GAL and a Court-Appointed Special Advocate (being a non-lawyer) shows the legislative intent to have GALs as attorneys. See Tenn. Code Ann. § 37-1-149(a) (1), (b)(1) (2005); see also Tenn. Sup. Ct. R. 40 (making it clear that attorneys are appointed as GALs).” Gerard F. Glynn, *The Child Abuse Prevention & Treatment Act—Promoting the Unauthorized Practice of Law*, 9 J.L. & Fam. Stud. 53, 78 (2007).

108 *Child Welfare*, supra note 1, at 235-36.

109 Tennessee Court Improvement Program for Juvenile Dependency Cases, *The Program Report for the Year*, Feb. 22, 1997-Feb. 21, 1998 at 4 (May 1998).

110 Brooks, supra note 48, at 1043.

111 Tennessee Court Improvement Program, *A Re-Assessment of Tennessee's Judicial Process in Foster Care Cases*, 69 (2005), citing Tenn. Code Ann. § 37-1-150.

112 In re Petition, supra note 46, at § 1(d)(8).

113 Tenn. Sup. Ct. R. 40 (a) and Tenn. Sup. Ct. R. 40A. Section 1 (b).

114 Tenn. Sup. Ct. R. 40.

115 Tenn. Sup. Ct. Rule 40. See Susan Brooks & Andrew Shookof, *Protecting Our Most Vulnerable Citizens: New Guidelines Clarify, Strengthen Mission for Guardians ad Litem*, Tenn. Bar Journal, June 2002 at 13-14.

116 Tenn. Sup. Ct. Rule 40 (a).

117 Tennessee Supreme Court Improvement Program, *A Reassessment of Tennessee's Judicial Processes in Foster Care Cases*, 48 (2005).

118 *Id.* at 58.

119 *Id.* at 64.

120 *Id.* at 71-72.

121 *Id.* at 74.

122 *Id.* at 114-16.

123 State of Tennessee, Executive Secretary to the Supreme Court, Claims Statistics (July 01, 2015 to June 30, 2016).

124 A delinquent child in Tennessee is one who has committed a delinquent act and is in need of treatment or Tenn. Code Ann. § 37-1-102 (b) (11). A delinquent act is an act, other than a traffic offense, that is designated as a crime under law. Tenn. Code Ann. § 37-1-102 (b) (10).

125 1911 Tenn. Pub. Acts. ch. 58, summarized in *Childress*.

126 Statutes were summarized in *Childress*.

127 *State ex rel. Bethell v. Kilvington*, 100 Tenn. 227, 45 S.W. 433, 435 (1898).

128 *Childress* at 643, 644 (citing *Ex parte Januszewski*, 196 F. 123, 124 (C.C.S.D. Ohio 1911))

129 Douglas E. Abrams and Sarah H. Ramsey, *Children and the Law: Doctrine Policy and Practice*, 976 (2010).

130 *Id.* at 977.

131 *Id.*, supra note 63 at 980.

132 *Kent v. United States*, 383 U.S. 541, 556 (1966).

133 *Id.* at 561.

134 1970 Tenn. Pub. Acts ch. 600, § 48.

135 *In re Winship*, 397 U. S. 358 (1970).

136 *Breed v. Jones*, 421 U. S. 519 (1975). The parallels of adult constitutional rights to those of minors are also similar in matters of constitutional privacy rights and are reflected in the right to counsel for minors established in Tenn. Code Ann. § 37-10-304.

137 1977 Defense System Study, p. 33.

138 *Id.*

139 *State ex rel. Anglin v. Mitchell*, 596 S. W. 2d 779, 791 n. 54 (1980).

140 Tennessee Supreme Court Improvement Program Reassessment at 76.

141 *Roper v. Simmons*, 543 U. S. 551 (2005).

142 *Graham v. Florida*, 560 U. S. 48 (2010).

143 *Miller v. Alabama*, 567 U. S. 460 (2012).

144 *Montgomery v. Louisiana*, 577 U.S. ____, 136 S. Ct. 718 (2016).

145 Press Release, *Department of Justice Enters into Agreement to Reform the Juvenile Court of Memphis and Shelby County, Tennessee* (December 18, 2012), available at Dept. of Justice Compliance Page, www.Shelbycountytn.gov.

146 *Id.*

147 Sandra Simkins, *Compliance Report #7* (June 10, 2016), available at shelbycountytn.gov.

148 Tenn. Sup. Ct. Rule 40A, § 1(a). Guardianship cases under this section are those in which permanent guardianship petitions are filed pursuant to Tenn. Code Ann. § 37-1-801 *et. seq.* This Rule does not apply to guardianships filed under Tenn. Code Ann. § 34-2-101.

149 Tenn. Sup. Ct. R. 40A, § 3(a), (b).

150 Tenn. Code Ann. § 34-1-107 (f)(1)(B).

151 Tenn. Code Ann. § 33-3-608.

152 1965 Tenn. Pub. Acts ch. 112.

C

APPENDIX

Right to Counsel Services in the 50 States

An Indigent Defense Reference Guide for Policymakers

(March 2017)

David Carroll, Executive Director, Sixth Amendment Center

Introduction

The provision of Sixth Amendment indigent defense services is a state obligation through the Fourteenth Amendment.¹ However, defining how states choose to deal with that constitutional requirement defies easy categorization. Some states pass on the entirety of its right to counsel duty to local governments, while other states delegate no responsibility at all. A significant number of other states try to strike a balance between sharing a portion of the financial burden of providing a lawyer to the indigent accused with its cities and counties. However, there is wide variation in what “shared responsibility” means. Some of these states contribute the vast majority of funding while others contribute only a minimal amount.

To be clear, it is not believed to be unconstitutional for a state to delegate some or all of its constitutional responsibilities to its counties and cities, but in doing so the state must guarantee that local governments are not only capable of providing adequate representation, but that they are in fact doing so.² This can only be accomplished if there is some state agency charged with the oversight and evaluation of defender services. Some states have permanent statewide indigent defense commissions or boards that either oversee all indigent defense services (both primary and conflict) or are authorized to set and enforce standards on localized right to counsel services. Other states have similar commissions or boards but limit their oversight capabilities to only certain types of cases or certain regions of the state. And, in those states that do have commissions or boards, some states insulate these bodies from undue political and judicial interference in accordance with national standards, and some do not.

The variations amongst how states deal with the Sixth Amendment does not stop at funding and oversight. The number of structural approaches to providing lawyers to the poor is great. City, county or state governments may employ public attorneys on either a full-time or part-time basis³ or pay for private lawyers to provide representation. Private lawyers may be under contract to take an unlimited number of cases for a flat fee, or be paid a single rate per case, or be paid hourly (with compensation capped at a set level, or not).

A state may have government-employed lawyers for one classification of cases (e.g., direct appeals) but use private lawyers for other types (e.g. felony cases), or they may give a first co-defendant a government-employed lawyer but assign the second co-defendant a private lawyer. A state may develop and fund a sophisticated delivery system for the representation of people charged with felony offenses, and then leave the total

responsibility for misdemeanor representation to local government - however the cities or counties choose to provide those services.

A state may require local government to design and pay for a local delivery system but then have a state-run organization reimburse the cities and counties a percentage of those costs. Not only do the percentage of reimbursement vary in each of these states, but reimbursement plans may be based on meeting state-imposed standards (or not), or be based on a percentage of criminal cases arising in a local jurisdiction (or not), or simply be based on geographical considerations (or not). And, some of these states require all counties to participate in the reimbursement plan, while others allow local governments to either opt-into, or to opt-out of, the state plan.

The Sixth Amendment Center (6AC) provides this five-part memorandum as a guide to the myriad ways in which the right to counsel is implemented in state and county courts across the United States.⁴ Part I details how each state attempts (if at all) to oversee that its Sixth and Fourteenth Amendment obligations are met throughout the state. The second part explains how indigent defense services are funded in each of the 50 states. Part II then details how states/local governments deliver right to counsel trial-level services - that is, whether the state or local governments design and manage day-to-day operations of those services.⁵

Part IV takes into account the first three classifications (state oversight, funding, and delivery of trial-level services) to offer the reader a guide to which states are the most similar in the provision of right to counsel services. The fifth part is a detailed description of Sixth Amendment services in each state presented in alphabetical order as a 50-state reference guide.

PART I: STATE OVERSIGHT

Again, it is not believed to be unconstitutional for a state to delegate some or all of its constitutional responsibilities to its counties and cities, but in doing so the state must guarantee that local governments are not only capable of providing adequate representation, but that they are in fact doing so. To accomplish this, there needs to be a state-entity that has the authority to evaluate indigent defense services against the parameters for effective representation (See Appendix A, page 36, for a discussion of a state's obligations under *United States v. Cronin*⁶ to maintain effective systems for the provision of counsel). Many states have created commissions and boards with the authority to promulgate and enforce standards.

For example, in 2014, a law was enacted banning the use of flat fee contracts in Idaho and creating the Idaho State Public Defense Commission (ISPDC). ISPDC is authorized to promulgate standards relate to attorney performance, attorney workload, and, attorney supervision, among others. All counties must comply with standards, without regard to whether they apply to the ISPDC for state financial assistance. The hammer to compel compliance with standards is significant. If the ISPDC determines that a county "willfully and materially" fails to comply with ISPDC standards, and if the ISPDC and county are unable to resolve the issue through mediation, the ISPDC is authorized to step in and rem-

edy the specific deficiencies, including taking over all services, and charge the county for the cost. And, if the cost is not paid within 60 days, “the state treasurer shall immediately intercept any payments from sales tax moneys that would be distributed to the county,” and the intercepted funds will go to reimburse the commission. As stated in HB 504, the “foregoing intercept and transfer provisions shall operate by force of law.”

The other reason for creating commissions is to insulate the system from undue political or judicial interference. For example, in systems where the Chief Public Defender is a gubernatorial appointee – rather than appointed by a commission -the chief understands that she must keep the Governor happy to keep her job. Thus, if a Governor puts forth a budget that is inadequate for providing effective assistance of counsel, the chief defender must either accept the budget or take a public position in opposition to the person who can terminate her employment. Indeed, this scenario took place in February of 2011 when the New Mexico governor terminate the chief public defender in the middle of the legislative session for suggesting that public defender office was underfunded.⁷

Not all commissions are created the same and not all offer the same amount of systemic protections to the indigent accused. For example, national standards⁸ call for indigent defense commission members to be appointed from diverse authorities, such that no one branch of government can exert more control over the system than any other branch. Some commissions are more independent than others.

There are three broad classifications for how states oversee right to counsel services:

A. Statewide Commission: States in this classification have one or more commissions or boards that oversee all indigent defense services for all case-types for all regions of the state.

B. Limited Commission: States in this classification have commissions or boards. However, those commissions either: a) oversee some, but not all, case-types; or, b) oversee some, but not all, regions of the state.

C. No State Commission: The states in this classification have no commissions overseeing any portion of indigent defense services.

TABLE 1: STATE OVERSIGHT

	Independent Commissions		Non-Independent
A. Statewide Commission 21 States 42%	Connecticut Kentucky Louisiana Maine Maryland Massachusetts Michigan	Minnesota Montana New Hampshire New Mexico North Dakota Utah Virginia	Arkansas Colorado Hawaii Missouri Oregon West Virginia Wisconsin
B. Limited Commission 13 States 26%	Idaho Indiana Nebraska New York North Carolina	Ohio South Carolina Tennessee Texas	Georgia Illinois Kansas Oklahoma
C. No Commission 16 States 32%	Alabama Alaska Arizona California Delaware	Florida Iowa Mississippi Nevada New Jersey	Pennsylvania Rhode Island South Dakota Vermont Washington Wyoming

ANALYSIS: There is a direct correlation between the extent to which states authorize commissions to hold state or local services accountable to state promulgated standards, and the quality of services rendered.

A. Statewide commissions: Twenty-one states (42%) vest the oversight of all indigent defense services with one or more statewide commission or board, though the composition and authority of those commissions vary greatly. Statewide commissions in fourteen of these states meet the national standard for independence while commissions in seven states⁹ do not.

B. Limited commissions: Thirteen states (26%) have commissions with limited authority, though the degree of those limitations can vary widely.

One state (North Carolina),¹⁰ for example, has very broad authority to set and enforce standards, but other state and local entities may infringe on that power. Six states (Idaho, Illinois, Kansas, Nebraska, Oklahoma and Tennessee) have commissions that oversee only a part of services statewide. These may be commissions that oversee representation in some counties or regions or commissions that oversee a certain case-type (e.g., direct appeals).¹¹ Six states (Georgia, Indiana, New York, Ohio, South Carolina, and Texas) have commissions that offer state support to county-based systems. Limited commissions in nine states meet the national standard for independence while limited authority commissions in four states¹² do not.

C. No state commission: Sixteen states (32%) have no state commission overseeing indigent defense representation.

PART II: FUNDING

There are three broad classifications for how states fund the right to counsel:

A. State-funded services: This classification is defined as those states that relieve its local government of all responsibility for funding right to counsel services even if alternative revenue sources (e.g., court fines and/or fees) are used in addition to state general fund appropriations. Also included are those states that allow, but do not require, local governments to augment state indigent funding if they so choose.

B. Mixed state and local-funded services: This classification includes all states that require local governments to share the funding costs of providing the right to counsel. This category includes states that provide almost all right to counsel funding as well as those where cities and counties shoulder the majority of funding. The thing that distinguishes the states in this category that provide less than half of all indigent defense funding from those in category C (below) is that the state governments in this classification spend a significant sum of money on trial-level services in a significant number of regions in the state.

C. Minimal or no state-funded services: The states in this classification obligate their local governments to bear the vast majority of costs for indigent defense services while the state contributes minimal to no state funding. This includes those states that pay for all, or a portion of, indigent appellate services but leave all funding responsibilities for indigent trial-level services to its local governments.

TABLE 2: FUNDING

Funding Classification	States			
A. State Funded 27 States 54%	Alabama Alaska Arkansas Colorado Connecticut Delaware Florida	Hawaii Iowa Kentucky Louisiana Maine Maryland Massachusetts	Minnesota Missouri Montana New Hampshire New Mexico North Carolina North Dakota	Rhode Island Oregon Vermont Virginia West Virginia Wisconsin
B. Mixed Funding 11 States 22%	Georgia Indiana Kansas	New Jersey New York Ohio	Oklahoma South Carolina Tennessee	Texas Wyoming
C. Minimal State Funds 12 States 24%	Arizona California Idaho	Illinois Michigan Mississippi	Nebraska Pennsylvania South Dakota	Utah Washington

ANALYSIS: State funding of indigent defense services has proven to be the most stable for two principle reasons. First, local governments have significant revenue-raising restrictions placed on them by the state while generally being statutorily prohibited from deficit spending. Second, the jurisdictions that are often most in need of indigent defense services are the ones that are least likely to be able to afford it. That is, in many instances, the same indicators of limited revenues – low property values, high unemployment, high poverty rates, limited household incomes, limited higher education, etc. – are often the exact same indicators of high crime. And those same counties have a greater need for broader social services, such as unemployment or housing assistance, meaning the amount of money to be dedicated to upholding the Sixth Amendment to the Constitution is further depleted.

State-funded services: Twenty-seven states (54%) relieve all local government of the financial burden to fund the right to counsel. Three of these states (Arkansas, Kentucky and Virginia) allow local governments to augment state funding with local funding if they so choose.¹³

Two other states (Alabama and Louisiana) use alternative revenue streams as their primary funding method. Alabama assesses a filing fee in civil court matters that is collected in a central fund dedicated to indigent defense services.¹⁴ By statute, if the amount in the fund is insufficient to cover the annual costs of indigent defense representation, the difference must be covered by the state General Fund.¹⁵

The majority of funding for trial-level indigent defense services in Louisiana comes from non-governmental generated revenue in the form of court fines and fees.¹⁶ The single greatest revenue generator for indigent defense is a special court cost (currently \$45) assessed against every criminal defendant convicted after trial, pleads guilty or no contest, or who forfeits his or her bond for violation of a state statute or a local ordinance other than a parking ticket. The result is that the most significant funding for trial-level defense services in Louisiana comes from fees assessed on traffic tickets.¹⁷

All other states in this classification provide right to counsel funding through a state general fund appropriation.¹⁸

Mixed state and local-funded services: Eleven states (22%) require shared funding for the right to counsel indigent defense services between state and local governments. Two states (Oklahoma and Tennessee) provide almost all funds for indigent defense representation, but each state has counties that fall outside of full state funding.¹⁹ As the result of a class action settlement, another state (New York) provides all funding for trial-level services in five counties.²⁰ Two states (South Carolina and Wyoming) have state-administered indigent defense services but ask all of their counties to fund a portion of the cost.²¹ Two states (Kansas and New Jersey) split the cost of representation by case-type.²² In four states (Georgia, Indiana, Ohio, and Texas), counties are required to fund trial-level services, but the state then provides some amount of funding to reimburse some portion of the counties' costs.²³

Minimal or no state-funded services: In twelve states (24%) there is negligible to no funding of trial-level services by the state, leaving local government to bear the vast majority of costs for indigent defense services. Three states (Idaho, Michigan and Utah) recently enacted statutes that when fully implemented will provide significant state money to local jurisdictions to meet state-imposed standards. Each of these three states will be re-classified as “mixed state and local-funded” states whenever implementation occurs.

Two states (Illinois and Mississippi) provide minimal funding for a minimal portion of trial-level indigent defense services while providing state-funded appellate services.²⁴ One state (Nevada) provides representation in counties that opt-into a state-run public defender office, though counties must still pay a significant portion of the cost of that program (80%).²⁵ Another state (Nebraska) has a limited state-funded office that provides direct representation in some capital trials, appeals, some serious non-capital felonies involving drugs and violent crime, and otherwise serves as a resource and training center for the county-based systems. Three other states (Arizona, California and Washington) provide no state funding of trial-level services but provide state funding for some other services.²⁶ Two states (Pennsylvania and South Dakota) provide no funding of any indigent defense representation.

PART III: DELIVERY OF TRIAL-LEVEL SERVICES

The “delivery of trial-level services” differs from “funding” in that the delivery model classifications are concerned with how services are organized and regardless of whether state or local government pays for those services. For example, a state may pay all costs of representing the indigent accused but leave local governments or local courts responsible for the manner in which those services are delivered (public or private attorneys) and/or operated (i.e., on a court-by-court basis or on a multi-county, regional basis). Conversely, a state may require local governments to help pay for the Sixth Amendment services, but gives the choice of delivery system and the responsibility for daily management of trial-level services entirely with the state.

There are three broad classifications for how states administer right to counsel trial-level services:

A. State-run services: This classification is defined as those states that relieve its local government and courts of all responsibility for administering trial-level right to counsel services.

B. Mixed state and local-run services: This classification includes all states that require the shared administration of indigent defense services with state and local governments. This includes states with a state-run agency for certain case-types (felony), but where local government administers other case types (misdemeanor). Also included in this classification are those states where a state-run agency administers indigent defense services in certain regions of the state, but where local governments administer defender services in all other regions.

C. Minimal or no state-run services: The states in this classification obligate their local governments to administer the vast majority of indigent defense services. This includes those states that may administer all, or a portion of, indigent appellate services but leave all administration of indigent defense trial-level services to its local governments.

TABLE 3: ADMINISTRATION OF TRIAL-LEVEL SERVICES

Administration Classification	States			
<p>A. State-run services 24 States 48%</p>	Alaska Arkansas Colorado Connecticut Delaware Hawaii	Iowa Kentucky Maine Maryland Massachusetts Minnesota	Montana New Hampshire New Mexico North Dakota Oregon Rhode Island	Vermont Virginia West Virginia Wisconsin Wyoming
<p>B. Mixed-run services 7 States 14%</p>	Florida Kansas	New Jersey Nevada	New York Oklahoma	Ohio
<p>C. Local-run services 19 States 38%</p>	Alabama Arizona California Georgia Idaho	Illinois Indiana Indiana Louisiana Michigan	Mississippi Nebraska North Carolina Pennsylvania South Carolina	South Dakota Tennessee Texas Utah Washington

ANALYSIS: Whether indigent defense trial-level services are organized at the state or local-level, or a combination of both, has less of an impact on the quality of services as either state-funding or state oversight of services.

State-run services: Twenty-four states (46%) administer all trial-level indigent defense services at the state-level. Twenty-one states²⁷ vest a single public defense agency with the administration of all indigent defense services (both primary and conflict) for all case-types.²⁸ Two states (Alaska and Colorado) have two separate state public defense agencies, one for primary services and one for conflict services. One state (Rhode Island) has a state-administered public defender office for primary services. Conflict representation is provided by a panel of private attorneys, paid hourly on a per-case basis, and administered by the Rhode Island Supreme Court. Only 23 of the 27 “state-funded” states identified in Part I administer all trial-level services at the state-level.²⁹ Additionally, one state (Wyoming) administers all indigent defense services at the state-level despite being categorized as a “mix state and local-funded” state in the above funding section.³⁰

Mixed state and local-run services: Seven states (14%) have mixed state and local-run indigent defense services. Two states (Kansas and New Jersey) split the administration of trial-level services representation by case-type.³¹ Four states (Nevada, New York, Oklahoma and Ohio) administer trial-level representation for a portion of their counties.³² One state (Florida) elects chief public defenders on a circuit basis that have sole authority for the operations of primary right to counsel services in each circuit, and is therefore considered to have local-administration. Florida’s conflict trial-level representation is shared between the state and the local courts. Five state-run regional conflict defender offices covering each of the state’s five appellate jurisdictions provide representation when a circuit

public defender has a conflict, Tertiary representation is provided by private attorneys paid on an hourly basis or under contract to the local judiciary.

Minimal or no state-run services: Nineteen states (38%) administer trial-level indigent defense at the local level. Thirteen states require local government to administer all services.³³

PART IV: INDIGENT DEFENSE SERVICES IN THE 50 STATES

Taking into account indigent defense service funding, administration, and state oversight, there are 27 possible permutations that states can use to implement their Sixth and Fourteenth Amendment obligations.³⁴ If states were spread out evenly over these classifications it would make comparisons virtually meaningless.

However, states fall into six broad categories, as detailed in Table 4 on the next page:

TABLE 4: 50 STATE OVERVIEW

OVERVIEW		States			
A. State Funded, State Administered	Independent Commissions	Non-Independent		No Commission	
24 States 48%	Connecticut Kentucky Maine Maryland Massachusetts Michigan Minnesota	Montana New Hampshire New Mexico North Dakota Utah Virginia	Arkansas Colorado Hawaii Missouri	Oregon West Virginia Wisconsin	Alaska Deleware Iowa Vermont
B. State-Funded, Mixed Administered	Statewide Commission		Limited Commission		No Commission
2 States 4%					Florida Rhode Island
C. State-Funded, Local Administered	Statewide Commission		Limited Commission		No Commission
3 States 6%	Louisiana		North Carolina		Alabama
D. Mixed-Funded, State Administered	Statewide Commission		Limited Commission		No Commission
1 States 2%					Wyoming
E. Mixed- Funded, Mixed Administered	Statewide Commission		Limited Commission		No Commission
14 States 16%	Michigan Utah		Georgia Idaho Indiana Kansas New York	Oklahoma Ohio Tennessee Texas	Mississippi Nevada New Jersey
F. Local-Funded, Local Administered	Statewide Commission		Limited Commission		No Commission
6 States 22%			Nebraska		Arizona California Pennsylvania South Dakota Washington

PART V: STATE DESCRIPTIONS

ALABAMA	<p>The Office of Indigent Defense Services (OIDS) is an executive branch agency housed in the Department of Finance, responsible for overseeing all indigent defense services, both primary and conflict. The Finance Director appoints the OIDS Director to a three-year term from three names nominated by the Alabama State Bar, Board of Commissioners.</p> <p>OIDS is statutorily obligated to set standards related to: fiscal responsibility and accountability; minimum attorney qualification, training and other standards by case type; caseload management; attorney performance standards; the independent, efficient and competent representation of conflict defendants; indigency and partial-indigency; and recoupment; among others.</p> <p>However, local indigent advisory boards within each judicial circuit make decisions regarding the structure of local right to counsel services. Each circuit’s five-person advisory board is composed of: the presiding circuit court judge; the president of the local circuit bar association; and three lawyers selected by the circuit bar association commission (in multi-county circuits these appointments are made by the president of local county bar associations). Advisory boards must reflect the racial and gender diversity of the circuit.</p> <p>But, because OIDS is ultimately responsible for all contracting, payment of assigned counsel, and oversight of staff public defenders, the director of OIDS has an important say over the decisions of the local advisory boards. First, if a local advisory board fails to recommend a delivery service model at all, then the OIDS director determines how to provide services in that county. If the OIDS director disagrees with the recommendation of the local advisory board, the director can appeal the recommendation to a state Indigent Defense Review Panel.³⁵</p> <p>Counties do not contribute to the funding of indigent defense services. Instead, money from a filing fee in civil court matters is collected in a central fund dedicated to indigent defense services. If OIDS exceeds the amount of dollars available in that fund, the state is statutorily responsible for funding the difference out of the state general fund.</p>
ALASKA	<p>Alaska has two parallel systems providing right to counsel services across the state. The governor appoints the chief attorneys of both agencies. The primary system, the Public Defender Agency, has branch offices located across the state, with direct trial services provided by a mixture of full time staff attorneys and contracts with private attorneys. In cases of conflict, the Office of Public Advocacy provides services in structure similar to the primary system, but with a greater emphasis on contracting with private counsel for direct representation.</p>

<p style="text-align: center;">ARIZONA</p>	<p>The state of Arizona delegates to the counties its Sixth Amendment right to counsel obligations. Each county determines on its own how best to provide such services, with the majority of counties (10) establishing county public defender offices (in some urban counties, there are two or more such offices for conflict and overflow representation) and others relying entirely on contracts with private attorneys to handle cases on behalf of indigent clients. And each county is similarly responsible for determining on its own what amounts to an adequate level of funding.</p> <p>For many years, the county-based defender systems together have maintained a statewide public defender association to provide training and support resources. But county-level systems are not compelled to participate. Meanwhile, the state provides no assistance to counties, and with no oversight it has no means of knowing whether each county is in fact capable of fulfilling its federal obligation, and then that each county actually does so.</p>
<p style="text-align: center;">ARKANSAS</p>	<p>The Arkansas Public Defender Commission (APDC) is an executive branch agency. APDC is composed of seven members, all appointed by the Governor. Four commissioners must be attorneys; one must be a county judge, and one a district judge. APDC has ultimate statutory authority to set standards and policies related to the delivery of indigent defense services, including the power to determine how best to deliver services throughout the state.</p> <p>For the most part, APDC delivers indigent defense services through staffed public defender offices in each of the state’s 23 judicial circuits (covering 75 counties), although they have determined that certain circuits require two or more offices.³⁶</p> <p>In <i>State v. Independence County</i>, 312 Ark. 472, 850 S.W.2d 842 (1993), the Arkansas Supreme Court decided that the state is responsible for the funding of indigent defense services. However counties are responsible for some limited physical plant costs including utilities and telecommunications for public defender offices. Additionally, counties and municipalities can – if they so desire – contribute to an office to increase staff and augment state funding (though only the city of Little Rock has chosen to do so).</p> <p>The authority to be flexible in how services are delivered extends to the APDC’s oversight of conflict services. For the most part, APDC sets standards for the qualification, training and performance of private attorneys paid under contract for conflict representation and pay them \$60-\$90 per hour (felonies) and \$50-\$80 (misdemeanors). However, the Commission has determined that enough conflicts exist in certain urban areas of the state to support conflict public defender offices. For example, the Northwest Conflict Office serves as a regional conflict office serving two counties (Madison and Washington counties), while another conflict office in Little Rock only serves Pulaski County. In addition to the trial-level offices, the Commission has a central office that houses a conflict capital office, appellate services and training unit.</p>

In 1976, the California legislature created the Office of the State Public Defender as part of the judicial branch of government. Originally designed as a state appellate defender office the SPD was defunded in the 1980s and now handles only a limited number of post-conviction death penalty cases each year.

This means that local governments shoulder the entire burden of providing trial-level public attorneys to the poor. For California's more affluent counties, this has not proven to be a problem for the most part, and some of the most respected public defender offices and assigned counsel systems in the country are in California.

As opposed to trial-level indigent defense services, which are the responsibility of county governments in California, the representation of individuals in direct appeals and post-conviction proceedings, in both capital and non-capital cases, is a function of the California courts system with private attorneys handling the vast majority of direct services to clients. The state courts contract with a number of non-profit corporations to provide oversight and training on its behalf.

In death penalty matters, the non-profit California Appellate Project (CAP-SF) was established in San Francisco by the State Bar of California in 1983 as a resource center for private attorneys taking capital cases on direct appeal and onward through habeas corpus proceedings. CAP-SF operates under contract from the Judicial Council of California. The state of California supplemented CAP-SF in 1998 with the creation of the Habeas Corpus Resource Center, an arm of the state courts that provides direct representation to individuals in death penalty habeas proceedings before the Supreme Court of California and the federal courts. HCRC also provides training and accreditation assistance for private attorneys looking to become qualified to handle appointments in capital post-conviction proceedings.

Appellate representation in non-capital cases is divided among the state's six appellate districts, with direct services administered by one of the state's six appellate projects: the First District Appellate Project, the California Appellate Project of Los Angeles, the Central California Appellate Program, Appellate Defenders Incorporated, and the Sixth District Appellate Program.

<p style="text-align: center;">COLORADO</p>	<p>The Office of the Colorado State Public Defender administers 21 regional defender offices across the state, each staffed with full time attorneys and substantive support staff. All administrative and support functions for these offices are handled by a central administrative office in Denver. A five-member commission selects the system’s chief attorney, the state public defender, who is responsible for implementing and enforcing the commission’s policies throughout the regional offices.</p> <p>In cases of conflict, the Office of the Alternate Defense Counsel (OADC) oversees an assigned counsel system. The conflict system operates completely independent of the primary system, reporting to a second independent, nine-member statewide defender commission, which is responsible for implementing and enforcing the commission’s policies.</p> <p>Both the primary and conflict systems are funded entirely by state general fund appropriation and both are judicial branch agencies. The state Supreme Court appoints all members of both commissions.</p>
<p style="text-align: center;">CONNECTICUT</p>	<p>The Division of Public Defender Services (DPDS) in Connecticut is a state-funded agency in the judicial branch that oversees both primary and conflict defender services throughout the state. The independence of Connecticut’s public defense system is ensured through an independent seven-person commission appointed by diverse authorities.³⁷ Trial-level services are provided throughout the state by branch offices staffed with full-time government attorneys serving all state courts. DPDS provides conflict representation through a panel of private attorneys paid hourly.</p>
<p style="text-align: center;">DELEWARE</p>	<p>The Office of the Public Defender is a statewide, state-funded public defender system in the executive branch led by a chief public defender appointed directly by the governor. Full time staff attorneys represent juvenile and adult clients in all levels of court from branch offices located in each of Delaware’s three counties. The public defender office also oversees the Office of Conflicts Counsel to oversee the state’s conflict program, which is generally provided by private bar attorneys working under contract for an annual flat rate (though certain conditions trigger counsel to earn an hourly rate above and beyond the annual flat fee).</p>

FLORIDA	<p>Public defender offices staffed with full time employees provide primary representation to indigent defendants in each of the state’s 20 judicial circuits (covering 67 counties). Each office is overseen by a popularly elected chief public defender³⁸ to ensure independence from the judiciary and other government agencies.</p> <p>The Florida Public Defender Association (FPDA) is a private, non-profit entity created in the early 1970s to bring a more unified voice to the 20 independent elected public defenders. Its executive director is selected by vote of the elected circuit defenders. FPDA provides training, lobbying, and other technical assistance services where cost efficiencies can be had through centralized services among the distinct offices. FPDA also disseminates state funding to each of the circuit defender offices.³⁹</p> <p>Five regional conflict defender offices covering each of the state’s five appellate jurisdictions provide representation when a circuit public defender has a conflict, Tertiary representation is provided by private attorneys paid on an hourly basis or under contract to the judiciary. Beyond the elected public defender system to provide for trial level services, Florida maintains three Capital Collateral Resource Offices, one office each serving the northern, central, and southern regions of the state. Lastly, the state maintains five appellate offices, one in each appellate district, to handle direct appeals arising out of the 20 trial circuits. Directors of all of these offices are direct gubernatorial offices.</p> <p>All services are state-funded.</p>
GEORGIA	<p>The Georgia Public Defender Standards Council (GPDSC) is a fifteen-member commission within the executive branch that appoints circuit public defenders to oversee trial-level indigent defense services in 49 of the state’s judicial circuits. GDPSC also oversees a central office providing training, capital support services, appellate representation, and mental health advocacy. GPDSC has limited authority to enforce standards it promulgates.</p> <p>Though the executive branch of government has the majority of appointments to GPDSC, there is an eight-member legislative oversight committee that reviews the Council’s work. And, although this appears to be a structured system, counties can opt out of the system, meaning the state has no regulatory authority over those regions. Because of this, GPDSC is defined as a commission with limited authority.</p>
HAWAII	<p>The Office of the Public Defender (OPD) is a state-funded, state-administered agency in the executive branch responsible for right to counsel services across Hawaii. The state public defender is appointed by the Defender Council, a commission of five members with each member selected by and serving at the pleasure of the governor. Five branch offices, each staffed with full time public defenders, handle direct services. Private attorneys handle conflicts on individual cases diverted away from the public defender offices.</p>

<p style="text-align: center; writing-mode: vertical-rl; transform: rotate(180deg);">IDAHO</p>	<p>In 2014, a law was enacted banning the use of flat fee contracts and creating a seven-person public defense commission within the Department of Self-Governing Agencies – a constitutional provision in Idaho that means that though the commission is still located in the Executive Branch, the commission would not have to answer directly to the Governor. Diverse authorities appoint the members of the Idaho Public Defense Commission such that no one branch of government has undue influence over the actions of the commission.⁴⁰</p> <p>ISPDC is authorized to promulgate standards, which are consistent with many of the ABA’s Ten Principles. All counties must comply with standards, without regard to whether they apply to the ISPDC for state financial assistance. ISPDC must create grant policies and procedures to assist counties in meeting those standards.</p> <p>The hammer to compel compliance with standards is significant. If the ISPDC determines that a county “willfully and materially” fails to comply with ISPDC standards, and if the ISPDC and county are unable to resolve the issue through mediation, the ISPDC is authorized to step in and remedy the specific deficiencies, including taking over all services, and charge the county for the cost. And, if the cost is not paid within 60 days, “the state treasurer shall immediately intercept any payments from sales tax moneys that would be distributed to the county,” and the intercepted funds will go to reimburse the commission. As stated in HB 504, the “foregoing intercept and transfer provisions shall operate by force of law.”</p> <p>The Office of the State Appellate Public Defender (SAPD) is an executive branch government agency that provides all appellate services. The head of SAPD is a direct gubernatorial appointee.</p>
<p style="text-align: center; writing-mode: vertical-rl; transform: rotate(180deg);">ILLINOIS</p>	<p>The Office of the State Appellate Defender is a state-funded, statewide agency in the judicial branch representing indigent persons in criminal appeals. Although an appellate defender commission exists, it only serves to advise the chief appellate attorney on budgetary and policy matters. The justices of the state supreme court, in fact, select the State Appellate Defender. By state statute, counties with populations above 35,000 must maintain a county public defender office; 42 of the state’s 102 counties meet this threshold. The remaining 60 select whatever method they so choose. In counties maintaining public defender offices (whether compelled or by choice) the chief public defender is selected either by the president of the county’s board of supervisors (in counties with more than 1 million residents) or by the presiding circuit court judge (everywhere else). The state covers only 66.6% of the cost of the chief defender’s salary in each county with a standing public defender office.</p>

INDIANA	<p>The state of Indiana has three state-funded right to counsel agencies – the Indiana State Public Defender, the Indiana Public Defender Council, and the Indiana Public Defender Commission – but none provides direct trial-level services, and none holds authority to ensure quality at the county level. The Indiana State Public Defender provides representation in post-conviction proceedings (i.e., indigent adults and juveniles who are incarcerated and are challenging a sentence or a commitment). All other direct representation services are county-based, provided through a mixture of traditional public defender offices, contracts with private attorneys, or attorneys appointed on a per-case basis. The Indiana Public Defense Council is a public defense support center, providing training and help-desk assistance to approximately 1,100 public defenders, assigned counsel and contract defenders across the state.</p> <p>Limited state assistance is provided to counties to help defray costs through the Indiana Public Defender Commission (IPDC) – an eleven-member commission appointed by a diversity of factions.⁴¹ The IPDC promulgates standards related to workload, attorney qualifications, and pay parity, among others, for both capital and non-capital representation. Those counties that meet the IPDC standards are eligible to be reimbursed up to 50% of their capital representation costs and up to 40% of their non-capital costs.</p> <p>State funding for the reimbursement plan has not always kept pace with its intended effect. For example, reimbursements to counties for non-capital representation dropped to a low of 25.1% in 2003-2004. In the 2009-2010 fiscal year, however, the Commission was able to raise the reimbursement rate for participating counties back up to the state’s intended 40%. But part of the explanation for why the state was able to reimburse counties 40% of their non-capital representation costs is due to the fact that the number of counties receiving reimbursements has decreased over the past decade from a high of 57 counties in 2006-2007 to a low of 48 in 2008-2009. In short, more and more counties have chosen to forego state assistance, opting to cut costs without complying with standards, through flat fee contracts.</p>
IOWA	<p>The Iowa State Public Defender Office is a statewide, state-funded executive branch agency that oversees representation services in all 99 counties for appeals, felonies, misdemeanors, juvenile delinquency and dependency cases. Most direct services are provided through 18 branch offices, with each office staffed by full time attorneys and support staff. The agency also contracts with more than 1,000 private attorneys and several nonprofit organizations throughout Iowa to provide court-appointed representation in counties without public defender offices, as well as conflict matters.</p>

<p style="text-align: center;">KANSAS</p>	<p>The Kansas Board of Indigents' Defense Services (BIDS) is a statewide, state-funded commission administratively housed in the state's executive branch. The Board itself is composed of nine members, each selected by the governor (with consent of the senate). BIDS' authority at the trial level, however, is limited to felonies; counties maintain the responsibility for funding and administering right to counsel services on behalf of defendants in adult misdemeanor and juvenile delinquency matters.</p> <p>BIDS has a central administrative office responsible for overseeing and implementing its policies. Defendants in 43 counties receive services through staffed public defender offices. BIDS contracts with private attorneys to BIDS provide services in the balance of counties, with attorneys receiving a single, flat rate per case-type. Though some public defender offices share conflicts (mostly serious felonies) the majority of conflict representation is handled through judicially controlled assigned counsel panels in which BIDS is obligated to pay the amount authorized by the local judge. Such an arrangement often leads to the most egregious abuses of judicial interference because judges can assign cases to friends or campaign contributors without being financially beholden locally for their actions.</p>
<p style="text-align: center;">KENTUCKY</p>	<p>The Kentucky Department of Public Advocacy (DPA) is a statewide, state-funded agency in the executive branch overseen by an independent 12-member Public Advocacy Commission appointed by diverse authorities.⁴² The Commission appoints the state public advocate who, in turn, is responsible for executing the Commission's policy directives including the proper administration of right to counsel services across the state. DPA oversees 32 branch offices whose chief attorneys, in turn, are responsible for direct client representation by full time government attorney staff and by local panels of private attorneys handling individual case assignments in conflict matters. The indigent defense system in Jefferson County (Louisville) operates outside of, but in cooperation with, the statewide system. Having been in existence long before the creation of the Department of Public Advocacy, Jefferson County opted to retain its method of contracting with a nonprofit public defender office, the Louisville Metro Public Defender Corporation (MPDC). The MPDC also subcontracts with private counsel to represent clients in cases of conflict. MPDC must meet all DPA policies and standards. Though funding is principally from the state, Jefferson County is allowed to, and does, augment the state funding with local dollars.</p>

<p style="text-align: center;">LOUISIANA</p>	<p>The Louisiana Public Defender Board (LPDB) is an eleven-member commission housed in the executive branch that is statutorily required to promulgate indigent defense standards. Diverse authorities appoint LPDB members.⁴³ Though indigent defense is organized at the state-level, trial-level services are still delivered with some local autonomy. LPDB contracts with local chief defenders in each of the state’s 41 judicial districts who make decisions about local delivery methods. However, LPDB has the statutory authority to not only promulgate standards but, importantly, to enforce them as well. LPDB ombudsmen are required to evaluate services in each district on a regular basis. If services are found to be deficient, LPDB is authorized to remove the chief defender and remedy services under any model the Board sees fit.</p> <p>As structured as the Louisiana system is, the state stands alone in the nation as the only jurisdiction with a statewide indigent defense system that relies to a large extent on locally generated, non-government general fund appropriations to fund the right to counsel. The majority of funding for trial-level services comes from a combination of fines and fees (e.g., bail bond revenue, criminal bond fees, revenue from forfeitures, and indigency screening fees, among others). The single greatest of these revenue generators for indigent defense in Louisiana is a special court cost (\$45) assessed against every criminal defendant convicted after trial, pleads guilty or no contest, or who forfeits his or her bond for violation of a state statute or a local ordinance other than a parking ticket. The result of this funding scheme is that a significant part of funding for trial-level representation in Louisiana comes from fees assessed on traffic tickets. There is no correlation between what can be collected through traffic tickets and the resources needed to provide effective representation.</p>
<p style="text-align: center;">MAINE</p>	<p>The Maine Commission on Indigent Legal Services (MCILS) is an independent five-member commission in the judicial branch that is statutorily charged with providing “efficient, high-quality representation to indigent criminal defendants, juvenile defendants and children and parents in child protective cases, consistent with federal and state constitutional and statutory obligations.” Though the Governor makes all five appointments, diverse authorities make nominations to the Governor from which he must appoint.⁴⁴ The appointments are made from nominations. MCILS oversees a statewide assigned counsel system that pays attorneys on an hourly basis.</p>
<p style="text-align: center;">MARYLAND</p>	<p>The Office of the Public Defender (OPD) is a state-funded, executive branch agency responsible for providing right to counsel services in all courts across the state, and overseen by an independent, 13-person commission known as the Board of Trustees.⁴⁵ Direct trial-level client services are provided primarily by staffed government attorneys in twelve district public defender offices (many cover multiple counties). In cases of conflict, each district defender maintains a roster of local private attorneys handling individual case assignments on an hourly basis. Private attorneys are paid at the same rate as federal Criminal Justice Act (CJA) attorneys with total attorney compensation capped at \$3,000 (felonies) and \$750 (misdemeanors).</p>

MASSACHUSETTS	<p>The Committee for Public Counsel Services (CPCS) is a judicial branch agency overseeing the delivery of indigent defense services in all courts across the state of Massachusetts. CPCS is a 15-member board appointed by diverse authorities.⁴⁶ The board appoints CPCS’s chief counsel to run the agency. CPCS runs an assigned counsel model to provide the bulk of its representational needs, with public defender offices handling only the most serious cases in the more urban areas of the state. Of the 2,000+ attorneys participating in the statewide panel, more than 600 are certified to handle cases in Superior Court (more serious cases which carry potential sentences exceeding 2.5 years in jail). Of those certified for Superior Court work, 150 attorneys are certified even further still to handle murder cases. Attorneys are paid \$60 per hour (felonies) and \$50 per hour (misdemeanors) with no compensation caps.</p> <p>CPCS maintains annual contracts with non-profit bar advocate programs in each county. Those bar advocate programs in turn select a volunteer board to review attorney applications using CPCS’ minimum statewide qualification standards. To further ensure that all representation is provided locally, the county bar programs are responsible for the actual assignment of cases to individual attorneys. Private attorneys accepting public case-assignments agree to abide by CPCS’ “Performance Guidelines Governing Representation of Indigents in Criminal Cases,” but as with most everything else in the Massachusetts assigned counsel program, the direct review of ongoing attorney performance is also handled locally. Each county bar program maintains contracts with private attorneys who handle no cases, and instead act solely as supervisors for other private attorneys handling direct case-assignments.</p>
MICHIGAN	<p>The Michigan Indigent Defense Commission (MIDC) is a 15-member commission in the executive branch appointed by diverse authorities with the power to develop and oversee the implementation of binding performance standards for trial-level right to counsel services in each of the state’s 83 counties.⁴⁷</p> <p>While each county determines the delivery methods it will use to provide direct services (public defender office, contracts, or assigned counsel panel), the county must submit a plan for compliance with MIDC’s standards, and MIDC has authority to investigate, audit and review the operation of local county right to counsel services to assure compliance. Counties must contribute a set amount of money each year (based on pre-MIDC spending levels), and all additional funding necessary to meet standards comes from the state.</p> <p>Appellate representation is provided under the purview of the state’s Appellate Defender Commission, a seven-member commission of the judicial branch that oversees the State Appellate Defender Office (SADO) and the Michigan Appellate Assigned Counsel System (MAACS). Diverse authorities appoint the commission.⁴⁸ Both SADO and MAACS are entirely state-funded. SADO is a traditional public defender office with full time attorneys and support staff. As its name suggests, MAACS is a coordinated roster of private attorneys appointed to individual cases who are paid an hourly fee for their services.</p>

MINNESOTA	<p>The Minnesota Board of Public Defense (BPD) is a state-funded, seven-member commission whose members are appointed by diverse authorities.⁴⁹ The BPD oversees the delivery of public defense services in the state’s 10 judicial districts. In each district, the BPD appoints a chief public defender that manages all public defense services within that district, whether through public defender offices or contracts with private assigned counsel. In other words, the Board sets policy, and it is each chief public defender’s responsibility to ensure compliance with such policies.</p>
MISSISSIPPI	<p>In 2011, the state legislature took initial steps toward state oversight of indigent defense services by establishing the Mississippi Office of the State Public Defender (OSPD). OSPD combined the previously existing state Office of Indigent Appeals and the Office of Capital Defense Counsel into one administrative unit in the executive branch. In addition to providing the direct client-representation services for which the two newly merged offices were previously responsible, the legislature also mandated that this new office examine the delivery of trial-level indigent defense services across the state. Specifically, the OSPD is to “coordinate the collection and dissemination of statistical data” and to “develop plans and proposals for further development of a statewide public defender system in coordination with the Mississippi Public Defenders Task Force.”</p> <p>A third state agency, the Office of Capital Post-Conviction, continues to exist outside of OSPD’s purview (it was not merged together along with the Office of Indigent Appeals and Office of Capital Defense Counsel in 2011). The Office of Capital Post-Conviction represents indigent individuals on Mississippi’s death row in state post-conviction proceedings.</p> <p>Unlike many states where municipal courts only hear local ordinance violations, Mississippi’s 246 municipal courts adjudicate misdemeanors and hold preliminary hearings on felonies. This makes cities and towns a primary funder of right to counsel services. Local governments, however, have significant revenue-raising restrictions placed on them by the state while being statutorily prohibited from deficit spending. There are three revenue sources available to local government: real estate taxes; fees for permits/services; and assessments on ordinance violations, traffic infractions and criminal convictions. But, because the state of Mississippi’s low tax burden, local governments must rely more heavily on unpredictable revenue streams, such as court fees and assessments, to pay for their criminal justice priorities. It comes as no surprise then that there is wide inconsistency on indigent defense cost-per-capita spending across the state.</p> <p>Contract defender services are the predominant delivery model in Mississippi (29.27%, or 24 of 82 counties). Attorneys working under fixed rate contracts are generally not reimbursed for overhead or for out-of-pocket case expenses, such as mileage, experts, or investigators. In short, the more work an attorney does on a case, the less money that attorney would make, giving attorneys a clear financial incentive to do as little work on their cases as possible.</p>

<p style="text-align: center;">MISSOURI</p>	<p>Missouri statute places oversight of the right to counsel with a seven-member commission appointed by the governor with advice and consent of the Senate. MSPD has 33 trial-level public defender offices providing services to adult and juvenile clients in 45 judicial circuits covering the state’s 115 counties. Unlike almost every other state public defender system that has a separate system for conflict representation, the Missouri public defender system assigns a neighboring public defender office to provide representation in multiple defendant and other conflict cases. Missouri uses assigned counsel or contract defenders in less than 2% of all cases assigned to the system.</p>
<p style="text-align: center;">MONTANA</p>	<p>The Montana Public Defender Commission (MPDC) is an 11-member public defender commission appointed by diverse authorities.⁵⁰ The MPDC oversees the Office of the State Public Defender (OSPD). OSPD employs 11 regional directors to oversee trial-level services. MPDC is statutorily authorized to promulgate standards related to the qualification and training of attorneys, performance guidelines, and supervision. MPDC is statutorily required to set standards related to manageable caseloads and workloads, to establish protocols for dealing with excessive caseloads, and to collect, record and report caseload data to support strategic planning, including proper staffing levels. MPDC is entirely state-funded.</p> <p>The regional directors determine the indigent defense delivery model employed in their respective regions in consultation with OSPD. Over time, the system gravitated to one in which each region now has staff attorneys and then qualified attorneys willing to accept cases enter into memoranda of understanding with OSPD to handle conflict cases and overload cases from the primary system.</p>

<p style="text-align: center;">NEBRASKA</p>	<p>Each county in Nebraska determines, without state input and with only minimal restrictions, the method it uses to provide Sixth Amendment right to counsel services. Those counties with populations exceeding 100,000 are required to establish public defender offices with popularly elected chief defenders at the helm [Douglas County (Omaha), Lancaster County (Lincoln) and Sarpy County (Papillion)]. Should any county with less than 100,000 residents voluntarily establish such an office, their chief public defender must likewise be locally elected. Approximately one-quarter of all counties have done so (23 elected defender systems in Nebraska’s 93 counties. Not all of the elected defenders, however, work full time; many have private practices in addition). All others use a combination of public defenders, contracts, and assigned counsel systems to provide direct representation.</p> <p>The Nebraska Commission on Public Advocacy (NCPA) is a 9-member commission of the executive branch appointed by the Governor from a list of attorneys submitted by the executive council of the Nebraska State Bar Association after consultation with the board of directors of the Nebraska Criminal Defense Attorneys Association. NCPA employs a small, six-attorney office that provides direct representation only in capital trials, appeals, some serious non-capital felonies involving drugs and violent crime, and otherwise serves as a resource and training center for the county-based systems. And while the commission has attempted to craft standards and guidelines for trial-level representation, including workload standards, the commission lacks authority to enforce those standards and to otherwise examine the provision of right to counsel services at the county level.</p>
<p style="text-align: center;">NEVADA</p>	<p>Nevada statutes require all counties whose population is 100,000 or more to create a county-funded office of the public defender – Clark County (Las Vegas) and Washoe County (Reno) are the only two counties that qualify. Each of these counties also has a conflict defender office, though the Clark County Office of the Special Public Defender handles just conflict death penalty cases, other murder cases and representation of parents in termination of parental rights proceedings. An independent, coordinated assigned counsel system in Clark County handles all other conflict matters. The remaining fourteen counties and one independent city (Carson City) may if they so desire also establish a county public defender office, though only one other (Elko County) has done so.</p> <p>The State Public Defender is under the Department of Human Services in the executive branch. Counties may choose to have the SPD administer indigent defense services but must foot 80% of the cost. Over time, counties learned that, by simply opting out of the state system, they could spend less money to provide the services and exercise local power over their public defense systems. In most instances, the county governments establish systems in which the lowest bidder is contracted to provide representation in an unlimited number of cases for a single flat fee. The attorneys are not reimbursed for overhead or for out-of-pocket case expenses such as mileage, experts, investigators, etc. Today, the state public defender serves only two counties.</p>

NEW HAMPSHIRE	<p>The New Hampshire Judicial council is a 24-member statewide board created to provide information/assistance regarding the New Hampshire Courts.⁵¹ The indigent defense fund provides state money for all right to counsel criminal services and funding for civil matters for which there is a state right to counsel. Since 1972, the judicial council has contracted the provision of all criminal right to council services to an independent, non-profit organization called the New Hampshire Public Defender (NHPD). An independent 9-member Board of Directors oversees the NHPD.⁵² The NHPD has independent authority to provide primary services as they see fit.</p> <p>The NHPD has the authority to qualify private counsel and make the direct appointment when conflicts are identified. The executive director and staff of the Judicial Council exert supervision of the conflict attorneys to ensure quality representation.</p>
NEW JERSEY	<p>The provision of Sixth Amendment right to counsel services in the state of New Jersey has two distinct tiers: adult felony and juvenile delinquency cases handled by the statewide Office of the Public Defender, funded entirely by state general fund appropriation; and “non-indictable” misdemeanor cases handled by whatever method and funded at whatever level each individual municipality deems best. The chief public defender is a direct gubernatorial appointee. The municipal public defenders, in general, are private attorneys working part time under contract with the city government.</p>
NEW MEXICO	<p>The New Mexico Law Offices of the Public Defender (LOPD) is a statewide, state-funded agency of the judicial branch overseen by an independent, 11-member commission appointed by diverse authorities.⁵³ The commission selects the state’s chief public defender. The LOPD is responsible for the provision of right to counsel throughout the state’s trial and appellate courts, and provides direct client services through a mixture of traditional public defender offices and contracts with private attorneys. The agency’s 11 branch public defender offices are located in and serve the state’s more urban areas. In rural parts of the state, the agency’s Contract Counsel Legal Services division administers contracts with private attorneys on a flat-fee-per-case basis.</p> <p>LOPD’s Chief Defender is statutorily required to “formulate a fee schedule for attorneys who are not employees of the department who serve as counsel for indigent persons under the Public Defender Act.” LOPD currently pays contract counsel on a per case basis by case severity: misdemeanor (\$180); juvenile (\$250); 4th degree felony (\$540); 3rd degree felony (\$595); 2nd degree felony (\$650); and 1st degree felony (\$700). Contracts that pay a flat fee per case are detrimental to the indigent accused because attorneys have a financial self-interest to both dispose of cases quickly and contemporaneously seek appointment in as many cases as possible.⁵⁴</p>

NEW YORK	<p>The state of New York has delegated to its counties the responsibility for administering the provision of right to counsel services at the trial level, along with almost the state’s entire obligation for funding those services. As a result, there is no consistency from one county to the next in the method employed, nor is their consistency in the level of funding provided across the state. As a result, the level of quality delivered varies dramatically across the state, with numerous recent reports finding services in general to be substandard, if not altogether unconstitutional.</p> <p>The Office of Indigent Legal Services (ILS) is a state agency of the executive branch, overseen by a nine-member board, with limited authority to assist the state’s county-based indigent defense systems to improve the quality of services provided. It does so primarily through funding assistance grants to counties. Diverse authorities appoint the Board.⁵⁵</p>
NORTH CAROLINA	<p>The North Carolina Office of Indigent Defense Services (IDS) is a judicial branch agency that oversees the provision of right to counsel services throughout the state. An independent 13-member commission with the authority to promulgate standards related to training, attorney qualification and performance, among others, governs IDS. Diverse authorities appoint the Commission.⁵⁶</p> <p>IDS also houses centralized representation units: appellate defender, office of parent representation, capital defender, and the juvenile defender. Trial-level representation is provided by staff public defenders, assigned counsel, and contract defenders throughout the state. The authority to determine the delivery model used in each judicial district is a legislative decision with input from local actors (county bars, judiciary, etc.).</p> <p>Because of the undue political interference to choose local delivery models only 16 judicial districts have established public defender offices. And, the presiding judge of the Superior Court in the district has the authority to hire the chief public defender, not IDS. In 2011, the state legislature directed IDS to move away from assigned counsel representation in favor of flat fee contract representation, and currently 18 counties provide services through such contracts.</p>
N. DAKOTA	<p>The North Dakota Commission on Legal Counsel for Indigents (CLCI) is an independent seven-person commission of the executive branch responsible for developing standards governing the representation of indigent persons. Diverse authorities appoint Commission members.⁵⁷ CLCI has established six full-time public defender offices. Private counsel under contract to CLCI handles conflict cases in these six regions, as well as all indigent defense services in regions where there is no full-time public defender office. Private attorneys are paid at a rate of \$75 per hour.</p>

<p style="text-align: center;">OHIO</p>	<p>The state of Ohio, for the most part, passes onto its county governments the responsibility for funding and administering the provision of Sixth Amendment right to counsel services. Ohio has a nine-member statewide indigent defense commission overseeing an executive branch state public defender agency.⁵⁸ However, unlike statewide defender agencies in other jurisdictions, the Ohio State Public Defender (OSPD) provides direct representation in only certain case types statewide. OSPD’s Legal Division handles non-death adult appeals and post-conviction cases. Trial-level services are the responsibility of the state’s 88 counties, though a county may opt to contract with the OSPD to provide these services (only 10 counties have done so).</p> <p>OSPD reimburses counties a portion of the cost of trial-level representation. The commission is responsible for promulgating standards, and the office responsible for disbursing state funds to counties meeting those standards. If counties complied with state-promulgated standards of quality, as originally conceived, the state would reimburse up to 50% of the county’s costs made available in the next fiscal year. But state funding never reached the promised 50% level, dropping in some years to as low as 25%. At the same time, for decades, the state commission failed to promulgate any standards whatsoever, meaning there was no minimum threshold of quality against which to attach the state dollars. As a result, counties have little incentive to provide constitutionally adequate services.</p>
<p style="text-align: center;">OKLAHOMA</p>	<p>The Oklahoma Indigent Defense System is a state-funded agency in the executive branch that provides trial-level, appellate and post-conviction criminal defense representation to the indigent accused in 75 of the state’s 77 counties. Both Tulsa County (Tulsa) and Oklahoma County (Oklahoma City) established public defender offices prior to statewide reform and were allowed to continue to provide services outside of the OIDS system. OIDS is overseen by a 5-person Board of Directors appointed by the governor with advice and consent of the Senate. Trial-level services are provided by staff public defenders operating out of one of six regional offices. Private attorneys under contract to OIDS provide services in conflict cases.</p>

<p style="text-align: center;">OREGON</p>	<p>The Oregon Public Defender Services Commission (OPDC) is an independent body in the judicial branch responsible for overseeing and administering the delivery of right to counsel services in each of Oregon’s counties. The Chief Justice appoints all seven members. The commission is statutorily responsible for promulgating standards regarding the quality, effectiveness, and efficiency by which public counsel services are provided. With all funding for direct services provided by the state, the commission’s central Office of Public Defense Services handles the day-to-day management of the system.</p> <p>Oregon is the only statewide system in the country that relies entirely on contracts for the delivery of public defense services. The statewide office lets individual contracts with private not-for-profit law firms (which look and operate much like the public defender agencies of many counties with full time attorneys and substantive support personnel on staff), smaller local law firms, individual private attorneys, and consortia of private attorneys working together. The actual contracts are the enforcement mechanism for the state’s standards, with specific performance criteria written directly into the contracts. Should any non-profit firm or group of attorneys fail to comply with their contractual obligations, the contract simply will not be renewed.</p>
<p style="text-align: center;">PENNSYLVANIA</p>	<p>The Commonwealth of Pennsylvania provides no statewide administration or funding of right to counsel services. Its county-based systems remain entirely decentralized with no oversight by state government. In fact, the state’s only statutory requirement is that each county must operate a county public defender office.</p> <p>In most counties, the local public defender office is a mixture of full time and part time attorneys. In the smallest counties, however, the defender office is a system of one or two attorneys who represent publicly appointed clients purely on a part time basis. And in the city and county of Philadelphia, the nonprofit law firm “the Defender Association of Philadelphia” is not a county agency, but operates as the city’s primary right to counsel service provider under contract with the city. In all counties, private attorneys who accept appointments on an hourly basis or under annual contract, depending on the county handle conflict representation.</p>
<p style="text-align: center;">RHODE ISLAND</p>	<p>Rhode Island is home to the nation’s first-ever statewide, state-funded public defender office. The Rhode Island Public Defender remains to this day as the state’s primary system for providing right to counsel services. The chief public defender is a direct gubernatorial appointee, and is responsible for directing the agency’s services to indigent defendants in adult criminal and juvenile delinquency trials and appeals. Being a geographically small state, the agency has but five satellite offices located across the state. Conflict representation is provided by a panel of private attorneys, paid hourly on a per-case basis, and administered by the Rhode Island Supreme Court.</p>

SOUTH CAROLINA	<p>The South Carolina Commission on Indigent Defense is a statewide, state-funded body of the executive branch charged with overseeing the state’s delivery of indigent defense services. The commission is comprised of thirteen members.⁵⁹ The commission has the authority to promulgate standards regarding the provision of indigent defense services, including, among others: attorney qualification, performance, workload, training, data collection, attorney compensation, and indigence determinations.</p> <p>The commission also oversees the state’s Office of Indigent Defense, a central office that: (1) provides day-to-day management of the statewide system; (2) processes and pays vouchers submitted by appointed counsel (Family court Abuse and Neglect cases, Termination of Parental Rights cases, other Family court matters, and Post Conviction Relief cases, and criminal conflicts); (3) operates an Appellate Division (handling all indigent appeals); and, (4) maintains a Capital Trial Division that provides death penalty representation throughout the state (usually alongside a local public defender) as first chair or second chair.</p> <p>At the trial level, the commission employs 16 circuit public defenders that serve four-year terms and that are selected through a complex process that begins at the county Bar level. Circuit defenders maintain salary and benefits parity with both the state’s circuit judges and the state’s 16 elected Circuit Prosecutors (called Solicitors in SC). The circuit defenders have broad flexibility as to how they run their day-to-day operations within the parameters of commission policy and standards. However, though the circuit defenders are state employees, the assistant public defenders are employees of one of the counties within their circuits.</p>
SOUTH DAKOTA	<p>State statutes require government to pay public lawyers a “reasonable and just compensation for his services.” South Dakota Unified Judicial System Policy 1-PJ-10, issued by the state supreme court, interprets this statute to ban all flat fee. In 2000, the Court set public counsel compensation hourly rates at \$67 per hour and mandated that “court-appointed attorney fees will increase annually in an amount equal to the cost of living increase that state employees receive each year from the legislature.” In 2014, assigned counsel compensation in South Dakota stands at \$84 per hour.</p> <p>The State of South Dakota has no involvement in the oversight of indigent defense services and very limited involvement in the funding of the right to counsel. The vast majority of South Dakota’s counties rely on private attorneys for indigent defense services, with only three counties electing the public defender model.</p>

The Tennessee District Public Defender Conference (TDPDC) is a state-funded organization that coordinates training, provides assistance, and disseminates state funding to each of the state's 31 judicial districts (encompassing 95 counties). With the exception of Shelby County (Memphis), whose chief defender is appointed by the county mayor, the heads of each of the remaining 30 district defender offices are popularly elected. All serve eight-year terms, except the chief public defender in Davidson County (Nashville) who is elected every four years.

Under Tenn. Code Ann. § 8-14-402, the 31 district defenders vote to elect the executive director of TDPDC to a four-year term by simple majority vote. It may be tempting to think of the TDPDC executive director as analogous to a statewide chief public defender in another state, but that would be incorrect. The TDPDC executive director carries out policies as determined by the district public defenders. To facilitate more efficient decision-making, the 31 district defenders annually elect an executive committee that runs the day-to-day operation of the Conference through the executive director. Similar to the election of the TDPDC executive director, the election of the executive committee and policy positions (including budget) are determined by majority vote of the district defenders. The executive director then presents and defends TDPDC's budget at the state level. All TDPDC funding comes from a state appropriation.

However, because the public defender offices in Shelby and Davidson counties predated the creation of TDPDC, state funding for those offices is statutorily required to increase at the same percentage equal to the cost of living.

Additionally, although the State of Tennessee funds prosecutors throughout the state (called "district attorney generals"), local jurisdictions may augment that state prosecution funding if they so choose. However, Tenn. Code Ann. § 16-2-518 requires that any "increase in local funding for positions or office expense for the district attorney general shall be accompanied by an increase in funding of seventy-five percent (75%) of the increase in funding to the office of the public defender in such district for the purpose of indigent criminal defense." Knox County (Knoxville) is one of the few jurisdictions in the Tennessee that augments its state funding through the "75% rule." More than a quarter of the budget of the Knox County Community Law Office is local funding.

Tennessee Supreme Court Rule 13 establishes the rules for the appointment, qualification and payment of attorneys in those cases where the public defender has a conflict of interest. Tenn Sup. Ct. Rule 13(1)(e)(4)(A-D) directs the court to appoint the district public defender unless there is a conflict of interest or unless the district defender "makes a clear and convincing showing that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards." Tenn. Sup. Ct. Rule 13(1)(b) directs each trial court to "maintain a roster

of attorneys from which appointments will be made.” Although the court rule lists extensive qualifications for lead and co-counsel in capital cases, there are no qualification parameters set out for the trial-level representation of adults and juveniles in non-capital cases. In short, discretion is left to the local courts about which lawyers are or are not qualified.

The same court rule delineates how such attorneys will be compensated. Attorneys can bill the court \$40 per hour for out-of-court case preparation and \$50 per hour for in-court work, though total compensation cannot exceed pre-set limits (e.g., the maximum an attorney can bill for a juvenile delinquency case is \$1,000). Though the local judge is responsible for approving the voucher – and for approving case-related expenses – the state Administrative Office of Courts (AOC) pays the attorney out of state funds.

The Tennessee Office of the Post-Conviction Defender (TPCD) is a state-funded agency of the judicial branch providing representation to death row inmates in state collateral proceedings. The TPDC also provides training and assistance to district defenders on death penalty cases. A statewide nine-member commission oversees the TPCD. Diverse authorities make the appointments.⁶⁰ However, this commission does not satisfy the state’s obligation to ensure that its Sixth and Fourteenth Amendment obligations are being met at the local level.

<p style="text-align: center;">TEXAS</p>	<p>Texas’ 254 counties are responsible for funding and administering the right to counsel, with limited support from the state. The vast majority of counties rely on assigned counsel systems administered by the judiciary, in which private attorneys are paid either on an hourly rate or at a set rate per case.</p> <p>The state’s limited oversight and fiscal support is directed through the Texas Indigent Defense Commission (TIDC). TIDC is a standing committee of the Texas Judicial Council – a statewide criminal justice coordinating body. TIDC itself is a 13-member commission.⁶¹ TIDC is authorized to set standards and policies related to, among others: attorney performance; attorney qualifications; training; case-load controls; indigence determinations; contracting; and attorney compensation. Counties are required to submit an annual indigent defense plan to TIDC indicating how the county meets TIDC standards, and in return TIDC disseminates state funding to offset the cost of meeting standards. TIDC serves as a compliance monitor for state standards, acts as a clearinghouse for Texas indigent defense data, and provides technical assistance to counties looking to improve right to counsel services. Importantly, TIDC also awards single- and multi-year grants to fund innovative direct client services.</p> <p>More so than any other state, Texas has increasingly experimented with providing indigent defense services on a regional (multi-county) basis, and often such regional defender systems are exclusive to certain types of cases. For example, the Lubbock Regional Capital Defender Office represents clients in death penalty cases in 94 counties scattered across the state. Perhaps based in part on the Lubbock regional office model, Bee County likewise has combined resources with neighboring Live Oak County and McMullen County to create a regional defender office to handle adult felonies and misdemeanors, while juvenile delinquency and mental health matters are still handled by the private attorney model so prevalent in the rest of the state.</p> <p>In 2010, the state of Texas created the Office of Capital Writs, a capital post-conviction state agency charged with representing death sentenced persons in state post-conviction habeas corpus and related proceedings.</p>
<p style="text-align: center;">UTAH</p>	<p>In 2016, the Utah legislature created the Utah Indigent Defense Commission (UIDC) – an 11-member commission made up of members appointed from diverse appointing authorities.⁶² The principal duty of the UIDC is to adopt guiding principles for the oversight and assessment of public criminal defense services. The UIDC is additionally charged with ensuring that service providers are adequately compensated and to develop data collection procedures to ensure uniformity from jurisdiction to jurisdiction regarding attorney performance. The UIDC has express statutory authority to accomplish these aims, along with the authority to review, investigate, and enforce UIDC standards on local systems. UIDC is statutorily required to develop policies and procedures for how best to disseminate state new monies to help counties meet standards. However, it is important to note that all local governments are bound by UIDC standards whether they seek state funding or not.</p>

VERMONT	<p>The Vermont Defender General is a direct gubernatorial appointee that oversees primary and conflict indigent defense services related to criminal matters, as well as juvenile cases (delinquencies and dependencies). The central office houses an administrative office, the state appellate defender, a juvenile unit and a prisoners’ rights unit. Primary trial-level services are provided through a combination of public defender offices with fulltime staff attorneys and contracts with private law firms. Vermont has 14 counties, eight of which are served by public defender offices. Private law firms provide services in the remaining six counties. When any one of these counties needs relief from caseload, the Office of the Defender General has three “caseload relief” contracts. One attorney handles caseload in the northern part of the state, one in the South, and one handling serious felonies anywhere in the state. The Defender General also contracts with a private attorney to run the managed assigned counsel system for conflict representation. The managing attorney appoints cases to other private attorneys qualified to handle different cases by case type.</p>
VIRGINIA	<p>The Virginia Indigent Defense Commission (VIDC) is an independent, state-funded body in the judicial branch responsible for the delivery of right to counsel services across the state. Diverse authorities appoint VIDC members.⁶³ VIDC has authority to set standards and to enforce compliance against those standards through its central office. The VIDC’s executive director administers a statewide roster of qualified assigned counsel handling all cases where there is no public defender office, and handling conflicts where there is such an office. Virginia pays private attorneys an hourly rate (\$90/hour). However, attorney compensation is capped at some of the lowest rates in the nation: Felonies (\$445); Misdemeanors (\$158).</p>
WASHINGTON	<p>Indigent defense services in the state of Washington are, for the most part, entirely county funded. The Office of Public Defense (OPD) provides direct representation, through contracts with private attorneys in direct appeals and civil commitment cases, as well as dependency and termination of parental rights in a limited number of counties. The OPD director is an appointee of the Supreme Court, though there is a legislatively derived 11-person advisory committee made up of diverse appointing authorities to assist in the promulgation of policies. Though there is no statewide commission overseeing the effectiveness of representation, the Washington Supreme Court has promulgated a number of rules impacting how services are provided, including banning flat fee contracting, establishing performance standards, and implementing caseload controls.</p>

WEST VIRGINIA	<p>West Virginia Public Defender Services (WVPDS) is a state-funded executive branch agency housed in the Department of Administration. Though WVPDS has an 11-member commission authorized to set standards related to attorney qualification, performance and training, the executive director of WVPDS is an at-will, direct gubernatorial appointee.⁶⁴</p> <p>WVPDS also has total authority to decide how services are delivered in the state’s 55 counties. Twenty-nine counties currently provide primary trial-level services through non-profit public defender corporations. Though each corporation has a Board of Directors – appointed jointly by the Governor, the county commission, and the local bar association – WVPDS has the authority to hire and fire (for just cause) the chief of each public defender corporation. Another 15 counties are slated to open public defender offices under a strategic plan currently being implemented.</p> <p>Though WVPDS provides no direct trial-level services, it does oversee an appellate defender office and a trial-level resource center. WVPDS also has an administration department that oversees contracts with non-profit public defender corporations and pays assigned council vouchers with 100% state funds. Conflict services in all counties and primary services in those counties with no public defender corporation are provided by private attorneys. The commission sets compensation levels for public defenders, experts, and investigators, though statutory language sets assigned counsel compensation at \$65 (in court) and \$45 (out of court).</p>
WISCONSIN	<p>Primary indigent defense services in Wisconsin are provided by government staff attorneys working in 35 local public defender offices to handle trial-level services, plus another two offices for appellate work, all overseen by the system’s central administration. A state public defender serves as the system’s chief attorney, who is appointed by an independent, nine-person commission, and who is responsible for carrying out the commission’s policies and directives. The Governor appoints commission members with advice and consent of the Senate.</p> <p>SPD, through a division set apart from the primary system through ethical screens, is also responsible for overseeing representation of conflict defendants. SPD oversees certification, appointment, and payment of private attorneys who represent indigent clients. Private attorneys are paid in two ways: (1) an hourly rate; or (2) a flat, per case contracted amount (misdemeanor cases only).</p>

The Wyoming Office of the Public Defender (OPD) is an executive branch agency whose chief executive, the state public defender, directs the delivery of all right to counsel services across the state, both primary and conflict services, from the central OPD office. Fourteen branch public defender offices (with full time and part time staff attorneys) provide the majority of services, although the agency also contracts with private attorneys to handle conflict cases.

Statutory language requires the funding of indigent defense services to be a hybrid state and county responsibility, with 85% of the OPD appropriation coming from state general funds and 15% from counties. But, whereas most hybrid state-county systems require budgets to be advocated for on many fronts, the same Wyoming statute authorizes OPD to bill individual counties a prorated share of their state budget based upon an equitable formula that takes into account such factors as population, property valuation, and level of serious crime. Thus all indigent defense budget battles occur at the state level.

¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963) at 343-45.

² Cf. *Robertson v. Jackson*, 972 F.2d 529, 533 (4th Cir. 1992) (although administration of a food stamp program was turned over to local authorities, “ultimate responsibility’ . . . remains at the state level.”); *Claremont School Dist. v. Governor*, 794 A.2d 744 (N.H. 2002) (“While the State may delegate [to local school districts] its duty to provide a constitutionally adequate education, the State may not abdicate its duty in the process.”); *Osmunson v. State*, 17 P.3d 236, 241 (Idaho 2000) (where a duty has been delegated to a local agency, the state maintains “ultimate responsibility” and must step in if the local agency cannot provide the necessary services); Letter and white paper from American Civil Liberties Union Foundation et al to the Nevada Supreme Court, regarding Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services (Sept. 2, 2008) (“While a state may delegate obligations imposed by the constitution, ‘it must do so in a manner that does not abdicate the constitutional duty it owes to the people.’”) available at http://www.nlada.net/sites/default/files/nv_delegationwhitepaper09022008.pdf.

³ On top of this, two states (Florida and Tennessee) give the electorate the right to vote into office a full-time chief public defender on either a circuit or district basis. Another state (Nebraska) requires counties of a certain population threshold to elect defenders while allowing all other counties the option of electing chief defenders. California authorizes a single county (San Francisco County) to elect its chief public defender.

⁴ This analysis only includes defender services in state and/or county prosecutions and does not include municipal court cases in which the right to counsel attaches. The one exception is New Jersey where municipal courts hear the equivalent of most misdemeanor cases in other states’ courts of general jurisdiction.

⁵ Because trial-level services constitute the vast majority of state criminal and delinquency cases, this section focuses exclusively on that part of a state’s Sixth and Fourteenth Amendment obligations.

⁶ 466 U.S. 648 (1984).

⁷ The undue political interference on the right to counsel in New Mexico was not a partisan issue as Governors from both the Republican and Democratic parties have seen fit to replace sitting public defenders. In fact, former Governor Bill Richardson, a democrat, vetoed a bill passed on an overwhelmingly bi-partisan basis that would have created an independent statewide public defender commission, as required under national criminal justice standards. All of this political interference prompted the electorate to pass a state constitutional amendment requiring the creation of an independent right to counsel commission. Just as the creation of a commission moved

New Mexico out of this classification, many of the states in this classification could greatly improve their systems by also creating independent commissions.

8 The first of the American Bar Association Ten Principles of a Public Defense Delivery System explicitly requires that the “public defense function, including the selection, funding, and payment of defense counsel, is independent.” In the commentary to this standard, the ABA notes that the public defense function “should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel” noting specifically that “[r]emoving oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.” The ABA Principles cite to the National Study Commission on Defense Services’ (NSC) Guidelines for Legal Defense Systems in the United States (1976). The Guidelines were created in consultation with the United States Department of Justice (DOJ) under a DOJ Law Enforcement Assistance Administration (LEAA) grant. NSC Guideline 2.10 (The Defender Commission) states in part: “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, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented. Commission members should be selected under the following criteria: The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director. (a) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics. (b) No single branch of government should have a majority of votes on the Commission.”

9 In five of the states the governor makes all appointments (Arkansas, Hawaii, Missouri, West Virginia, and Wisconsin.) In two states (Colorado and Oregon) the judicial branch makes all of the appointments.

10 The North Carolina commission has apparent broad authority to oversee both primary and conflict services. Despite this the authority to change local delivery service models statutorily requires a legislative act after input from local actors (county bar associations, judiciary, etc.). Additionally, the presiding judge of the Superior Court in the North Carolina district has the authority to hire the local chief public defender.

11 The six states are: Idaho (trial-level only); Illinois (appellate only); Kansas (felony and appellate only); Nebraska (capital trials/appeals, and limited non-capital felonies); Oklahoma (rural counties only; Tulsa and Oklahoma City are outside the commission’s authority); and Tennessee (capital post-conviction only).

12 The governor appoints all commission members in three states (Georgia, Kansas and Oklahoma). The judiciary appoints the members of Illinois’ limited authority commission.

13 In Kentucky, Jefferson County (Louisville) augments state funding of the right to counsel. Arkansas counties and municipalities both may augment state funding although only the city of Little Rock has chosen to do so. No Virginia counties contribute to indigent defense funding though they are statutorily allowed to augment state funds.

14 ALA CODE § 12-19-251 establishes the “Fair Trial Tax Fund” (“Fund”). ALA CODE § 12-19-72 requires circuit and district courts to assess, collect and remit civil filing fees to the Fund in the following manner: a) For cases filed on the small claims docket of the district court in which the matter in controversy, exclusive of interest, costs, and attorney fees, totals one thousand five hundred dollars (\$1,500) or less, seventeen dollars (\$17) to the Fair Trial Tax Fund; b) For cases on the small claims docket of the district court in which the matter in controversy, exclusive of interest, costs, and attorney fees, exceeds one thousand five hundred dollars (\$1,500), twenty-one dollars (\$21) to the Fair Trial Tax Fund; and, c) For cases filed in circuit court, twenty-five dollars (\$25) to the Fair Trial Tax Fund.

15 ALA CODE § 12-19-252.

16 Each judicial district has a Judicial District Indigent Defender Fund that receives money collected by the courts within that jurisdiction from a \$45 fee assessed on convictions for all offenses other than parking violations and on bond forfeitures. La. Rev. Stat. Ann. §§ 15:168 (2015). Clients seeking appointed counsel are also assessed a nonrefundable \$40 application fee that deposits to the local Judicial District Indigent Defender Fund. La. Rev. Stat. Ann. §§ 15:175.A.(1)(f)-(h) (2015). Clients who are financially able may also be ordered to make

reimbursement for their representation, and payments are deposited to the local Judicial District Indigent Defender Fund. La. Rev. Stat. Ann. §§ 15:176(2015). The funds deposited to the Judicial District Indigent Defender Fund are non-reverting and remain permanently within the judicial district where they are collected. La. Rev. Stat. Ann. §§ 15:168 (2015).

17 There is no correlation between what can be collected through traffic tickets and the resources needed to provide effective representation. Reliance on fee-generated funding of public defense places law enforcement officers in the unenviable position of dramatically decreasing indigent defense revenue when they uphold public safety concerns. For example, a Louisiana Sheriff may determine it is in the community's best interest to focus his own limited resources on the prevention of a particular type of crime (e.g., the spread of opioids or methamphetamines). Objectively, that decision to shift police personnel from traffic enforcement to drug prevention may be the exact best thing for public safety. At the very least, it is a public policy that local voters in Louisiana can either support or reject when re-electing a Sheriff in a future election. However, the rededication of police resources in such a hypothetical would result in a decrease in public defense revenue while contemporaneously causing an increase in the need for public defense attorneys to represent those accused of drug crimes. Putting law enforcement in this position simply makes no sense.

18 Even this statement is not entirely accurate. Fourteen states have other (minimal) funding sources: 1) Arkansas: The Arkansas Public Defender Commission is state-funded except “[t]he cost of facilities, equipment, supplies, and other office expenses” and “additional personnel” beyond public defenders, secretaries, and support staff, which costs are borne by the counties. See ARK . CODE ANN . § 16-87-302; 2) Florida: Funding for all public defenders’ offices “shall be provided from state revenues appropriated by general law” and counties are not required to provide any funding other than for the local facilities, utilities, and communications services. FLA . CONST . art. V, § 14; 3) Kentucky: The funding for the Department of Public Advocacy (DPA) comes predominantly from the state general funds, but also from three special funds: court-ordered partial fees paid by clients who are financially able to pay toward the cost of their representation, KY . REV . STAT . ANN . §31.211 (West 2010); DUI services fees assessed on every person convicted of a DUI, KY . REV . STAT . ANN . §189A.050 (West 2010); and court costs of which DPA receives 3.5% capped at a maximum of \$1.75 million, KY . REV . STAT . ANN . §43.320(2)(f) (West 2010); 4) Massachusetts: The Committee for Public Counsel Services funding is a general appropriation, although a portion of the appropriation comes from fees assessed on indigent clients to defray the cost of public representation. MASS . GEN . LAWS ANN . ch. 211D § 2A (West 2010); 5) Minnesota: A general fund appropriation is augmented through a non-reverting special revenue fund that comes from fees assessed on indigent clients to defray the cost of public representation, MINN . STAT . ANN . § 611.20 (West 2012); 6) Missouri: Funding for all public defense services is provided through a general appropriation, except that cities and counties provide office space and utilities. MO . REV . STAT . § 600.040 (2015). There is also a “Legal Defense and Defender Fund” that holds receipts from fees assessed on indigent clients to defray the cost of public representation, which are used for designated defense-related expenses. MO . REV . STAT . § 600.090, .093 (2015); 7) Montana: Funding is predominantly through a general appropriation, but the state also has a special revenue fund that holds a public defender account that receives various assessments, MONT . CODE ANN . § 47-1-110 (2015); 8) New Mexico: Funding is through a general fund appropriation, N.M. STAT . ANN . § 31-15-5 (West 2010), plus a small Public Defender Automation Fund, N.M. STAT . ANN . § 31-15-5.1 (West 2010), that receives application fees collected from those seeking to have a public defender appointed, N.M. STAT . ANN . § 31-15-12.C. (West 2010); 9) North Carolina: Funding is through three line items in the general appropriation budget: the Indigent Defense Service fund; the Public Defender Service fund; and the Indigent Persons’ Attorney Fee Fund. Every person applying for counsel in trial-level criminal cases is also assessed a mandatory \$60 fee, of which \$55 is remitted to the state Indigent Persons’ Attorney Fee Fund. N.C. GEN . STAT . §§ 7A-455.1. Convicted clients who are capable of paying for some portion of their representation can be assessed a fee, which is collected by the local court and deposited to the state treasury. N.C. GEN . STAT . §§ 7A-455. A small amount of funds is collected by the county or municipal court as a facility fee, imposed as a cost assessed against criminal defendants, and the collected funds remain in the coffers of the locality to defray facility costs. N.C. GEN . STAT . §§ 7A-304(a)(2); 10) North Dakota: Funding is primarily through a general fund appropriation, though there is also a small special fund that receives money from court administration fees and indigent defense application fees; 11) Oregon: The state provides all funding, and 98% of that is through a general fund appropriation, while the remaining 2% is through the Public Defense Services Account, which is continuously appropriated to the Commission, OR . REV . STAT . ANN . § 151.225 (West 2013). The Public Defense Services Account receives: reimbursements from public defense services clients who are financially able to pay a portion of the cost of their representation, OR . REV . STAT . ANN . §§ 135.050(8), 151.487, 151.505, 419A.211, 419B.198, 419C.203, 419C.535 (West 2013); 12) Rhode Island: Funding is predominantly through a general appropriation, R.I. GEN . LAWS §

12-15-7 (2010), although the Office of the Public Defender is authorized to accept grants and funds from other than the state, which are deposited into a restricted receipt account for the use of the public defense system, R.I. GEN . LAWS § 12-15-5 (2010); 13) Vermont: The largest portion of the funding is through a general fund appropriation. Additionally, there is a Public Defender Special Fund that receives money from: indigent clients who are financially able are required to reimburse the state for their representation, VT . STAT . ANN . tit. 13 § 5238 (2015); and, a surcharge assessed against every person convicted of operating a vehicle under the influence of alcohol, VT . STAT . ANN . tit. 23 § 1210(j) (2015); 14) Virginia: Funding is provided by almost entirely from a general fund appropriation. Counties and cities may, but are not required to, supplement the compensation of the public defender attorneys. Va. Code Ann. § 19.2-163.01:1 (2010). Convicted clients are assessed the cost of their representation as a cost of prosecution and collections go to the Commonwealth.Va. Code Ann. §§ 19.2-163, -163.4:1 (2010).

19 Oklahoma County (Oklahoma City) and Tulsa County (Tulsa) fund their own indigent defense services. Services in the rest of Oklahoma are state-funded. Public defender offices in Davidson County (Nashville) and Shelby County (Memphis) receive some state funding but each county must contribute significant local funding as well. All other indigent defense representation in Tennessee is state-funded.

20 In October 2014, the State of New York settled a class action lawsuit, Hurrell-Harring v. New York, that alleged defendants were being deprived of their right to counsel in five upstate counties. As part of that settlement, the state is required to fund and administer defender services in those five counties. The state of New York also currently provides some limited resources to improve defender services in other counties through a centralized grant-making office. In June 2016, the New York General Assembly and Senate both unanimously passed a bill to have the state of New York state reimburse its counties and New York City for all expenses for the right to counsel phased in over seven years: 25% in 2017; 35% in 2018; 45% in 2019; 55% in 2020; 65% in 2021; 75% in 2022; and full reimbursement as of April 1, 2023 and every year after. If signed by the Governor, New York will be reclassified as “state-funded” if and when that statutory promise is fulfilled.

21 The South Carolina Commission on Indigent Defense is a statewide, state-funded organization charged with overseeing the state’s delivery of indigent defense services. The commission hires and pays the salary of chief public defenders in the 16 state court circuits. However, although the circuit defenders are state employees, the assistant public defenders are employees of one of the counties within their circuits. The Wyoming Office of the Public Defender (OPD) directs the delivery of all right to counsel services across the state. However, counties are statutorily required to reimburse the state 15% of costs based upon an equitable formula that takes into account such factors as population, property valuation, and level of serious crime. Thus all indigent defense budget decisions occur at the state level.

22 Kansas pays for all appellate and felony representation while its counties pay for misdemeanor and juvenile delinquency representation. New Jersey funds appellate, felony and delinquency representation while municipalities fund misdemeanor representation.

23 The Georgia Public Defender Standards Council (GPDSC) does not directly provide services to clients but rather it provides support of various types and serves as the fiscal officer for circuit public defender offices, GA .CODE ANN . § 17-12-6 (2015). Under certain circumstances, single county judicial circuits can elect to “opt-out” of the circuit public defender system and instead use an alternative delivery system if: (1) the existing system had a full-time director and staff and had been operational for at least two years on July 1, 2003; (2) GPDSC determined the system meets or exceeds standards; (3) the county submitted a resolution to the GPDSC by September 30, 2004 requesting to opt out; and (4) the county fully funds the system, though the Council will still provide some funds to that county. GA . CODE ANN . § 17-12-36 (2015). Indiana reimburses those counties that opt to meet state-standards up to 45% of the cost of providing indigent defense representation in non-capital trial services (excluding misdemeanors) and 50% for capital trial services. However, thirty-seven of Indiana’s 92 counties do not choose to participate in the state’s non-capital case reimbursement program as of the end of 2015. And, while any county with an indigent death penalty case can apply for reimbursement of 50% of their defense expenses, only 43 counties have ever done so.

The Ohio State Public Defender (OSPD) provides direct representation in only non-death adult appeals and post-conviction cases. Trial-level services are the responsibility of the state’s 88 counties, though a county may opt to contract with the OSPD to provide these services (only 10 counties have done so). OSPD also reimburses counties up to 50% of the costs of providing trial-level representation. The Texas Indigent Defense Commission (TIDC)

disseminates state funding to counties to offset the cost of meeting TIDC standards. Additionally, TIDC has increasingly provided state funding for regional (multi-county) delivery systems for certain case-types. For example, the Lubbock Regional Capital Defender Office represents clients in death penalty cases in 94 counties scattered across the state. TIDC funds a regional defender office to handle adult felony and misdemeanor cases in Bee County, Live Oak County and McMullen County, while juvenile delinquency and mental health matters are still funded locally.

24 55 ILCS 5/3-4004.2 requires Illinois counties with populations above 35,000 must maintain a county public defender office; 42 of the state's 102 counties meet this threshold. The remaining 60 select whatever method they so choose. In counties maintaining public defender offices (whether compelled or by choice) the state covers 66.6% of the cost of the chief defender's salary (55 ILCS 5/3-4007I). The Mississippi Office of the State Public Defender (OSPD) houses an Office of Capital Defense Counsel that handles some trial-level capital representation.

25 Currently only White Pine county and the independent city of Carson City participate.

26 Arizona pays "a portion of the fees incurred" by a county when appointed counsel is designated to present a capital defendant in state post-conviction relief. California funds the representation of individuals in direct appeals and post-conviction proceedings, in both capital and non-capital cases. The state funded Office of Public Defense in Washington contracts with private counsel to provide direct representation in direct appeals and civil commitment cases, as well as dependency and termination of parental rights in a limited number of counties.

27 Arkansas, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Mexico, North Dakota, Oregon, Vermont, Virginia, West Virginia, Wisconsin and Wyoming.

28 All case-types include: appellate, felony, misdemeanor, juvenile delinquency and, if applicable, state civil right to counsel cases (e.g., termination of parental rights, children in need of services, etc.).

29 The four other states (Alabama, Florida, Louisiana, and North Carolina) are classified here as either "mixed state and local-run services" or "minimal or no state-run services," as discussed in the next sections.

30 Wyoming requires its counties to reimburse that state 15% of the costs for administering all services at the state-level.

31 Kansas administers all appellate and trial-level felony representation while its counties administer all misdemeanor and juvenile delinquency representation. New Jersey manages all appellate, felony and delinquency representation while municipalities operate misdemeanor trial-level representation.

32 Nevada administers public defender services in those counties that opts-into the state systems and agrees to share the costs. New York administers services in five counties. Oklahoma provides services for all rural counties outside of Oklahoma City and Tulsa. Ohio provides services to those counties opting to have services administered by the state.

33 Arizona, California, Idaho, Illinois, Indiana, Michigan, Mississippi, Nebraska, Pennsylvania, South Dakota, Texas, Utah, and Washington.

34 State-funded, state administered services under a commission; 2) State-funded, state administered services under a limited commission; 3) State-funded, state administered services under no commission; 4) State-funded, mixed administered services under a commission; 5) State-funded, mixed administered services under a limited commission; 6) State-funded, mixed administered services under no commission; 7) State-funded, local administered services under a commission; 8) State-funded, local administered services under a limited commission; 9) State-funded, local administered services under no commission; 10) Mixed-funded, state administered services under a commission; 11) Mixed-funded, state administered services under a limited commission; 12) Mixed-funded, state administered services under no commission; 13) Mixed-funded, mixed administered services under a commission; 14) Mixed-funded, mixed administered services under a limited commission; 15) Mixed-funded, mixed administered services under no commission; 16) Mixed-funded, local administered services under a commission; 17) Mixed-funded, local administered services under a limited commission; 18) Mixed-funded, local administered services under no commission; 19) Local-funded, state administered services under a commission; 20) Local-funded,

ed, state administered services under a limited commission; 21) Local-funded, state administered services under no commission; 22) Local-funded, mixed administered services under a commission; 23) Local-funded, mixed administered services under a limited commission; 24) Local-funded, mixed administered services under no commission; 25) Local-funded, local administered services under a commission; 26) Local-funded, local administered services under a limited commission; and, 27) Local-funded, local administered services under no commission.

35 The Indigent Defense Review Panel is a five-member body composed of appointees made by: the president of the Alabama State Bar (two appointees); the state's Association of Circuit Court Judges (one appointee); the Association of District Court Judges (one); and the president of the Alabama Lawyers Association (the state's African-American Bar). Appeals to the review board by OIDS may be either standards-based or based on fiscal concerns. The decision of the review board is final.

36 For example, Arkansas' second judicial circuit is composed of six counties. Rather than have a single office, the Commission authorized one office to serve four counties (Clay, Craighead, Greene, and Poinsett), a second office to serve Crittenden County, and a third to serve Mississippi County.

37 Conn. Gen. Stat. 887 §51-289: "(1) The Chief Justice shall appoint two judges of the Superior Court, or a judge of the Superior Court and any one of the following: A retired judge of the Superior Court, a former judge of the Superior Court, a retired judge of the Circuit Court, or a retired judge of the Court of Common Pleas; (2) the speaker of the House, the president pro tempore of the Senate, the minority leader of the House and the minority leader of the Senate shall each appoint one member; (3) the Governor shall appoint a chairman."

38 Chief defenders are elected every four years.

39 It may be tempting to think of the FPDA executive director as analogous to a statewide chief public defender in another state, but that would be incorrect. The FPDA executive director carries out policies as determined by the elected circuit public defenders. And, because FPDA is a non-statutorily required entity, the elected circuit defenders are not required to participate in the Association. The 20 circuit defenders are ultimately solely responsible to the constituencies that elected them.

40 The commission consists of: a member of the state senate; a member of the house of representatives; an appointee of the chief justice; four gubernatorial appointees. Three of the members appointed by the governor must be chosen from names submitted by the Idaho Association of Counties, the State Appellate Defender and the Idaho Juvenile Justice Commission, and must be confirmed by the senate; the fourth gubernatorial appointee must be an experienced criminal defense attorney. None of the appointees may be a prosecuting attorney or a current employee of a law enforcement agency.

41 Governor (3 appointments); Chief Justice (3); Speaker of the House (2); Senate President Pro Tempore (2); and the Indiana Criminal Justice Institute, which is the state's criminal justice planning committee (1).

42 Ky. Rev. Stats. 31.015 (1)(a): "The Public Advocacy Commission shall consist of the following members, none of whom shall be a prosecutor, law enforcement official, or judge, who shall serve terms of four (4) years, except the initial terms shall be established as hereafter provided: 1. Two (2) members appointed by the Governor; 2. One (1) member appointed by the Governor. This member shall be a child advocate or a person with substantial experience in the representation of children; 3. Two (2) members appointed by the Kentucky Supreme Court; 4. Three (3) members, who are licensed to practice law in Kentucky and have substantial experience in the representation of persons accused of crime, appointed by the Governor from a list of three (3) persons submitted to him or her for each individual vacancy by the board of governors of the Kentucky Bar Association; 5. The dean, ex officio, of each of the law schools in Kentucky or his or her designee; and, 6. One (1) member appointed by the Governor from a list of three (3) persons submitted to him or her by the joint advisory boards of the Protection and Advocacy Division of the Department for Public Advocacy."

43 In June 2016, the governor signed legislation to restructure the composition of LPDB to more closely meet national standards. La. R.S. 15 §146 will authorize the Governor to appoint five members, one from each appellate court district. The five members shall be appointed from a list of three nominees submitted to the governor by a majority of the district public defenders providing public defender services in each appellate district. The chief justice of the Supreme Court of Louisiana appoints four members (a juvenile justice advocate; a retired judge with

criminal law experience; and two members at large.) The president of the Senate and the speaker of the House of Representatives shall each appoint one member.

44 M.R.S.A. Title 4, Chap. 37 §1803: “1. Members; appointment; chair. The commission consists of 5 members appointed by the Governor and subject to review by the joint standing committee of the Legislature having jurisdiction over judiciary matters and confirmation by the Legislature. The Governor shall designate one member to serve as chair of the commission. One of the members must be appointed from a list of qualified potential appointees provided by the President of the Senate. One of the members must be appointed from a list of qualified potential appointees provided by the Speaker of the House of Representatives. One of the members must be appointed from a list of qualified potential appointees provided by the Chief Justice of the Supreme Judicial Court. In determining the appointments and recommendations under this subsection, the Governor, the President of the Senate, the Speaker of the House of Representatives and the Chief Justice of the Supreme Judicial Court shall consider input from persons and organizations with an interest in the delivery of indigent legal services. 2. Qualifications. Individuals appointed to the commission must have demonstrated a commitment to quality representation for persons who are indigent and have the skills and knowledge required to ensure that quality of representation is provided in each area of law. No more than 3 members may be attorneys engaged in the active practice of law.”

45 MD Crim Pro Code §16-301(c): “(2) 11 members of the Board of Trustees shall be appointed by the Governor with the advice and consent of the Senate and shall include a representative of each judicial circuit of the State. (3) All members of the Board of Trustees shall be active attorneys admitted to practice before the Court of Appeals of Maryland. (4) One member shall be appointed by the President of the Senate. (5) One member shall be appointed by the Speaker of the House of Delegates. (6) Each member appointed to the Board of Trustees shall: (i) have significant experience in criminal defense or other matters relevant to the work of the Board of Trustees; or (ii) have demonstrated a strong commitment to quality representation of indigent defendants, including juvenile respondents. (7) A member of the Board of Trustees may not be: (i) a current member or employee of: 1. the Judicial Branch; or 2. a law enforcement agency in the State; or (ii) 1. a State’s Attorney of a county or municipal corporation of the State; 2. the Attorney General of Maryland; or 3. the State Prosecutor.”

46 Mass. Gen. Laws Ann. Ch. 211D §1: “The committee shall consist of 15 persons: 2 of whom shall be appointed by the governor; 2 of whom shall be appointed by the president of the senate; 2 of whom shall be appointed by the speaker of the house of representatives; and 9 of whom shall be appointed by the justices of the supreme judicial court, 1 of whom shall have experience as a public defender, 1 of whom shall have experience as a private bar advocate, 1 of whom shall have criminal appellate experience, 1 shall have a background in public administration and public finance, and 1 of whom shall be a current or former dean or faculty member of a law school. The court shall request and give appropriate consideration to nominees for the 9 positions from the Massachusetts Bar Association, county bar associations, the Boston Bar Association and other appropriate bar groups including, but not limited to, the Massachusetts Black Lawyers’ Association, Inc., Women’s Bar Association of Massachusetts, Inc., and the Massachusetts Association of Women Lawyers, Inc. All members of the committee shall have a strong commitment to quality representation in indigent defense matters or have significant experience with issues related to indigent defense. The committee shall not include presently serving judges, elected state, county or local officials, district attorneys, state or local law enforcement officials or public defenders employed by the commonwealth.”

47 MI Comp. L. § 780.987: “(1) [T]he governor shall appoint members under this subsection as follows: (a) Two members submitted by the speaker of the house of representatives. (b) Two members submitted by the senate majority leader. (c) One member from a list of 3 names submitted by the supreme court chief justice. (d) Three members from a list of 9 names submitted by the criminal defense attorney association of Michigan. (e) One member from a list of 3 names submitted by the Michigan judges association. (f) One member from a list of 3 names submitted by the Michigan district judges association. (g) One member from a list of 3 names submitted by the state bar of Michigan. (h) One member from a list of names submitted by bar associations whose primary mission or purpose is to advocate for minority interests. Each bar association described in this subdivision may submit 1 name. (i) One member from a list of 3 names submitted by the prosecuting attorney’s association of Michigan who is a former county prosecuting attorney or former assistant county prosecuting attorney. (j) One member selected to represent the general public. (k) One member selected to represent local units of government. (2) The supreme court chief justice or his or her designee shall serve as an ex officio member of the MIDC without vote. (3) Individuals nominated for service on the MIDC as provided in subsection (1) shall have significant experience in the defense or prosecution of criminal proceedings or have demonstrated a strong commitment to providing effective representation in indigent criminal defense services. Of the members appointed under this section, the governor shall ap-

point no fewer than 2 individuals who are not licensed attorneys. Any individual who receives compensation from this state or an indigent criminal defense system for providing prosecution of or representation to indigent adults in state courts is ineligible to serve as a member of the MIDC. Not more than 3 judges, whether they are former judges or sitting judges, shall serve on the MIDC at the same time. The governor may reject the names submitted under subsection (1) and request additional names.”

48 MI Comp. L. § 780.712: “(1) An appellate defender commission is created within the office of the state court administrator. The appellate defender commission consists of 7 members appointed by the governor for terms of 4 years. Of the 7 members, 2 members shall be recommended by the supreme court of this state, 1 member shall be recommended by the court of appeals of this state, 1 member shall be recommended by the Michigan judges association, 2 members shall be recommended by the state bar of Michigan, and 1 member, who shall not be an attorney, shall be selected from the general public by the governor. A member of the commission shall not be at the time of appointment a sitting judge, a prosecuting attorney, or a law enforcement officer.”

49 Minn. Stat. § 611.215(1): “(a) The State Board of Public Defense is a part of, but is not subject to the administrative control of, the judicial branch of government. The State Board of Public Defense shall consist of seven members including: (1) four attorneys admitted to the practice of law, well acquainted with the defense of persons accused of crime, but not employed as prosecutors, appointed by the Supreme Court; and (2) three public members appointed by the governor. The appointing authorities may not appoint a person who is a judge to be a member of the State Board of Public Defense, other than as a member of the ad hoc Board of Public Defense. (b) All members shall demonstrate an interest in maintaining a high quality, independent defense system for those who are unable to obtain adequate representation. Appointments to the board shall include qualified women and members of minority groups. At least three members of the board shall be from judicial districts other than the First, Second, Fourth, and Tenth Judicial Districts.”

50 Mont. Code Ann. § 2-15-1028(2): “The commission consists of 11 members appointed by the governor as follows: (a) two attorneys from nominees submitted by the supreme court; (b) three attorneys from nominees submitted by the president of the state bar of Montana, as follows: (i) one attorney experienced in the defense of felonies who has served a minimum of 1 year as a full-time public defender; (ii) one attorney experienced in the defense of juvenile delinquency and abuse and neglect cases involving the federal Indian Child Welfare Act; and (iii) one attorney who represents criminal defense lawyers; (c) two members of the general public who are not attorneys or judges, active or retired, as follows: (i) one member from nominees submitted by the president of the senate; and (ii) one member from nominees submitted by the speaker of the house; (d) one person who is a member of an organization that advocates on behalf of indigent persons; (e) one person who is a member of an organization that advocates on behalf of a racial minority population in Montana; (f) one person who is a member of an organization that advocates on behalf of people with mental illness and developmental disabilities; and (g) one person who is employed by an organization that provides addictive behavior counseling. (3) A person appointed to the commission must have significant experience in the defense of criminal or other cases subject to the provisions of Title 47, chapter 1, or must have demonstrated a strong commitment to quality representation of indigent defendants.”

51 N.H. Rev. Stat. Ann. § 494:1: “There is hereby established a judicial council which shall consist of the following: I. The 4 members of the judicial branch administrative council, appointed pursuant to supreme court rules. II. The attorney general or designee. III. A clerk of the superior court, selected by the chief justice of the superior court. IV. A clerk of the circuit court, selected by the administrative judge of the circuit court. V. The president-elect of the New Hampshire Bar Association. VI. The chairperson of the senate judiciary committee or a designee from such committee appointed by the chairperson. VII. The chairperson of the house judiciary committee or a designee from such committee appointed by the chairperson. VIII. Eight other members appointed by the governor and council, 3 of whom shall be members of the New Hampshire Bar Association of wide experience who have been admitted to practice in the state for more than 5 years, and 5 of whom shall be members of the public who are not lawyers. IX. Five other members appointed by the chief justice of the supreme court, 3 of whom shall be members of the New Hampshire Bar Association of wide experience who have been admitted to practice in the state for more than 5 years, and 2 of whom shall be members of the public who are not lawyers.”

52 The President of the New Hampshire State Bar Association appoints three members and the Board elects the other six.

53 NMSA § 31-15-2.1. “A. The public defender commission, created pursuant to Article 6, Section 39 of the consti-

tution of New Mexico, consists of eleven members. Members shall be appointed as follows: (1) the governor shall appoint one member; (2) the chief justice of the supreme court shall appoint three members; (3) the dean of the university of New Mexico school of law shall appoint three members; (4) the speaker of the house of representatives shall appoint one member; (5) the majority floor leaders of each chamber shall each appoint one member; and (6) the president pro tempore of the senate shall appoint one member. B. The appointments made by the chief justice of the supreme court and the dean of the university of New Mexico school of law shall follow the appointments made by the other appointing authorities and shall be made in such a manner so that each of the two largest major political parties, as defined in the Election Code, shall be equally divided on the commission.”

54 One June 2, 2016 the New Mexico Supreme Court handed down a decision in *Kerr v. Parson* in which assigned counsel rates and compensation caps were detailed. To read more see: <http://sixthamendment.org/calm-down-the-nm-supreme-court-did-not-say-flat-fee-contracts-are-always-constitutional/>.

55 The chief justice serves a chairman of the Board with the Governor appointing other members based on recommendations by: President of the Senate; the Speaker of the Assembly, the New York State Bar Association; state association of counties (2); and, the Chief Justice (judge or retired judge). The Governor also appoints one attorney and one other person of his choosing.

56 .C. Gen. Stat. § 7A-498.4: “(b) The members of the Commission shall be appointed as follows: (1) The Chief Justice of the North Carolina Supreme Court shall appoint one member, who shall be an active or former member of the North Carolina judiciary. (2) The Governor shall appoint one member, who shall be a no attorney. (3) The General Assembly shall appoint one member, who shall be an attorney, upon the recommendation of the President Pro Tempore of the Senate. (4) The General Assembly shall appoint one member, who shall be an attorney, upon the recommendation of the Speaker of the House of Representatives. (5) The North Carolina Public Defenders Association shall appoint member, who shall be an attorney. (6) The North Carolina State Bar shall appoint one member, who shall be an attorney. (7) The North Carolina Bar Association shall appoint one member, who shall be an attorney. (8) The North Carolina Academy of Trial Lawyers shall appoint one member, who shall be an attorney. (9) The North Carolina Association of Black Lawyers shall appoint one member, who shall be an attorney. (10) The North Carolina Association of Women Lawyers shall appoint one member, who shall be an attorney. (11) The Commission shall appoint three members, who shall reside in different judicial districts from one another. One appointee shall be a nonattorney, and one appointee may be an active member of the North Carolina judiciary. One appointee shall be Native American. The initial three members satisfying this subdivision shall be appointed as provided in subsection (k) of this section.... (d) Persons appointed to the Commission shall have significant experience in the defense of criminal or other cases subject to this Article 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, or active employees of such persons, may be appointed to or serve on the Commission, except as provided in subsection (b) of this section. No active public defenders, active employees of public defenders, or other active employees of the Office of Indigent Defense Services may be appointed to or serve on the Commission, except that notwithstanding this subsection, G.S. 14-234, or any other provision of law, Commission members may include part-time public defenders employed by the Office of Indigent Defense Services and may include persons, or employees of persons or organizations, who provide legal services subject to this Article as contractors or appointed attorneys.”

57 N.D.C.C. § 54-61-01: “(2) The commission consists of the following members: a) Two members appointed by the governor, one of whom must be appointed from a county with a population of not more than ten thousand. b) Two members of the legislative assembly, one from each house, appointed by the chairman of the legislative management. c) Two members appointed by the chief justice of the supreme court, one of whom must be appointed from a county with a population of not more than ten thousand. d) One member appointed by the board of governors of the state bar association of North Dakota... (5) Individuals appointed to the commission should have experience in the defense of criminal cases or other cases in which appointed counsel services are required or should have demonstrated a commitment to quality representation in indigent defense matters. Membership of the commission may not include any individual, or the employee of that individual, who is actively serving as a judge, state’s attorney, assistant state’s attorney, contract counsel or public defender, or law enforcement officer.”

58 The Governor appoints 5 members (2 each from the major political parties) and the Supreme Court appoints 4 members (2 each from the major political parties).

59 The governor appoints nine members. Five gubernatorial appointments are based on the recommendations of the South Carolina Bar Association, and four are based on recommendations of the South Carolina Public Defender Association (and must reflect geographic diversity based on the state's four Judicial Regions). The chief justice of the South Carolina Supreme Court makes two appointments: one must be a retired circuit court judge, and one must be a retired judge with either family court or appellate experience. The Senate and House Judiciary chairs each appoint one person from their respective committees.

60 Governor (2); Lieutenant Governor (2); Speaker of the House (2); and Supreme Court (3).

61 Eight members are ex officio members of the Judicial Council as follows: the chief justice of the Supreme Court of Texas (the state court of last resort on civil matters); the presiding judge of the Court of Criminal Appeals (the state court of last resort on criminal matters); the chair of the House Criminal Jurisprudence Committee; two members of the Senate appointed by the lieutenant governor; one member of the House of Representatives appointed by the House speaker; one Court of Appeals justice appointed by the governor; and one county court judge also appointed by the governor. The governor appoints five additional members with the advice and consent of the Senate: one presiding district court judge; two county court judges or county commissioners (one of which must represent a county with a population greater than 250,000); one practicing criminal defense attorney; and one chief public defender.

62 Specifically, the Utah commission is composed of 11 voting and two ex officio nonvoting members. The governor, with the consent of the Senate, appoints nine members recommended by the following: The Utah Association of Criminal Defense Lawyers (3 members; two must be practicing criminal defense attorneys and one must be a director of a county public defender agency); The Utah Minority Bar Association (recommends an attorney); The Utah Association of Counties (two commission members, one from a more populated county and one from a more rural county); Utah League of Cities and Towns (recommends two members); and, The Utah Legislature (one member selected jointly by the Speaker of the House and the President of the Senate). The Utah Judicial Council and the Commission on Criminal and Juvenile Justice (UCCJJ) appoint the remaining two voting members. The Utah Judicial Council – a 14-member body of the judicial branch charged with the promulgation of uniform rules and standards to ensure the proper administration of justice across the state – directly appoints a retired judge to the UIDC. The Executive Director of the UCCJJ, or his designee, also serves on the UIDC. The UCCJJ is a governmental entity made up of 22 criminal justice stakeholders created to achieve broad philosophical agreement concerning the objectives of the criminal justice system. Finally, the two non-voting members of the new commission are a representative from the Administrative Office of Courts (appointed by the Judicial Council) and the Executive Director of the UIDC itself. All members appointed to the commission are to have significant experience in criminal defense proceedings or have demonstrated a strong commitment to providing effective representation in indigent criminal defense services.

63 VA Code § 19.2-163.02: “The Virginia Indigent Defense Commission shall consist of 14 members as follows: the chairmen of the House and Senate Committees for Courts of Justice or their designees who shall be members of the Courts of Justice committees; the chairman of the Virginia State Crime Commission or his designee; the Executive Secretary of the Supreme Court or his designee; two attorneys officially designated by the Virginia State Bar; two persons appointed by the Governor; three persons appointed by the Speaker of the House of Delegates; and three persons appointed by the Senate Committee on Rules. At least one of the appointments made by the Governor, one of the appointments made by the Speaker, and one of the appointments made by the Senate Committee on Rules, shall be an attorney in private practice with a demonstrated interest in indigent defense issues.”

64 The Director of WVPDS serves as the commission chairperson with the Governor appointing the remaining members as follows: one former or retired circuit judge; three experienced criminal defense lawyers (one from each of the state's Congressional districts); one sitting chief public defender; one non-lawyer; one mental health or developmental disability advocate; and, one juvenile justice advocate.

D

APPENDIX

TENNESSEE SUPREME COURT RULE 13

Appointment, Qualifications, and Compensation of Counsel for Indigent Defendants

Section 1. Right to counsel and procedure for appointment of counsel.

(a)(1) The purposes of this rule are:

- (A) to provide for the appointment of counsel in all proceedings in which an indigent party has a statutory or constitutional right to appointed counsel;
- (B) to provide for compensation of appointed counsel in non-capital cases;
- (C) to establish qualifications and provide for compensation of appointed counsel in capital cases, including capital post-conviction proceedings;
- (D) to provide for payment of expenses incident to appointed counsel's representation;
- (E) to provide for the appointment and compensation of experts, investigators, and other support services for indigent parties in criminal cases, parental rights termination proceedings, dependency and neglect proceedings, delinquency proceedings, and capital post-conviction proceedings;
- (F) to establish procedures for review of claims for compensation and reimbursement of expenses; and
- (G) to meet the standards set forth in Section 107 of the Antiterrorism and Effective Death Penalty Act of 1996.

(2) The failure of any court to follow the provisions of this rule shall not constitute grounds for relief from a judgment of conviction or sentence. The failure of appointed counsel to meet the qualifications set forth in this rule shall not be deemed evidence that counsel did not provide effective assistance of counsel in a particular case.

(b) Each trial court exercising criminal jurisdiction shall maintain a roster of attorneys from which appointments will be made. However, a court may appoint attorneys whose names are not on the roster if necessary to obtain competent counsel according to the provisions of this rule.

(c) All general sessions, juvenile, trial, and appellate courts shall appoint counsel to represent indigent defendants and other parties who have a constitutional or statutory right to representation (herein "indigent party" or "defendant") according to the procedures and standards set forth in this rule.

(d)(1) In the following cases, and in all other cases required by law, the court or appointing authority shall advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and requests appointment of counsel.

- (A) Cases in which an adult is charged with a felony or a misdemeanor and is in jeopardy of incarceration;
- (B) Contempt of court proceedings in which the defendant is in jeopardy of incarceration;
- (C) Proceedings initiated by a petition for habeas corpus, early release from incarceration, suspended sentence, or probation revocation;
- (D) Proceedings initiated by a petition for post-conviction relief, subject to the provisions of Tennessee Supreme Court Rule 28 and Tennessee Code Annotated sections 40-30-101 et seq.;
- (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; and
- (I) Proceedings initiated pursuant to Tenn. R. Crim. P. 36.1 and in which the trial court, pursuant to Tenn. R. Crim. P. 36.1(b), has determined that the motion states a colorable claim for relief.

(2) In the following proceedings, and in all other proceedings where required by law, the court or appointing authority shall advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and, except as provided in (C) and (D) below, requests appointment of counsel.

- (A) 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;
- (B) 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;
- (C) Reports of abuse or neglect or investigation reports under Tennessee Code Annotated sections 37-1-401 through 37-1-411. The court shall appoint a guardian ad litem for every child who is or may be the subject

of such report. The appointment of the guardian ad litem 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. For purposes of this subsection, the compensation limits established in section 2 apply to each guardian ad litem appointed rather than to each child.

(D) Proceedings to terminate parental rights. The court shall appoint a guardian ad litem for the child, unless the termination is uncontested. The child who is or may be the subject of proceedings to terminate parental rights 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. For purposes of this subsection, the compensation limits established in section 2 apply to each guardian ad litem appointed rather than to each child.

(E) Cases alleging unruly conduct of a child which place the child in jeopardy of being removed from the home pursuant to § 37-1-132(b).

(e)(1) Except in cases under Sections 1(d)(1)(F) proceedings under the mental health law, 1(d)(1)(G) proceedings for guardianship under Title 34, and 1(d)(2)(A) juvenile delinquency proceedings, whenever a party to any case in section 1(d) requests the appointment of counsel, the party shall be required to complete and submit to the court an Affidavit of Indigency Form provided by the Administrative Office of the Courts, herein "AOC".

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

(3) Upon finding a party indigent, the court shall enter an order appointing counsel unless the indigent party rejects the offer of appointment of counsel with an understanding of the legal consequences of the rejection.

(4)(A) When appointing counsel for an indigent defendant pursuant to section 1(e)(3), the court shall appoint the district public defender's office, the state post-con-

viction defender's office, or other attorneys employed by the state for indigent defense (herein "public defender") if qualified pursuant to this rule and no conflict of interest exists, unless in the sound discretion of the trial judge appointment of other counsel is necessary. Appointment of public defenders shall be subject to the limitations of Tennessee Code Annotated sections 8-14-201 et seq.

- (B) If a conflict of interest exists as provided in Tennessee Rules of Professional Conduct 1.7 or the public defender is not qualified pursuant to this rule, the court shall designate counsel from the roster of private attorneys maintained pursuant to section 1(b).
- (C) The court shall appoint separate counsel for indigent defendants having interests that cannot be represented properly by the same counsel or when other good cause is shown.
- (D) The court shall not make an appointment if counsel makes a clear and convincing showing that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards.
- (E) When the court appoints counsel pursuant to this subsection, the order of appointment shall assess the non-refundable administrative fee provided by Tennessee Code Annotated section 37-1-126(c)(1) or section 40-14-103(b)(1). Additionally the court shall consider the financial ability of the indigent party to defray a portion or all of the cost for representation by the public defender or a portion or all of the costs associated with the provision of court appointed counsel as provided by Tennessee Code Annotated sections 8-14-205(d)(1); 37-1-126(c)(2); or, 40-14-103(b)(2). If the court finds the indigent party is financially able to defray a portion or all the cost of the indigent party's representation, the court shall enter an order directing the indigent party to pay into the registry of the clerk of such court such sum as the court determines the indigent party is able to pay as specified by Tennessee Code Annotated section 40-14-202(e).

(5) 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. See Tenn. Sup. Ct. R. 14 (setting out the procedure for withdrawal in the Court of Appeals and Court of Criminal Appeals); Tenn. Sup. Ct. R. 8, RPC 1.16.

(f)(1) Indigent parties shall not have the right to select appointed counsel. If an indigent party refuses to accept the services of appointed counsel, such refusal shall

be in writing and shall be signed by the indigent party in the presence of the court. (2) The court shall acknowledge thereon the signature of the indigent party and make the written refusal a part of the record in the case. In addition, the court shall satisfy all other applicable constitutional and procedural requirements relating to waiver of the right to counsel. The indigent party may act pro se without the assistance or presence of counsel only after the court has fulfilled all lawful obligations relating to waiver of the right to counsel.

EXPLANATORY COMMENT:

Section 1(e)(1) has been revised for simplicity and organization. Section 1(e)(2) emphasizes that the finding of indigency must be evidenced by a court order. Section 1(e)(4)(A) is stricter than the former rule and emphasizes that trial courts “shall” appoint the public defender to represent criminal defendants unless a conflict of interest exists or in the sound discretion of the trial court, appointment of another counsel is necessary. Section 1(e)(4)(D) includes a specific standard that must be satisfied before counsel may refuse an appointment. Section 1(e)(4)(E) emphasizes that courts have a statutory duty to assess the administrative fee when appointing counsel as well as a statutory duty to consider whether the indigent party can afford to defray a portion or all of the costs of representation. Section 1(e)(5) clarifies that appointed counsel is obligated to represent the indigent party until a court allows counsel to withdraw. Section 1(f) delineates the rights of indigent parties and the obligations of courts when an indigent party chooses to proceed without counsel.

Section 2. Compensation of counsel in non-capital cases.

(a)(1) Appointed counsel, other than public defenders, shall be entitled to reasonable compensation for services rendered as provided in this rule. Reasonable compensation shall be determined by the court in which services are rendered, subject to the limitations in this rule, which limitations are declared to be reasonable.

(2) These limitations apply to compensation for services rendered in each court: municipal, juvenile, or general sessions; criminal, circuit, or chancery; Court of Appeals or Court of Criminal Appeals; Tennessee Supreme Court; and United States Supreme Court.

(b) Co-counsel or associate attorneys in non-capital cases shall not be compensated.

(c)(1) The hourly rate for appointed counsel in non-capital cases shall not exceed forty dollars (\$40) per hour for time reasonably spent in trial preparation and fifty dollars (\$50) per hour for time reasonably spent in court.

- (2) For purposes of this rule, “time reasonably spent in trial preparation” means time spent preparing the case to which the attorney has been appointed to represent the indigent party. “Time reasonably spent in court” means time spent before a judge on the case to which the attorney has been appointed to represent the indigent party.

(d)(1) The maximum compensation allowed shall be determined by the original charge or allegations in the case. Except as provided in section 2(e), the compensation allowed appointed counsel for services rendered in a non-capital case shall not exceed the following amounts:

(2) Five Hundred Dollars (\$500) for:

- (A) Contempt of court cases where an adult or a juvenile is in jeopardy of incarceration;
- (B) Parole revocation proceedings pursuant to the authority of state and/or federal law;
- (C) Judicial proceedings under Tennessee Code Annotated, Title 33, Chapters 3 through 8, Mental Health Law;
- (D) Cases in which a superintendent of a mental health facility files a petition under the guardianship law, Tennessee Code Annotated, Title 34;
- (E) 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;
- (F) Cases alleging unruly conduct of a child which place the child in jeopardy of being removed from the home pursuant to § 37-1-132(b).

(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 which an adult or a juvenile is charged with a misdemeanor and is in jeopardy of incarceration;
- (C) Direct and interlocutory appeals in the Court of Appeals or Court of Criminal Appeals;
- (D) Direct and interlocutory appeals in the Tennessee Supreme Court;
- (E) Cases in which a defendant is applying for early release from incarceration or a suspended sentence;
- (F) Non-capital post-conviction and habeas corpus proceedings;
- (G) Probation revocation proceedings;
- (H) Cases in which a juvenile is charged with a non-capital felony;
- (I) All other non-capital cases in which the indigent party has a statutory or constitutional right to be represented by counsel.

(4)(A) One thousand, five hundred dollars (\$1,500) for cases in trial courts in which the defendant is charged with a felony other than first-degree murder or a Class A or B felony;

(B) Two thousand, five hundred dollars (\$2,500) for cases in trial courts in which the defendant is charged with first-degree murder or a Class A or B felony;

(5) Maximum compensation for juvenile dependency and neglect proceedings and termination of parental rights proceedings is as follows:

(A) Seven Hundred and Fifty dollars (\$750) for:

- (i) 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;
- (ii) 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; and
- (iii) 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;

(B) One Thousand Dollars (\$1,000) for:

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

(iii) Counsel appointed pursuant to Tennessee Supreme Court Rule 40(e)(2) and in accordance with section 1(d)(2)(D) 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) One thousand dollars (\$1000) for:

- (i) Proceedings against parents in which allegations against the parents could result in termination of parental rights;
- (ii) Guardian ad litem representation in termination of parental rights cases in accordance with section 1(d)(2)(D); and
- (iii) 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;

(e)(1) Notwithstanding the provisions of section (2)(d), an amount in excess of the maximum, subject to the limitations of section (2)(e)(3), may be sought by filing a motion in the court in which representation is provided. The motion shall include specific factual allegations demonstrating that the case is complex or extended. The court shall enter an order which evidences the action taken on the motion. 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 witnesses;
- (C) The case involved multiple protracted hearings;
- (D) The case involved novel and complex legal issues.
- (E) If the motion is granted, an order shall be forwarded to the Director of the AOC (herein "director") certifying the case as complex or extended. The order shall either recite the specific facts supporting the finding or incorporate by reference and attach the motion which includes the specific facts supporting the finding. To qualify for payment under this section, the order certifying the claim as extended or complex must be signed contemporaneously with the court's approval of the claim. Nunc pro tunc certification orders are not sufficient to support payment under this section.

(2) All payments under section 2(e)(1) must be submitted to the director for approval. If a payment under section 2(e)(1) is not approved by the director, the director shall transmit the claim to the chief justice for disposition. The determination of the chief justice shall be final.

(3) Upon approval of the complex or extended claim by the director or the chief justice, 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 and fifty dollars (\$750);
- (C) Except as provided in section (2)(e)(3)(D), 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 other than first-degree murder or a Class A or B felony; and
- (E) Five thousand dollars (\$5,000) in cases in trial courts in which the defendant is charged with first-degree murder or a Class A or B felony. Where the felony charged is first-degree murder, the director may waive the five thousand dollar (\$5,000) maximum if the order demonstrates that extraordinary circumstances exist and failure to waive the maximum would result in undue hardship.

(f) Attorneys shall not be compensated for time associated with traveling to a court in another county for the sole purpose of hand-delivering or filing a document.

(g) Counsel appointed or assigned to represent indigents shall not be paid for any time billed in excess of 2,000 hours per calendar year unless, in the opinion of the Administrative Director, an attorney has made reasonable efforts to comply with this limitation, but has been unable to do so, in whole or in part, due to the attorney's representation pursuant to Section 3 of this Rule. It is the responsibility of private counsel to manage their billable hours in compliance with the annual maximum.

EXPLANATORY COMMENT:

Section 2(b) unequivocally provides that only one attorney will be compensated in non-capital cases. Section 2(c) clarifies that appointed counsel will not be paid in-court rates for time spent waiting for a case to be called and that appointed counsel will not be compensated for time spent on Board of Professional Responsibility complaints arising from appointments. Section 2(d) has been reorganized for simplicity and clarity. Compensation rates for counsel appointed in juvenile, dependency and neglect, and termination of parental rights cases are now contained in Section 2(d)(4). Section 2(d)(4) further defines the dispositional and post-dispositional phases at which compensation is appropriate and also compensates attorneys appointed pursuant to Tennessee Supreme Court Rule 40(e)(2). Section 2(d)(4)(B) increases the maximum compensation for appointed counsel in certain

post-dispositional proceedings from \$500 to \$750. Section 2(e)(1) further delineates the procedure and factors supporting certification of a case as complex or extended, including the mandatory requirement that the order certifying the claim be submitted to the AOC contemporaneously with the claim requesting complex or extended compensation. Section 2(e)(2) reiterates that approval of the director or the chief justice is required and that the determination of the chief justice is final. Section 6 of this rule sets out in more detail the claims review process. Section 2(e)(3)(A)-(C) has been revised to simplify and clarify the language. Section 2(e)(3)(D) has been revised to limit waiver of the \$3,000 maximum to first-degree murder cases, rather than all homicide cases. Section 2(f) precludes compensating attorneys for time spent traveling to and from a clerk's office in another county for the sole purpose of hand-delivering or filing documents.

Section 3. Minimum qualifications and compensation of counsel in capital cases.

(a) For purposes of this rule, a capital case is a case in which a defendant has been charged with first-degree murder and a notice of intent to seek the death penalty, as provided in Tennessee Code Annotated section 39-13-208 and Tennessee Rule of Criminal Procedure 12.3(b), has been filed and no order withdrawing the notice has been filed. Non-capital compensation rates apply to services rendered by appointed counsel after the date the notice of intent to seek the death penalty is withdrawn.

(b)(1) The court shall appoint two attorneys to represent a defendant at trial in a capital case. Both attorneys appointed must be licensed in Tennessee and have significant experience in Tennessee criminal trial practice, unless in the sound discretion of the trial court, appointment of one attorney admitted under Tennessee Supreme Court Rule 19 is appropriate. The appointment order shall specify which attorney is "lead counsel" and which attorney is "co-counsel." Whenever possible, a public defender shall serve as and be designated "lead counsel."

(2) If the notice of intent to seek the death penalty is withdrawn at least thirty (30) days prior to trial, the trial court shall enter an order relieving one of the attorneys previously appointed. In these circumstances, the trial court may grant the defendant, upon motion, a reasonable continuance of the trial.

(3) If the notice is withdrawn less than thirty (30) days prior to trial, the trial court may either enter an order authorizing the two attorneys previously appointed to remain on the case for the duration of the present trial, or enter an order relieving one of the attorneys previously appointed and granting the defendant, upon motion, a reasonable continuance of the trial.

(c) Lead counsel must:

(1) be a member in good standing of the Tennessee bar or be admitted to practice pro hac vice;

(2) have regularly participated in criminal jury trials for at least five years;

(3) have completed, prior to the appointment, a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense; and, complete a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense every two years thereafter;

(4) have at least one of the following:

(A) experience as lead counsel in the jury trial of at least one capital case;

(B) experience as co-counsel in the trial of at least two capital cases;

(C) experience as co-counsel in the trial of a capital case and experience as lead or sole counsel in the jury trial of at least one murder case;

(D) experience as lead counsel or sole counsel in at least three murder jury trials or one murder jury trial and three felony jury trials; or

(E) experience as a judge in the jury trial of at least one capital case.

(5) The provisions of this subsection requiring lead counsel to have participated in criminal jury trials for at least five years, rather than three years, and requiring six (6) hours of specialized training shall become effective January 1, 2006.

(d) Co-counsel must:

(1) be a member in good standing of the Tennessee bar or be admitted to practice pro hac vice;

(2) have completed, prior to the appointment, a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense; and, complete a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense every two years thereafter;

(3) have at least one of the following qualifications:

(A) qualify as lead counsel under (c) above; or

(B) have experience as sole counsel, lead counsel, or co-counsel in a murder jury trial.

(4) The provisions of this subsection requiring six (6) hours of specialized training shall become effective January 1, 2006.

(e) Attorneys who represent the defendant in the trial court in a capital case may be designated to represent the defendant on direct appeal, provided at least one trial attorney qualifies as new appellate counsel under section 3(g) of this rule and both attorneys are available for appointment. However, new counsel will be appointed to represent the defendant if the trial court, or the court in which the case is pending, determines that appointment of new counsel is necessary to provide the defendant with effective assistance of counsel or that the best interest of the defendant requires appointment of new counsel.

(f) If new counsel are appointed to represent the defendant on direct appeal, both attorneys appointed must be licensed in Tennessee, unless in the sound discretion of the judge, appointment of one attorney admitted under Tennessee Supreme Court Rule 19 is appropriate.

(g) Appointed counsel on direct appeal, regardless of any prior representation of the defendant, must have three years of litigation experience in criminal trials and appeals, and they must have at least one of the two following requirements: experience as counsel of record in the appeal of a capital case; or experience as counsel of record in the appeal of at least three felony convictions within the past three years and a minimum of six hours of specialized training in the trial and appeal of capital cases.

(h) Counsel eligible to be appointed as post-conviction counsel in capital cases must have the same qualifications as appointed appellate counsel, or have trial and appellate experience as counsel of record in state post-conviction proceedings in three felony cases, two homicide cases, or one capital case. Counsel also must have a working knowledge of federal habeas corpus practice, which may be satisfied by six hours of specialized training in the representation in federal courts of defendants under the sentence of death imposed in state courts; and they must not have previously represented the defendant at trial or on direct appeal in the case for which the appointment is made, unless the defendant and counsel expressly consent to continued representation.

(i) No more than two attorneys shall be appointed to represent a death-row inmate in a proceeding regarding competency for execution. See *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999). At least one of the attorneys appointed shall be qualified as post-conviction counsel as set forth in section 3(h).

(j) Appointed counsel in capital cases, other than public defenders, shall be entitled to reasonable compensation as determined by the court in which such services are rendered, 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 claims in accordance with Section 6 of this rule.

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

- (1) Lead counsel out-of-court--seventy-five dollars (\$75);
- (2) Lead counsel in-court--one hundred dollars (\$100);
- (3) Co-counsel out-of-court--sixty dollars (\$60);
- (4) Co-counsel in-court--eighty dollars (\$80);
- (5) Post-conviction counsel out-of-court--sixty dollars (\$60);
- (6) Post-conviction counsel in-court--eighty dollars (\$80);
- (7) Counsel appointed pursuant to section 3(i) out-of-court--sixty dollars (\$60);
- (8) Counsel appointed pursuant to section 3(i) in-court--eighty dollars (\$80).

(l) For purposes of this rule, “out-of-court” means time reasonably spent working on the case to which the attorney has been appointed to represent the indigent party. “In-court” means time spent before a judge on the case to which the attorney has been appointed to represent the indigent party.

(m) Attorneys shall not be compensated for time associated with traveling to a court in another county for the sole purpose of hand-delivering or filing a document.

EXPLANATORY COMMENT:

Section 3(a) clarifies that even if a trial court allows two appointed attorneys to remain on a case, under Section 3(b)(3), after a notice of intent to seek the death penalty is withdrawn, counsel will be compensated at non-capital rates for services rendered after the date the notice is withdrawn. Section 3(b)(1) has been revised to require that the appointment order must specify lead and co-counsel and that the public defender must serve and be designated lead counsel whenever possible. Section 3(b)(2) & (3) previously appeared as Section 3(l) of Rule 13. Section 3 now permits former prosecutors and judges with appropriate experience to be appointed counsel in capital cases. Section 3(c)(2) has been revised to require five years participation in criminal jury trials, rather than three years representation of defendants in criminal jury trials. Section 3(c)(3) has been revised to enhance the educational requirements for appointed counsel. Section 3(c)(4)(E) has been revised to include an experience requirement applicable only to former judges. Section 3(i) has been revised to clarify that its scope is limited to affording compensation to appointed counsel in a proceeding challenging the inmate’s competency to be executed. Section 3(k)(7) & (8) provides that attorneys appointed in competency

proceedings will be compensated at the same \$60/\$80 rates applicable in other capital post-conviction proceedings. Section 3(l) precludes compensating appointed counsel at in-court rates for time spent waiting for a case to be called and also precludes compensating appointed counsel for time spent defending against a Board of Professional Responsibility action that arises from the appointment. Section 3(m) precludes compensating attorneys for time spent driving to and from a clerk's office in another county for the sole purpose of hand-delivering or filing a document.

Section 4. Payment of expenses incident to representation.

(a)(1) Appointed counsel, experts, and investigators may be reimbursed for certain necessary expenses directly related to the representation of indigent parties.

(2) The services or time of a paralegal, law clerk, secretary, legal assistant, or other administrative assistants shall not be reimbursed. Normal overhead expenses also shall not be reimbursed.

(3) The following expenses will be reimbursed without prior approval if reasonably necessary to the representation of the indigent party:

(A) Long distance telephone charges, if supported by a log showing the date of the call, the person or office called, the purpose of the call, and the duration of the call stated in one-tenth (1/10) hour segments;

(B) Mileage for travel within the state in accordance with Judicial Department travel regulations, if supported by a log showing the mileage, the purpose of the travel, and the origination and destination cities;

(C) Lodging where an overnight stay is required at actual costs, if supported by a receipt, not to exceed the current authorized executive branch rates;

For in-state rates: www.state.tn.us/finance/act/travel.html

For out-of-state rates: www.state.tn.us/finance/act/policy.html

(D) Meals in accordance with the Judicial Department travel regulations if supported by a receipt, where an overnight stay is required;

(E) Parking at actual costs up to ten dollars per day if supported by a receipt;

(F) Photocopying--Black and White Copies

(i) In-house copying at a rate not to exceed seven cents (\$0.07) per page;

(ii) Actual cost of outsourced copying if supported by a receipt, at a rate not to exceed ten cents (\$0.10) per page;

(iii) Actual cost of providing to client a copy of appellate briefs and opinion.

(iv) The cost of providing to the indigent party a copy of the court file or transcript will not be reimbursed once the appeal is complete because the original file and transcript belong to the client.

(v) Prior approval of the court and the director is required if an attorney, expert, or investigator anticipates that total copying costs will exceed \$500.

(G) Photocopying--Color Copies

(i) In-house color copying at a rate not to exceed one dollar (\$1.00) per page;

(ii) Actual cost of outsourced color copies at a rate not to exceed \$1.00 per page if supported by a receipt;

(iii) Prior approval of the court and the director is required if an attorney, expert, or investigator anticipates that total copying costs will exceed \$500.

(H) Computerized Research at actual cost for case-related legal and internet research if supported by receipts. If actual costs are not incurred, compensation will be limited to time spent conducting the search. Pro rata cost of subscription[s] will not be paid.

(I) Miscellaneous expenses such as postage, commercial delivery service having computer tracking capacity, film, or printing will be compensated at actual cost, not to exceed the fair and reasonable market value, if accompanied by a receipt. Prior approval of the court and the director is required if an attorney, expert, or investigator anticipates that total miscellaneous expenses will exceed \$250.

(J) Expenses relating to improving the indigent party's appearance, including but not limited to expenses for dental plates, haircuts, clothing and cleaning charges for clothing, are not reimbursable.

(K) Appellate Record--Actual expenses for an electronic copy of the appellate record (excluding exhibits) and of any transcripts on appeal purchased from the Appellate Court Clerk's Office, not to exceed \$100.00.

(b) Expenses not listed in section 4(a), including travel outside the state, will be

reimbursed only if prior authorization is obtained from the court in which the representation is rendered and prior approval is obtained from the director.

(1) Authorization of expenses shall be sought by motion to the court.

(2) The motion shall include both an itemized statement of the estimated or anticipated costs and specific factual allegations demonstrating that the expenses are directly related to and necessary for the effective representation of the indigent party.

(3) The court shall enter an order that evidences the action taken on the motion. If the motion is granted, the order shall either recite the specific facts demonstrating that the expenses are directly related to and necessary for the effective representation of the indigent party or incorporate by reference and attach the defense motion that includes the specific facts demonstrating that finding.

(4) The order and any attachments shall be submitted to the director for prior approval before any expenses are incurred.

(c) The director is hereby authorized to reimburse the Department of Children's Services at the Judicial Department rate for the expense of transcripts in termination of parental rights appeals without obtaining prior approval by court order in each case.

(d) Foreign Language Interpreters and Translators. The appointment of interpreters and/or translators, and the compensation by the AOC for costs associated with an interpreter's and/or translator's services, are governed by Rule 42, Rules of the Tennessee Supreme Court.

EXPLANATORY COMMENT:

Section 4(a) provides uniform guidelines and certainty as to expenses that will be reimbursed and delineates the documentation that must accompany a claim for reimbursement. Section 4(a)(3) permits reimbursement without prior approval of certain expenses and is intended to eliminate time previously spent by attorneys and judges considering such expenses. Section 4(a)(3)(F)(iv) clarifies that attorneys will not be reimbursed for the costs of copying the record since the record belongs to the indigent party. Section 4(b) delineates the expenses for which prior approval is required and sets out the requirements and procedure for obtaining prior approval. Section 4(b) dispenses with the former requirement that prior approval be obtained from both the director and the chief justice and makes prior approval of the director essential and final. Section 4(d) cross-references Tenn. Sup. Ct. R. 42, which provides the mechanism and method for compensating foreign language interpreters and translators.

Section 5. Experts, investigators, and other support services.

(a)(1) In the trial and direct appeal of all criminal cases in which the defendant is entitled to appointed counsel and in the trial and appeals of post-conviction proceedings in capital cases involving indigent petitioners, the court, in an ex parte hearing, may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected. If such determination is made, the court may grant prior authorization for these necessary services in a reasonable amount to be determined by the court. The authorization shall be evidenced by a signed order of the court. The order shall provide for the payment or reimbursement of reasonable and necessary expenses by the director. See Tenn. Code Ann. § 40-14-207(b); *State v. Barnett*, 909 S.W.2d 423 (Tenn. 1995); *Owens v. State*, 908 S.W.2d 923 (Tenn. 1995).

(2) In non-capital post-conviction proceedings, funding for investigative, expert, or other similar services shall not be authorized or approved. See *Davis v. State*, 912 S.W.2d 689 (Tenn. 1995).

(b)(1) Every effort shall be made to obtain the services of a person or entity whose primary office of business is within 150 miles of the court where the case is pending. If the person or entity proposed to provide the service is not located within the 150-mile radius, the motion shall explain the efforts made to obtain the services of a provider within the 150-mile radius.

(2) Any motion seeking funding for expert or similar services shall itemize:

(A) the nature of the services requested;

(B) the name, address, qualifications, and licensure status, as evidenced by a curriculum vitae or resume, of the person or entity proposed to provide the services;

(C) the means, date, time, and location at which the services are to be provided; and

(D) a statement of the itemized costs of the services, including the hourly rate, and the amount of any expected additional or incidental costs.

(3) Any motion seeking funding for investigative or other similar services shall itemize:

(A) the type of investigation to be conducted;

(B) the specific facts that suggest the investigation likely will result in admissible evidence;

- (C) an itemized list of anticipated expenses for the investigation;
- (D) the name and address of the person or entity proposed to provide the services; and
- (E) a statement indicating whether the person satisfies the licensure requirement of this rule.

(4) If a motion satisfies these threshold requirements, the trial court must conduct an *ex parte* hearing on the motion and determine if the requested services are necessary to ensure the protection of the defendant's constitutional rights.

(c)(1) Funding shall be authorized only if, after conducting a hearing on the motion, the court determines that there is a particularized need for the requested services and that the hourly rate charged for the services is reasonable in that it is comparable to rates charged for similar services.

(2) Particularized need in the context of criminal trials and appeals is established when a defendant shows by reference to the particular facts and circumstances that the requested services relate to a matter that, considering the inculpatory evidence, is likely to be a significant issue in the defense at trial and that the requested services are necessary to protect the defendant's right to a fair trial. See *Barnett*, 909 S.W.2d at 423.

(3) Particularized need in the context of capital post-conviction proceedings is established when a petitioner shows, by reference to the particular facts and circumstances of the petitioner's case, that the services are necessary to establish a ground for post-conviction relief and that the petitioner will be unable to establish that ground for post-conviction relief by other available evidence. See *Owens*, 908 S.W.2d at 928.

(4) Particularized need cannot be established and funding requests should be denied where the motion contains only:

- (A) undeveloped or conclusory assertions that such services would be beneficial;
- (B) assertions establishing only the mere hope or suspicion that favorable evidence may be obtained;
- (C) information indicating that the requested services relate to factual issues or matters within the province and understanding of the jury; or
- (D) information indicating that the requested services fall within the capability and expertise of appointed counsel. See, e.g., *Barnett*, 909 S.W.2d at 430; *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985); *State v. Abraham*, 451 S.E.2d 131, 149 (N.C. 1994).

(d)(1) The director and/or the chief justice shall maintain uniformity as to the rates paid individuals or entities for services provided to indigent parties. Appointed counsel shall make every effort to obtain individuals or entities who are willing to provide services at an hourly rate less than the maximum. Although not an exclusive listing, compensation for individuals or entities providing the following services shall not exceed the following maximum hourly rates:

(A) Accident Reconstruction	\$115.00
(B) Medical Services/Doctors	\$250.00
(C) Psychiatrists	\$250.00
(D) Psychologists	\$150.00
(E) Investigators (Guilt/Sentencing)	\$ 50.00
(F) Mitigation Specialist	\$ 65.00
(G) DNA Expert	\$200.00
(H) Forensic Anthropologist	\$125.00
(I) Ballistics Expert	\$ 75.00
(J) Fingerprint Expert	\$ 75.00
(K) Handwriting Expert	\$ 75.00

(2) For persons or entities compensated at a rate of one hundred dollars (\$100) per hour or more, time spent traveling shall be compensated at no greater than fifty percent (50%) of the approved hourly rate.

(3) Investigators shall not be compensated unless licensed by the Private Investigation and Polygraph Commission of Tennessee or exempted from this licensure requirement, except when an investigator licensed in another state is authorized by a court in Tennessee to conduct an investigation in that other state.

(4) In a post-conviction capital case, a trial court shall not authorize more than a total of \$20,000 for all investigative services, unless in its sound discretion the trial court determines that extraordinary circumstances exist that have been proven by clear and convincing evidence.

(5) In a post-conviction capital case, a trial court shall not authorize more than a total of \$25,000 for the services of all experts unless in its sound discretion the trial court determines that extraordinary circumstances exist that have been proven by clear and convincing evidence.

(6) Expenses shall not be authorized or approved for expert tests or expert services if the results or testimony generated from such tests or services will not be admissible as evidence.

(e)(1) If the requirements of sections 5(c) and (d) are satisfied and the motion is granted, the authorization shall be evidenced by a signed order of the court. Unless otherwise indicated in the order, the amount authorized includes both fees and necessary expenses under section 4(a).

(2) The order shall include a finding of particularized need and the specific facts that demonstrate particularized need as well as the information required by section 5(b)(1) or (b)(2).

(3) The court may satisfy the requirements of subsection (2) above by incorporating and attaching that portion of the defense motion that includes the specific facts supporting the finding of particularized need.

(4) Once the services are authorized by the court in which the case is pending, the order and any attachments must be submitted in writing to the director for prior approval. Claims for these services may not be submitted electronically.

(5) If the director denies prior approval of the request, the claim shall also be transmitted to the chief justice for disposition and prior approval. The determination of the chief justice shall be final.

EXPLANATORY COMMENT:

Section 5(a)(1) contains the language that previously appeared as Section 5(a). Section 5(a)(2) unequivocally provides that funding for investigative, expert, or other similar services is not available in non-capital post-conviction proceedings. Section 5(b)(1) explains that counsel must make “every effort” to obtain the services of experts, investigators or others who are located within 150 miles of the court where the case is pending. Section 5(b)(2) delineates the information that must be included in or submitted with a motion requesting funding for expert or similar services. Section 5(b)(3) delineates the information that must be included in or submitted with a motion requesting funding for investigative or similar services. Section 5(c) has been revised for clarity and includes in subsections (c)(1)-(4) definitions of particularized need and the standards governing a trial court’s consideration of funding requests. Section 5(d) has been revised to provide certainty and guidance to attorneys, service providers, and trial courts. Section (5)(d)(1) establishes maximum hourly rates for certain services, instructs the director and the chief justice to maintain state-wide uniformity as to the rates paid for services, and directs appointed counsel to seek to retain individuals and/or entities willing to provide services at a rate less than the maximum. Section 5(d)(2) establishes permissible compensation rates for travel for experts paid in excess of \$100 per hour. Section 5(d)(3) establishes the licensure requirements for investigators. Section 5(d)(4) and (5) impose maximum limits on the amounts that may be approved in capital

post-conviction proceedings and permit funding in excess of these amounts only upon clear and convincing evidence that extraordinary circumstances exist. Section 5(d)(6) precludes funding for expert tests or services if the results of the tests or the expert's testimony is per se inadmissible. Section 5(e)(1)-(3) delineates the information that must be included in or attached to orders authorizing funding. Section 5(e)(4)-(5) sets out the procedure that must be followed in obtaining prior approval of the request. Section 5(e)(5) provides that only those claims denied by the director will be submitted to the chief justice for disposition. This changes prior law which required the chief justice to review every request for funding involving an hourly rate in excess of \$150 or an overall amount in excess of \$5,000, even those requests approved by the director.

Section 6. Review of claims for compensation and reimbursement of expenses.

(a)(1) All claims for attorney compensation and expenses shall be submitted utilizing the system established by the AOC for electronic submission. Claims of two hundred dollars (\$200.00) or more for attorney compensation and expenses shall be electronically submitted, and shall be reviewed and approved by the judge who presided over final disposition of the case prior to payment by the AOC. Electronic claims that total less than two hundred dollars (\$200.00) shall be exempt from the judicial review and approval requirement; such claims, however, shall be subject to the AOC's examination and audit pursuant to this section

(2) Time spent by counsel on a single case or proceeding shall be included in a single claim for compensation.

(3) Claims shall be supported by a copy of the court order appointing counsel or authorizing the expenditure and, in the case of expenses requiring prior approval, a copy of the approval of the director and/or the chief justice.

(4) Appointed counsel in a capital case shall file interim claims. Interim claims shall be filed at least every 180 days, but no more frequently than every 30 days. Any portion of a claim requesting payment for services rendered more than 180 days prior to the date on which the claim is approved by the court in which the services were rendered shall be deemed waived and shall not be paid. The provisions of this subsection regarding the time frame for submission of claims shall become effective January 1, 2005.

(5) Appointed counsel in non-capital cases are not permitted to file interim claims but shall file claims for compensation no later than 180 days after disposition of the case in each court in which representation is provided. However, claims for the post-dispositional phase of a juvenile dependency and

neglect proceeding shall be filed no later than 180 days from the last activity related to the case. Claims for compensation submitted after the 180-day period shall be deemed waived and shall not be paid. The provisions of this subsection regarding the time frame for submission of claims shall become effective January 1, 2005.

(6) 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.

(7) The payment of a claim by the AOC shall not prejudice the AOC's right to object to or question any claim or matter in relation thereto. Claims shall be subject to reduction for amounts included in any claim or payment previously made which are determined by the AOC not to constitute proper remuneration for compensable services. The AOC reserves the right to deduct from claims which are or shall become due and payable any amounts which are or shall become due and payable to the AOC.

(8) As a part of its examination and audit of claims for compensation and reimbursement under this Rule 13, the AOC shall determine from information provided by the Board of Professional Responsibility whether there are unpaid costs assessed against counsel submitting the claim pursuant to Tenn. Sup. Ct. R. 9, Section 31.3. Claims for compensation and reimbursement under this Rule 13 shall be subject to reduction for any such unpaid costs.

(b)(1) The AOC shall examine and audit all claims for compensation and reimbursement to insure compliance with this rule and other statutory requirements. The AOC may decline to make any payment or decline to continue to accept any assignment should either the attorney or the third-party assignee fail to comply with the requirements of Rule 13 and other statutory requirements.

(2) After such examination and audit and giving due consideration to state revenues, the director shall make a determination as to the compensation and/or reimbursement to be paid and cause payment to be issued in satisfaction thereof.

(3) Payment may be made directly to the person, agency, or entity providing the services.

(4) The determination by the director shall be final, except where review by the chief justice also is required. In those instances, the determination of the

chief justice shall be final. The chief justice may designate another justice to perform this function if the chief justice determines that a designation is appropriate or necessary.

(5) If the director denies an attorney's fee claim in whole or substantial part, such denial shall be forwarded to the chief justice for review. The determination of the chief justice shall be final. Reductions made during the process of auditing a fee claim which are due to mathematical miscalculations or result from requests for payments not permitted by this rule shall not be forwarded to the chief justice for review.

(c)(1) Appointed counsel may contract with a third-party agent to prepare and file claims for attorney compensation and expenses; provided, however, that counsel shall remain responsible for all filings and communications in connection with such claims;

(2) Appointed counsel may assign the right to payment of claims for attorney compensation and expenses to a third-party assignee; provided, however, that: (i) counsel electing to assign the right to payment shall assign such right for all subsequent cases in which counsel will present claims for payment pursuant to this rule; and (ii) counsel shall provide adequate written notice to the director of counsel's assignment of the right to payment to the third-party assignee. Such written notice shall not be effective unless submitted on the Uniform Assignment of Payment For Services Due to An Attorney form provided by the administrative office of the courts. Upon receipt of adequate written notice of counsel's assignment, the director shall make subsequent payments of counsel's claims to the third-party assignee. An assignment submitted to the director shall not relieve counsel of the responsibility for the accuracy and timeliness of all filings nor shall it relieve counsel of the responsibility to personally respond to inquiries from the administrative office of the courts in connection with counsel's claims. Counsel's written notice of assignment shall remain in effect until the director receives written notice that counsel revokes the assignment. The third-party assignee shall agree in writing to indemnify and hold the state harmless for all payments made by the administrative office of the courts in good faith and without notification that the assignment has been revoked and shall file such writing with the director.

EXPLANATORY COMMENT:

Section 6(a)(1)-(3) has been revised to clarify the requirements and process for submitting claims for compensation and reimbursement. Section 6(a)(4) mandates that appointed counsel in capital cases file interim claims at least every 180 days but no more frequently than every 30 days and provides that any portion of a claim for services rendered more than 180 days prior to the date on which the

claim is approved by the court will be deemed waived and not paid. The effective date of Section 6(a)(4) is January 1, 2005. Section 6(a)(5) precludes appointed counsel in non-capital cases from filing interim claims for compensation but requires them to submit claims for compensation no later than 180 days after disposition of the case in each court in which representation is provided, with the 180 day period running from the date of the last case-related activity for post-dispositional phases of a dependency and neglect proceeding. Claims for compensation submitted after the 180-day period will be deemed waived and not paid. The effective date of Section 6(a)(5) is January 1, 2005. Section 6(a)(6) provides that counsel will be held to a high degree of care in record keeping and documentation of the claim. Section 6(a)(7) provides that the AOC reserves the right to review claims that come into question even if they have already been paid and establishes that the AOC may recoup any overpayment by setting off the amount of any such overpayment against claims that may be filed. Section 6(b) delineates how claims are audited, approved for payment, and how payments are made. Section 6(b)(4) provides that the determination of the director and/or the chief justice is final. Unlike prior law, Section 6 does not provide for an appeal to the Tennessee Supreme Court from the decision of the director or the chief justice. Section 6(b)(4) also provides that the chief justice may designate another justice to review these claims if the chief justice determines that designation is appropriate or necessary. Section 6(b)(5) sets out those instances where an attorney may appeal the director's decisions to the chief justice.

Section 7. Contracts for Indigent Representation.

In addition and as an alternative to the procedures for appointment and compensation of court-appointed counsel for services described above, the Administrative Director is authorized to enter into agreements with attorneys, law firms, or associations of attorneys to provide legal services for a fee to indigent persons in: (1) emergency involuntary judicial hospitalization actions brought pursuant to Tenn. Code Ann. Title 33, Chapter 6, Part 4; (2) Title IV-D child support enforcement proceedings brought pursuant to Tenn. Code Ann. Title 36, Chapter 5; and (3) 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. 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.

Any such contracts for indigent representation shall be awarded based on an evaluation to determine the quality of representation to be provided, including the ability of attorneys making proposals to exercise independent judgment on behalf of each client, and to maintain workload rates that allow for attorneys to devote adequate time to each client covered by such contracts.

Attorneys providing legal services pursuant to contracts entered into pursuant to this Section shall be appointed to represent all indigent defendants in these cases unless such representation is otherwise prohibited by the Rules of Professional Conduct. See Tenn. Sup. Ct. R. 8. In any such case, the court shall appoint qualified counsel pursuant to the provisions of Section 1 of this rule.

The Administrative Director shall prescribe adequate procedures to ensure compliance with the terms of such contracts and shall report to the Court annually on the effectiveness of the contract process for the provision of indigent representation.

Credits

[Amended December 1, 1982; November 7, 1983; August 20, 1984; August 4, 1986; amended May 12, 1992, effective July 1, 1991; amended effective July 1, 1993; September 1, 1994; April 3, 1997; July 1, 1997; February 4, 1998; November 23, 1998; January 25, 2001; June 25, 2001; April 29, 2003; amended June 23, 2003, effective July 1, 2003; June 1, 2004, effective July 1, 2004; effective September 2, 2004; September 2, 2005, effective October 1, 2005; amended effective June 12, 2006; amended effective February 27, 2008; amended effective July 1, 2008; July 13, 2011; June 27, 2012; July 1, 2012; amended February 6, 2013, effective July 1, 2013; February 20, 2013, effective April 1, 2013; amended effective March 5, 2013; amended June 25, 2013, effective July 1, 2013; September 4, 2013, effective January 1, 2014; September 19, 2013, effective January 1, 2014; November 19, 2014, effective January 1, 2015.]

FE

APPENDIX

_____ Court _____ County _____ Tennessee	UNIFORM AFFIDAVIT OF INDIGENCY page 1 of 2	Case Number _____
_____ vs. _____		

Comes the defendant and, subject to the penalty of perjury, makes oath to the following facts (please list, circle, complete, etc.):

PART I

1. Full Name: _____ 2. Social Security No.: _____
3. Any other names ever used: _____ 4. Address: _____
5. Telephone Nos.: (Home) _____ (Work) _____ (Other) _____
6. Are you working anywhere? Yes () No () Where _____
7. How much do you make? _____ (weekly, monthly, etc.) 8. Birth date: _____
9. Do you receive any governmental assistance or pensions (disability, SSI, AFDC, etc.)? Yes () No ()
 What is its value? _____ (weekly, monthly, etc.)
10. Do you own any property (house, car, bank acct., etc.): Yes () No ()
 What is its value? _____
11. Are you, or your family, going to be able to post your bond? Yes () No ()
12. Are you, or your family, going to hire a private attorney? Yes () No ()
13. Are you now in custody? Yes () No ()
 If so, how long have you been in custody? _____
(If the defendant is in custody, unable to make bond and the answers to questions one (1) through eleven (11) make it clear that the defendant has no resources to hire a private attorney, skip Part II and complete Part III. If Part II is to be completed, do not list items already listed in Part I.)

PART II

14. Names & ages of all dependents: _____ relationship _____
 _____ relationship _____
 _____ relationship _____
15. I have met with following lawyer(s), have attempted to hire said lawyer(s) to represent me, and have been unable to do so:
 Name _____
 Address _____
16. All my income from all sources (including, but not limited to wages, interest, gifts, AFDC, SSI, social security, retirement, disability, pension, unemployment, alimony, worker's compensation, etc.):
 \$ _____ per _____ from _____
 \$ _____ per _____ from _____
 \$ _____ per _____ from _____
17. All money available to me from any source:
 A. Cash _____
 B. Checking, Saving, or CD Account(s)-give bank, acct. no., balance _____
 C. Debts owed me _____
 D. Credit Card(s)-give acct. no., balance, credit limit, and type (Visa, Mastercard, American Express, etc.) _____

Legal Authority: Tenn. Rule Sup. Ct. 13

_____ _____ _____ Court County Tennessee	UNIFORM AFFIDAVIT OF INDIGENCY page 2 of 2	Case Number _____
_____ vs. _____		

E. Other _____

18. All vehicles/vessels owned by me, solely or jointly, within the last six months (including but not limited to cars, trucks, motorcycles, farm equip., boats etc.):

_____ value \$ _____ amt. owed _____
 _____ value \$ _____ amt. owed _____
 _____ value \$ _____ amt. owed _____

19. All real estate owned by me, solely or jointly, within the last six months (including land, lots, houses, mobile homes, etc.):

_____ value \$ _____ amt. owed _____
 _____ value \$ _____ amt. owed _____

20. All assets or property not already listed owned within the last six months or expected in the future:

_____ value \$ _____ amt. owed _____
 _____ value \$ _____ amt. owed _____

21. The last income tax return I filed was for the year _____ and it reflected a net income of \$ _____.
 I will file a copy of same within one week if required.

22. I am out of jail on bond of \$ _____ made by _____. The money to make bond, \$ _____ was paid by _____.

PART III

23. Acknowledging that I am still under oath, I certify that I have listed in Parts I and II all assets in which I hold or expect to hold any legal or equitable interest.

24. I am financially unable to obtain the assistance of a lawyer and request the court to appoint a lawyer for me.

25. I understand that it is a **Class A misdemeanor** for which I can be sentenced to jail for up to 11 months 29 days or be fined up to \$2500.00 or both if I intentionally or knowingly misrepresent, falsify, or withhold any information required in this affidavit. I also understand that I may be required by the Court to produce other information in support of my request for an attorney.

This _____ day of _____, _____.

Defendant

Sworn to and Subscribed before me this ____ day of _____, _____.

Clerk

Judge

Legal Authority: Tenn. Rule Sup. Ct. 13

F

APPENDIX

History of Compensation Under Tennessee Supreme Court Rule 13

Year	Hourly Rate	Description
1981	\$30	In-court time for a case involving an adult felony
	\$30	In-court time for juvenile proceedings
	\$30	In-court time for post-conviction & habeas proceedings
	\$20	All out-of-court time or a preliminary hearing
1986	\$30	In-court time for misdemeanors & juvenile proceedings
	\$30	In-court time for capital cases
	\$20	Out-of-court time for all cases, including capital cases
1997	\$50	In-court time for non-capital cases
	\$100	In-court time for lead counsel in capital case
	\$75	Out-of-court time for lead counsel in capital case
	\$80	In-court time for post-conviction capital case or co-counsel in capital case
	\$60	Out-of-court time for post-conviction capital case or co-counsel in capital case
	\$40	Out-of-court time in all other cases

G

APPENDIX

Maximum hourly rates for expert services

Tennessee Supreme Court Rule 13

Accident Reconstruction	\$115.00
Medical Services/Doctors	\$250.00
Psychiatrists	\$250.00
Psychologists	\$150.00
Investigators (Guilt/Sentencing)	\$ 50.00
Mitigation Specialist	\$ 65.00
DNA Expert	\$200.00
Forensic Anthropologist	\$125.00
Ballistics Expert	\$ 75.00
Fingerprint Expert	\$ 75.00
Handwriting Expert	\$ 75.00

III

APPENDIX

PUBLIC DEFENDER RESOURCES

Fiscal Year 2016 District Public Defender Expense by District

District	State Funds	County Funds	Federal Grant	Other	Total
1	\$1,703,400	\$0	\$0	\$0	\$1,703,400
2	\$1,685,800	\$218,019	\$0	\$0	\$1,903,819
3	\$1,561,500	\$0	\$0	\$0	\$1,561,500
4	\$1,265,500	\$0	\$0	\$0	\$1,265,500
5	\$1,040,000	\$52,978	\$0	\$0	\$1,092,978
6	\$3,296,600	\$2,003,680	\$15,000	\$9,310	\$5,324,590
7	\$1,066,100	\$37,615	\$0	\$0	\$1,103,715
8	\$1,318,300	\$83,034	\$0	\$0	\$1,401,334
9	\$1,004,100	\$0	\$0	\$0	\$1,004,100
10	\$1,301,800	\$0	\$0	\$0	\$1,301,800
11	\$1,990,500	\$683,537	\$0	\$0	\$2,674,037
12	\$1,286,300	\$0	\$0	\$0	\$1,286,300
13	\$1,388,900	\$0	\$0	\$0	\$1,388,900
14	\$942,900	\$2,511	\$0	\$0	\$945,411
15	\$1,462,900	\$0	\$0	\$0	\$1,462,900
16	\$1,508,600	\$71,988	\$0	\$0	\$1,580,588
17	\$1,336,900	\$0	\$0	\$0	\$1,336,900
18	\$974,900	\$0	\$0	\$0	\$974,900
19	\$1,563,000	\$7,313	\$0	\$0	\$1,570,313
20	\$2,219,700	\$4,946,600	\$0	\$0	\$7,166,300
21	\$1,114,900	\$0	\$0	\$0	\$1,114,900
22	\$1,429,100	\$0	\$0	\$0	\$1,429,100
23	\$1,423,700	\$0	\$0	\$0	\$1,423,700
24	\$1,164,300	\$0	\$0	\$0	\$1,164,300
25	\$1,563,700	\$0	\$0	\$0	\$1,563,700
26	\$1,179,300	\$168,895	\$0	\$0	\$1,348,195
27	\$745,800	\$0	\$0	\$0	\$745,800
28	\$930,400	\$0	\$0	\$0	\$930,400
29	\$872,800	\$17,840	\$0	\$0	\$890,640
30	\$5,081,700	\$7,346,386	\$0	\$0	\$12,428,086
31	\$513,200	\$0	\$0	\$0	\$513,200
Statewide Total	\$45,936,600	\$15,640,396	\$15,000	\$9,310	\$61,601,306

NUMBER OF DISTRICT PUBLIC DEFENDERS

By Judicial District - Fiscal Year 2016

District	
1	9 full time; 5 part time
2	11
3	9
4	8 full time; 2 part time
5*	8
6*	27
7	5
8	8
9	5
10	9
11	15
12	8
13	9
14	5
15	9 full time; 3 part time
16	10
17*	8
18	5
19	9
20	50
21	10
22	8 full time; 1 part time
23	7 full time; 2 part time
24	6
25	8
26	8
27	4 full time; 2 part time
28	4 full time; 1 part time
29	5 full time; 1 part time
30	91
31*	3

*District filled investigator position with Assistant Public Defender

Source: District Public Defenders Conference

I

APPENDIX

AOC CLAIMS STATISTICS

Indigent Defense Expenditures Paid by the Administrative Office of the Courts

Fiscal Year	Total	Attorneys	Experts & Investigators
2016	\$ 36,376,198	\$ 32,765,278	\$ 3,610,920
2015	\$ 31,349,311	\$ 28,278,211	\$ 3,071,099
2014	\$ 34,364,891	\$ 31,155,044	\$ 3,209,847
2013	\$ 32,386,052	\$ 28,868,559	\$ 3,517,493
2012	\$ 35,571,086	\$ 32,208,352	\$ 3,362,734

J

APPENDIX

PERSONAL APPEARANCES BEFORE THE TASK FORCE

Indigent Representation Task Force Meeting

November 6, 2015

Nashville

David Byrne, Esq. – Assistant General Counsel – Administrative Office of the Courts
Judge Steve R. Dozier – 20th Judicial District Criminal Court
Pam Hancock – Fiscal Services Director – Administrative Office of the Courts
Chief Justice Sharon G. Lee – Tennessee Supreme Court
Deborah Taylor Tate, Esq. – Director, Administrative Office of the Courts

Indigent Representation Task Force Meeting

April 15, 2016

Nashville

Paul Bruno, Esq. – President - Tennessee Association of Criminal Defense Lawyers
Vanessa P. Bryan, Esq. – District Public Defender, 21st Judicial District
David Carroll – Executive Director – Sixth Amendment Center
Judge Charles Anthony Cerny – Tennessee General Sessions Judges Conference, Knox County General Sessions Court, Div. I
Dawn Deaner, Esq. – District Public Defender, 20th Judicial District
Judge Geoffrey P. Emery – President – Tennessee General Sessions Judges Conference, Knox County General Sessions Court, Div. II
B. Jeffery Harmon, Esq. – President – Tennessee District Public Defenders Conference, District Public Defender, 12th Judicial District
Jeffrey S. Henry, Esq. – Executive Director, Tennessee District Public Defenders Conference,
Chief Justice Sharon G. Lee – Tennessee Supreme Court
William B. Lockert III, Esq. – District Public Defender, 23rd Judicial District
Judge Michael F. Mondelli – Tennessee General Sessions Judges Conference, Metropolitan Nashville General Sessions Court, Div. VI
John E. Nicoll, Esq. – District Public Defender, 14th Judicial District
Jessica Van Dyke, Esq. – Tennessee Association of Criminal Defense Lawyers

Indigent Representation Task Force Listening Tour Session

April 28, 2016

Memphis

Stephen Bush, Esq. – Shelby County Public Defender
Stacey Graham, Esq. – Law Office of Faye Longo
Peter Letsou, Esq. – Dean and Professor, Univ. of Memphis Cecil C. Humphreys School of Law
T.J. Matthews – Manager, Shelby County General Sessions Civil Court Clerk’s Office
Pamela Moses – Concerned Citizen
Karen “Peaches” Spencer McGee – Concerned Citizen
Edward Stanton, Jr. – Shelby County General Session Court Clerk

Indigent Representation Task Force Listening Tour Session

April 29, 2016

Trenton

Joseph P. Atnip, Esq. – 27th Judicial District Public Defender
C. Phillip Bivens – District Attorney General, 29th Judicial District
Judge Paul Conley – Crockett County General Sessions Court
Tom W. Crider, Esq. – 28th Judicial District Public Defender
Judge Tommy L. Moore, Jr. – Weakly County General Sessions Court
Brandon L. Newman, Esq. - Newman Law & Gibson County Bar Association President
Karen “Peaches” Spencer McGee – Concerned Citizen
Thomas A. Thomas – District Attorney General, 27th Judicial District

Indigent Representation Task Force Listening Tour Session

May 19, 2016

Johnson City

John C. Burgin, Esq. – Kramer Rayson LLP
Adam Casto, Esq. – Law Office of Adam Casto
John M. Goergen, Esq.
John L. Jolley, Esq. – Legal Aid of East Tennessee
Sandy Phillips, Esq. – Law Office of Sandy Phillips
Rachel W. Ratliff, Esq.
Frank Santore, Esq. – Santore & Santore Attorneys at Law
Melanie Sellers, Esq. – 1st Judicial District Assistant District Public Defender
Perry L. Stout, Esq.
Stephen M. Wallace, Esq. – 2nd Judicial District Public Defender

Indigent Representation Task Force Listening Tour Session

May 20, 2016

Knoxville

Nicholas A. Black, Esq. – Ralls Wooten & Black
Harold Boykin, Esq.
Aaron Campbell – Local Media
Matthew Elrod, Esq. – 4th Judicial District Assistant Public Defender
Rebecca Franklin, Esq. – Franklin Law
Bailey Harned, Esq.
Christina Kleiser, Esq. – Knox Co. Public Defender’s Community Law Office
Herbert Moncier, Esq.
Edward C. Miller, Esq. – 4th Judicial District Public Defender
Joy Radice, Esq. – Professor of Law, University of Tennessee College of Law
Christopher Seaton, Esq. – Fault Lines/Quest Collaborative Law
Michael J. Stanuszek, Esq. – The Stanuszek Law Group
Mark Stephens, Esq. – Knox County District Public Defender
Graham Swafford, Jr., Esq. – Swafford, Jenkins & Raines
Mike Whalen, Esq. – The Law Office of Mike Whalen

Indigent Representation Task Force Listening Tour Session

June 9, 2016

Cleveland

Patricia Basham, Esq.
William J. Bassett, Esq.
Abigail Burke, Esq. – Logan-Thompson, P.C.
Keith Davis, Esq.
Judith Hamilton, Esq.
Paul Pearce, Esq.
Jared Smith, Esq. – Law Office of Jared C. Smith, PLLC
Wencke West, Esq.
Charli Wyatt, Esq.

Indigent Representation Task Force Listening Tour Session

June 10, 2016

Cookeville

Paul Bruno, Esq. – Bruno/Newsom PLLC
Mingy Bryant, Esq. – Bryant Law
Lisa Cothron, Esq.
Sarah J. Cripps, Esq. – Cripps & Cox Attorneys, PLLC
Douglas Dennis, Esq. – Law Office of Douglas K. Dennis
Douglas Dimond, Esq. – General Counsel, Tennessee Dept. of Children Services
Craig Fickling, Esq. – 13th Judicial District Public Defender
John Nisbet, Esq. – Daniels and Nisbet
John Partin, Esq. – 31st Judicial District Public Defender
Tecia Puckett Pryor, Esq. – Puckett Law Offices
Judge R. Wylie Richardson – McMinn Co. General Sessions Court, Juv./Probate
Mark Tribble, Esq. – Tribble & Tribble
Bridget Willhite, Esq. – Carter, Harrod and Willhite, PLLC
Judge Jonathan Young – 13th Judicial District Circuit Court

Indigent Representation Task Force Listening Tour Session

July 29, 2016

Nashville

Jack Byrd, Esq. – Law Office of Jack Byrd, PLLC
Chad Davidson, Esq. – East Nashville Law
Dawn Deaner, Esq. – District Public Defender, 20th Judicial District
Nicole Flatt – Bring Brennen Home & Nicole Starr Ministries
Sandy Garrett, Esq. – Chief Disciplinary Counsel, Board of Professional Responsibility
Richard McGee, Esq.
Shane McNeill, Esq. – Tellus Law
Gerald Melton, Esq. – 16th Judicial District Public Defender
Nick Perenich, Esq.
Allan Ramsaur, Esq. – Executive Director - Tennessee Bar Association
Jessica Van Dyke, Esq. – Tennessee Association of Criminal Defense Lawyers
Michael Working, Esq. – The Working Law Firm

Indigent Representation Task Force Meeting

July 29, 2016

Nashville

David Byrne, Esq. – Assistant General Counsel – Administrative Office of the Courts
Pam Hancock – Fiscal Services Director – Administrative Office of the Courts
Jessica Van Dyke, Esq. – Tennessee Association of Criminal Defense Lawyers

Indigent Representation Task Force Listening Tour Session

August 11, 2016

Franklin

Henry Ambrose, Esq.
Natasha Blackshear, Esq. – Law Office of Natasha L. Blackshear
Harry Boyko, Esq.
Felicia K. Burk – Private Citizen
Nicole Flatt – Bring Brennen Home & Nicole Starr Ministries
Amanda Gentry, Esq. – Law Office of Amanda Gentry
David Grimmatt, Esq. – Grimmatt Law Firm, PLLC
John Henderson, Esq. – Retired 21st Judicial District Public Defender
Randy P. Lucas, Esq. – Lucas Law Firm
Whitney Manning – Private Citizen
Will Mullican III, Esq. – Bridge Street Attorneys
Connie Reguli, Esq. – Lawcare Family Law Center
David H. Veile, Esq. – Schell & Oglesby

Indigent Representation Task Force Meeting

September 30, 2016

Nashville

Charme P. Allen, Esq. – Tennessee District Attorneys General Conference, District Attorney General, 6th Judicial District
Chief Justice Jeffrey S. Bivins – Tennessee Supreme Court
Vince Dean - Hamilton Co. Criminal Court Clerk and President - Tennessee Clerks of Court Conference
Jerry N. Estes, Esq. – Executive Director - Tennessee District Attorneys General Conference
Judge Mark Fishburn – Tennessee Trial Judges Association, Criminal Court Judge, 20th Judicial District
Justyna Garbaczewska Scalpone, Esq. – Post-Conviction Defender – Tennessee Office of the Post-Conviction Defender

Indigent Representation Task Force Meeting

October 21, 2016

Nashville

Chief Justice Jeffrey S. Bivins – Tennessee Supreme Court
Judge Timothy Brock – 14th Judicial District General Sessions Court
David Carroll – Executive Director – Sixth Amendment Center
Leslie Barrett Kinhead, Esq. – Court Improvement Program Coordinator, Administrative Office of the Courts

Indigent Representation Task Force Meeting

January 13, 2017

Nashville

Rachel W. Harmon, Esq. – General Counsel, Administrative Office of the Courts

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APPENDIX

WRITTEN SUBMISSIONS TO THE TASK FORCE

- Ambrose, Henry Presentation: Comments on Improving Indigent Representation (Aug. 11, 2016), available at <http://www.tncourts.gov/node/4187746>
- Atnip, Joe Public Defender of the 27th Judicial District (Apr. 29, 2016), available at <http://www.tncourts.gov/node/4187746>
- Brock, Judge Timothy Presentation with Leslie Kinkead, Appointments in Juvenile Court (Sept. 26, 2016), available at <http://www.tncourts.gov/node/3852945>
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- Presentation: Juvenile Court Dockets (Sept. 26, 2016), available at <http://www.tncourts.gov/node/3852945>
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- Submission on behalf of the State of Tennessee District Public Defenders Conference, Compilation and Statistics (Nov. 8, 2016), available at <http://www.tncourts.gov/node/3993149>
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