From: "Stephen J. Jones" <sjjonesatty@gmail.com>
To: <janice.rawls@tncourts.gov>
Date: 12/10/2012 4:43 PM
Subject: TN Courts: Submit Comment on Proposed Rules

Submitted on Monday, December 10, 2012 - 4:43pm
Submitted by anonymous user: [66.18.33.130]
Submitted values are:

Your Name: Stephen J. Jones
Your Address: 73 Shallowford Rs, Apt.1, Chattanooga, Tennessee 37404
Your email address: sjjonesatty@gmail.com
Your Position or Organization: slos practitioner
Rule Change: Supreme Court Rule 13, Section 2
Docket number: M2012-02235-SC-RL2-RL
Your public comments:
On the court's previous limitation of 12.5 hours per day, which totals 44562.5 hours per year on 365 days is not excessive. I beleive that 2000 is much too low. I do a large anound of appointed works, and I often work some part of seven days in a wekk, and sometimes most of a holiday, or weekend. I don't beleive the quality of my represntation is diminished thereby.
Further, the ability of one person over another may vary, and those capable of handling a larged workload usccessfully should not be denied the opportunity to doso. The Client alos should not be denied that prerpesentation of experienced, and skilled counsel. This rule would tend to causes the latter to happen.

The results of this submission may be viewed at:
http://www.tncourts.gov/node/602760/submission/3988

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December 10, 2012

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

RE: Comment on Proposed Amendment to Supreme Court Rule 13, No. M2012-02235-SC-RL2-RL-Docket Number

Dear Mr. Catalano,

Please be kind enough to file this with the Court and disperse the same to the Honorable Justices of the Supreme Court.

MAY IT PLEASE THE COURT:

This is in regard to the proposed rule to limit the number of hours appointed counsel may bill in any given calendar year to 2000. This is apparently an attempt to cap the amount of money any given attorney may receive from the AOC for indigent defense work. The proposed rule purports to base this limit on an assumption that working more hours than 38.5 per week pre-supposes ineffective assistance of counsel.

If such is the case, working in excess of 38.5 hours equates with sub-standard performance, then the question is how is this important policing of hours to protect the client is going to be enforced on the private bar that does not accept indigent defense work. A friend of mine who recently left the job as clerk to one of our trial level judges to go to work for one of the larger firms in Nashville told me that he was told if he failed to bill on average 60 hours a week, he would not be working there for very long. Are you saying that the indigent defendant is entitled to more protection than a privately retained civil client? It would seem to me that if this presumption is valid, a mechanism to apply the standard to all attorneys would be necessary, for equal protection considerations if nothing else.

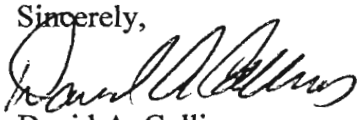
I really don't believe that is what this rule is addressing. The elephant in the room that is not being addressed directly is that apparently some attorneys, you feel, are "soaking the system" and billing for far more hours than you feel is doable. If that is in fact the problem you are seeking to address, then why not address it head-on and simply adopt a rule that when the aggregate claims of any one attorney exceed X dollar amount, the AOC is authorized to have an

audit performed to determine the legitimacy of the claims. If the audit in fact turns up fraudulent claims, then the attorney is liable for the cost of the audit and the attorney will be referred to the Board of Professional Responsibility for disciplinary action.

Those of us taking indigent defense work already have to practice with "one eye on the rear view mirror" with the thought in mind of how the doing or not doing of certain things in the course of representation will be viewed by a post-conviction court. Now, you are asking us to take the other eye off the ball and focus on a clock or calendar so as not to exceed working an arbitrary number of hours a year. There is an old adage that would appear to apply, to wit: "When you are up to your rump in alligators it's hard to remember that your original objective was to drain the swamp". This rule would certainly increase the number of alligators.

I sincerely and respectfully beg of you to find another solution to what you view as a problem with billing for indigent defense work.

Sincerely,



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Rec'd 12-14-12
Fax

DECEMBER 13, 2012

Michael W. Catalano, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
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In Re: Tennessee Supreme Court Rule 13, Section 2(g)

Dear Mr. Catalano,

I am writing in opposition to the proposed changes of the above referenced rule. Having routinely taken court appointments in all areas of juvenile law for the last three years, I believe that an annual cap on claims for court appointed lawyers would neither save state funding, nor increase efficiency of the courts of this state.

In the event that an attorney reaches his annual cap on billing, it is likely that the attorney will seek to withdraw from all of his existing appointed cases for the year. The court would then have to reassign cases to other attorneys who would then start not only the billing process over, but also have to become acquainted with the cases to which they have been appointed. I believe that this would cause dockets to become overburdened and frustrated in many instances, particularly in the metropolitan areas.

As an attorney who handles a high volume of court-appointed cases, I can say that the nature of this work is not comparable to the typical work day of a state or government position. For the most part, my days are spent in the local juvenile courthouse. In the late afternoons, I meet clients, and this continues until the early evening hours. For my practice, research and writing are often reserved for late evenings or weekends. Simply put, routinely handling a high volume of appointments often does not equate to a forty hour work week, nor does it carry a traditional "nine to five" work schedule.

While it does appear that 3,500 billable hours in a year is excessive by any standard, it is not out of the ordinary for an associate in a law firm to be expected to bill 2,200 or more hours in a calendar year. While a small hand full of attorneys have abused the existing system, I believe that the overwhelming majority of attorneys that do this work, work diligently at representing the public, and only want to be fairly compensated for the work they do. If an attorney works 2,400 hours on indigent defense cases in a given year, it only seems fair that the attorney be compensated for the work that he or she has done. Furthermore, even under the existing rule, attorneys frequently "cap out" on cases because of Rule 13 limits on compensation.

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It seems that the real issue is the few attorneys that have abused the system in years past. While I would have to agree that some measures should be taken to safeguard against fraudulent billing practices, to limit an attorneys annual compensation to 2,000 hours would be punishing the multitude of attorneys that are hard-working, honest, and diligent in their service to the public. I am honored to serve in the capacity of court appointed counsel for the indigent, but my services do not cease to exist after 5:00pm on weekdays, or even weekends for that matter. In my humble opinion, I believe that an annual cap, if set, should be much higher than 2,000 hours which would hopefully reflect the number of billable hours that an attorney could actually work over a given year. Please consider the negative consequences that this amendment would have on the indigent clients, the attorneys that represent them, and the courts. I respectfully urge the Supreme Court to reject this amendment as proposed.

Sincerely,

James Franklin, Jr.
TNBPR #024118

From: "James A. Rose" <james@jroseattorney.com>
To: <janice.rawls@tncourts.gov>
Date: 12/13/2012 1:08 PM
Subject: TN Courts: Submit Comment on Proposed Rules

Submitted on Thursday, December 13, 2012 - 1:08pm
Submitted by anonymous user: [174.50.221.42]
Submitted values are:

Your Name: James A. Rose
Your Address: 19 Music Sq W, Ste R, Nashville, TN 37203
Your email address: james@jroseattorney.com
Your Position or Organization: Solo practicing attorney
Rule Change: Supreme Court Rule 13, Section 2
Docket number: M2012-02235-SC-RL2-RL
Your public comments:
I respectfully take issue with this proposed rule change and ask that the Court at least reconsider the amount of hours allowed by individual attorneys each year. The practice of law, at least in the indigent defense arena, cannot be "boxed" into a finite amount of hours, suitable for delivery at a designated time. Each case is like a fingerprint, and each requires various amounts of decision-making, preparation, filing of pleadings and briefs, negotiation, and, sometimes, a full trial. There is no way to tell in a given year how many hours it will take to provide diligent, competent representation that would withstand Constitutional scrutiny at any level. Capping the amount of hours payable in a year is telling attorneys that they should do it for free past the 2000 hour threshold. This is insulting to attorneys who work hard to represent indigent clients each year.

Individual audits should be able to eliminate the payment of claims for unreasonable amounts of time spent on cases. To be sure, there is no such thing as an unlimited amount of time available on any case, whether compensated by the State or by a private party. We are under a duty to manage our time to ensure accuracy and efficient use of public funds or client funds. In recent years, placing limits on cases designated "complex and/or extended" was a check put in place to keep attorneys alert to this.

This amendment likely would not affect me individually in my practice. I do significant indigent defense work but also accept private-hire matters in the areas of family and entertainment law. I am respectful of noble goals but continue to grow weary of reading proposed amendments that seem to limit the amount of time attorneys may be paid to work or that threaten their livelihoods. Time after time, members of the Tennessee bar step up to the task of pro bono representation, community service, and going "above and beyond" to give back to their respective communities. Proposed rule amendments such as this send the wrong message: "Please give, but allow us to take."

Please reconsider this proposed change to Supreme Court Rule 13.

Sincerely and respectfully,
James A. Rose

The results of this submission may be viewed at:

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December 10, 2012

Mr. Michael Catalano, Clerk
100 Supreme Court Bldg.
401 7th Avenue North
Nashville, TN 37219-1407

IN RE: Docket No. M2012-02235-SC-RL2-RL
Proposed Change to Supreme Court Rule 13, Section 2

Dear Mr. Catalano:

While I do no necessarily object to the 2000 hourly yearly cap on indigent services, I feel that some provision needs to be made in the event an attorney is, during a single year, involved in (a) a death penalty case, (b) a non capital murder case and/or (c) a complex case of another nature. In that event, if the affected attorney bills over 2000 hours, his or her bill should be reviewed to ascertain whether the total billings are the result of a participation in one of these three types of cases set forth above, which are very time consuming. For instance, I can certainly see the situation where a capital murder case will take 1000 hours or more of the attorney's time during a particular year, working on weekends and the like.

Please add this comment to the list of comments you are receiving with regard to the above captioned rule.

Yours truly,

SANTORE AND SANTORE

Francis X. Santore, Jr.

TENNESSEE BAR
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December 14, 2012

The Honorable Michael Catalano
Clerk, Tennessee Supreme Court
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Nashville, TN 37219

IN RE: RULE 13, SECTION 2(g)
RULES OF THE TENNESSEE
SUPREME COURT

Dear Mike:

Attached please find an original and six copies of the Comment of the Tennessee Bar Association in reference to the above matter.

As always, thank you for your cooperation. I remain,

Very truly yours,

Allan F. Ramsaur
Executive Director

cc: Jackie Dixon, President, Tennessee Bar Association
David Eldridge, Chair, TBA Criminal Justice Section
Carl Seely, Chair, TBA Juvenile and Children's Law Section
Paul Ney, TBA General Counsel
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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: RULE 13, SECTION 2(g) RULES OF THE TENNESSEE SUPREME COURT	)	**No. M2012-02235-SC-RL2-RL**

COMMENT OF THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association ("TBA"), by and through its President, Jacqueline B. Dixon; Chair, TBA Criminal Justice Section, David Eldridge; Chair, TBA Juvenile and Children's Law Section, Carl E. Seely; General Counsel, Paul C. Ney; and Executive Director, Allan F. Ramsaur, recommends modification of the proposal to grant power to the Trial Court and the Administrative Office of the Courts the power to permit a lawyer to exceed the cap in extraordinary circumstances and to make explicit that the cap does not apply to representation in capital matters under TN. Sup. Ct. R. 13, Section 3, compensation of counsel in capital cases.

BACKGROUND

On October 23, 2012, this Honorable Court issued an order indicating that it was considering adoption of an annual cap on the total number of hours an attorney may bill for indigent services under TN. Sup. Ct. R. 13. The TBA circulated this proposal to its Criminal Justice and Juvenile and Children's Law Sections. Based on the recommendations of those sections, the Executive Committee of the TBA adopted the position recommending this Court amend the proposal in two aspects before adoption.

1. THE RULE SHOULD GIVE THE TRIAL COURT AND THE ADMINISTRATIVE OFFICE OF THE COURTS THE POWER TO PERMIT COUNSEL TO EXCEED THE CAP IN EXTRAORDINARY CIRCUMSTANCES.

In establishing other rules for payment of counsel for indigent representation, this Court has provided that both the Trial Court and the Administrative Office of the Courts can vary caps and other limitations of the rule. A similar escape clause should be adopted with respect to the establishment of the general rule that 2,000 hours per calendar year is all that is permitted.

2. THE 2000-HOUR ANNUAL CAP SHOULD NOT APPLY TO COUNSEL APPOINTED IN CAPITAL CASES.

As proposed it is unclear whether the cap applies to counsel in capital cases. Because of the extreme circumstances under which counsel in capital cases work the rule should explicitly not apply to such matters.

CONCLUSION

The rule should be amended as shown with strikes indicating deletion and underlines indicating additions as follows:

> (g) Unless the appointing Trial Court or the Administrative Office of the Courts finds that extraordinary circumstances exist, c~~C~~ounsel appointed or assigned to represent indigents shall not be paid for any time billed in excess of 2,000 hours per calendar year. It is the responsibility of private counsel to manage their billable hours in compliance with the annual maximum. The limitations provided in this subsection do not apply to counsel appointed under TN. Sup. Ct. R. 13, Section 3.

RESPECTFULLY SUBMITTED,

By: /s/ by permission _____

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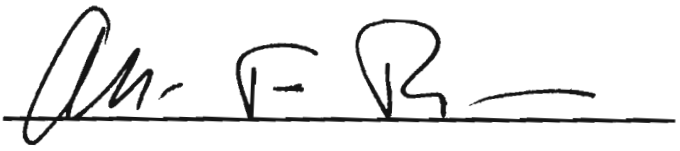
By: 

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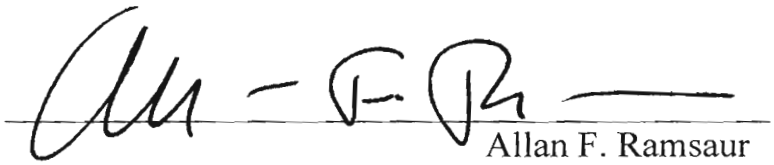
CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "A" by regular U.S. Mail, postage prepaid within seven (7) days of filing with the Court.



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From: "Walter J. Brumit" <waltbrumit@aol.com>
To: <janice.rawls@tncourts.gov>
Date: 12/14/2012 4:06 PM
Subject: TN Courts: Submit Comment on Proposed Rules

Submitted on Friday, December 14, 2012 - 4:05pm
Submitted by anonymous user: [50.149.193.110]
Submitted values are:

Your Name: Walter J. Brumit
Your Address: 30 East Dale Ct., Greeneville, TN, 37745
Your email address: waltbrumit@aol.com
Your Position or Organization: Concerned Citizen
Rule Change: Supreme Court Rule 13, Section 2
Docket number: M2012-02235-SC-RL2-RL
Your public comments:
December 14, 2012

Michael W. Catalano, Clerk
Re: Tenn. Sup. CT. R. 13, § 2(g)
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Tenn. Sup. CT. R. 13, § 2(g)
proposed rule changes

Michael W. Catalano:

As a citizen of the State of Tennessee, a qualified voter, and potential litigant living within the jurisdiction of the Tennessee Supreme Court, I do not believe that it is appropriate for The Court to amend any Supreme Court Rule; but, especially any rule concerning the employment and compensation of others whom derive their lively hood from the legitimate practice of law, while the Members of this Courts own legitimacy, their own employment and compensation, is questioned in pending litigation, see JOHN JAY HOOKER VS. GOVERNOR BILL HASLAM, et al., before a Special Tennessee Supreme Court.

For any citizen; but especially an indigent citizen, to have their legal representatives billable hours limited by a Court Rule, potentially limiting a citizens access to counsel, could impede their right to counsel, impeding their Constitutionally Guaranteed Due Process Rights. An amendment of the rules in any restrictive manner, regardless of the intentions of the court, would be extremely inappropriate. The Court already has adequate authority to sanction members of the Bar for abuse and remedies are currently available.

As the result of the pending litigation; which litigation questions the Unconstitutional Appointment of the Members of the Supreme Court, the question is open as to whether this court has jurisdiction to amend any Rule of the Court in any event.

It is for these very serious reasons that this citizen, qualified voter, and potential litigant would ask that the members of This Supreme Court postpone any decision on any amendment until your own legitimacy is ratified by the complete disposition of the Case cited above.

Sincerely,

Walt Brumit
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Greeneville, TN 37745
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The results of this submission may be viewed at:
http://www.tncourts.gov/node/602760/submission/4029

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- DISTRICT

December 14, 2012

Michael W. Catalano, Clerk
Re: Tenn. Sup. Ct. R. 13, § 2(g)
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

RE: Proposed Amendment Tennessee Supreme Court Rule 13, §2(g)
No. M2012-02235-SC-RL2-RL - Filed: October 23, 2012

To Whom It May Concern:

This comment is in response to the nonsensical proposed amendment to Tennessee Supreme Court Rule 13, Section 2(g), in which the Administrative Office of the Courts is seeking to impose a cap on how much work an attorney can spend on indigent cases, including those that involve abused and neglected children, per year. In short, it very much appears that, in addition to the previous caps that state how much that the Administrative Office of the Courts will pay an attorney for a particular type of case, the Administrative Office of the Courts now proposes to elongate litigation, further jam up the trial courts, transplant the judgment of the trial court judges as to which attorney is appropriate for which case with their own, create additional costs for the taxpayers of Tennessee in the short-term, and, in the long-term, invite a federal court to run the Tennessee Indigent Defense Fund when it's inevitably determined that Tennessee is no longer protecting the fundamental constitutional rights of its citizens.

The idea that attorneys must – or even can if the attorney is in high demand – work less than 38.5 hours per week and comply with ethical requirements for competent representation and rules such as Tennessee Supreme Court Rule 40 is asinine. Over the last three years, my average weekly billing time is approximately 55.1 hours per week. I

routinely practice before seven (7) judges and average three cases per year at the Court of Appeals/Court of Criminal Appeals and dispose of hundreds of cases per year. What does that require? Well, after the court day is through and the rest of the family has settled down to sleep, I am routinely working through the night and often work at least one day on the weekend. Is that a bad thing? Not from my point of view, because **I chose to do so.** I do not have a habit of turning down appointments when asked by trial judges for assistance, because all of Tennessee's citizens need competent legal representation at some time or another.

The Administrative Office of the Courts also cites days off as a veiled attempt to tar and feather those who represent indigent clients as frauds and thieves. I would like to address those charges from my own experiences. As the father of two precocious little boys, there are a decent number of colds and illnesses that make their way into our home. It probably doesn't help that I work so many hours, as the drain on my immune system is a natural result. However, I have soldiered on, because there are consequences to my clients. A man doesn't get out of jail when he should. A mother doesn't have her child to tuck into bed that night. A court date gets set out for months. A reset in a certain juvenile court that we practice in regularly can mean a five (5) to six (6) month reset, greatly delaying reunification with a parent or, in many cases, the child being out of the custody of the Tennessee Department of Children's Services. That being the case, I have taken two sick days this year. I worked from the office both of those days, but I was unable to go into court. The previous year (2011), I didn't take any. I was unable to travel to court for two days in 2010. So, over the past three years, I am averaging 1.3 sick days per year – and even on those, work is being accomplished in the office through e-mails, telephone calls, participation in CFTMs by telephone, etc. The same thing with the one week of vacation that my family takes a year. There are still e-mails, telephone calls, emergencies, CFTMs, etc., that are taking place and must be dealt with, so it's not like some form of work isn't happening then, either.

That takes us to the most hurtful – and ridiculous – accusation in the Supreme Court's Order – that my representation is inadequate because I carry a heavy caseload. If this was an interrogatory, I would demand that strict proof of such be furnished. As in typical AOC fashion, the stated (and false) appreciation "for all that (we) do for the indigent people of Tennessee" is overridden by the baseless accusation that I am committing malpractice in some of my cases. I would love to know what case of mine the AOC is targeting, because I dare say that the trial judges who continue to appoint me at a steady clip would beg to differ. If the quality of my work was suffering, then my appointments would dry up and, because I do believe that I have a great working relationship with the judges before whom I practice, they would let me know. Of course, this potential amendment is just another in a long line of attempts for the Supreme Court to strip away the ability of a trial judge to administer his or her own courtroom, so, in many respects, the designation of who can be appointed on a given case is to be expected.

With all due respect to the Supreme Court, the assertion that heavy caseloads equal malpractice or poor representation is inappropriate for this forum. I have always believed that the Board of Professional Responsibility did a fabulous job of disciplining attorneys who had ethical mishaps or whose work fell beneath an acceptable standard. If my heavy caseload was indicative of poor performance, one would expect me to have a plethora of complaints with the BPR. However, that is not the case, and I have never had to answer a

complaint in that forum. In fact, I don't know of any attorney who currently handles a heavy indigent caseload that has been the subject of a complaint lodged with the BPR. And if it is the position of the Supreme Court that attorneys working over 38.5 hours per week are producing shoddy work and are committing malpractice, is the Supreme Court going to investigate the billing practice of **all attorneys** in private practice and censure them accordingly? That would only seem consistent and equally protective of all of us.

So what is the outcome of this amendment? One of two things is likely to occur, depending on the attorney. Some will work their cases as they have been, continuing to produce the same standard of care that they have been. Then, when they reach this arbitrary cap, they will simply cease to practice their indigent cases for that year and reset them until January 1st of the following year. Due to the ridiculously low cap that has been proposed, my work year on indigent cases would end in late September. At that time, I would reset all of my cases to January and, if there is a complaint by a client, I will furnish them with the AOC's number and the number of a good class action attorney. This certainly isn't a good practice for the trial courts in any case, but it will affect some cases more than others. What about dependency and neglect cases, where emergencies crop up all of the time, where the need for CFTMs is nearly constant, and where federal mandates exist that will cost Tennessee federal funding when certain time requirements are not met? Other attorneys may cut their work weeks to four days per week as a way of controlling the cap. This will mean that cases stay in the system longer, that criminals stay in jail longer, and that children stay in DCS custody longer. If the point of passing this amendment is to cost the State money, then it seems like a fantastic way of accomplishing that end. Of course, when the inevitable lawsuits follow against the AOC, and a federal court is taxed with the prospect of protecting the fundamental constitutional rights of Tennessee citizens, the most costly aspect of this policy would be if the federal court decided to administer the Indigent Defense Fund, as happened with the schools in Missouri in the mid-1980s or with the nursing homes in Alabama. I do admit that it would be interesting to see what a federal judge thought of the $40 per hour rate for indigent cases, a rate that hasn't been increased since some retired judges that I know were putting out a shingle.

I vigorously argue against this amendment. There is a belief held by many in private practice that the AOC intends to adopt this amendment no matter what comments are submitted, as seen in the extraordinarily short comment period and the deadline resting a solid 17 days prior to the implimentation of the cap. There also seems to be no firm answer in either the Order or Appendix that explains when hours are applied to a certain year (options being when the claim is entered by the attorney, when the claim is approved by the judge, or when the AOC finally decides to pay the attorney for the work that he or she performed). As with many of the revolving door of reforms instituted by the AOC, it appears that the consequences of this amendment have not been thoroughly contemplated.

I admit that what I do – whether it's having to protect a newborn drug-exposed infant from her abusive mother, or representing a criminal defendant from the considerable prosecutorial powers of the State – is difficult in itself. Today, I ask the AOC and this Honorable Court to help me by not trying to make it more difficult, which, unfortunately, has been the pattern over the past several years. Please scrap this amendment and

instead work on ways to streamline the system so that we can remove the glut of cases from our crowded court dockets. I thank you for your time in this matter.

Regards,

Robert L. Huddleston

CC: The Honorable Ron Ramsey, Lt. Governor of Tennessee

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

RE: Comment on Proposed Amendment to Supreme Court Rule 13, No. M2012-02235-SC-RL2-RL-Docket Number

Dear Mr. Catalano,

Please be kind enough to file this with the Court and disperse the same to the Honorable Justices of the Supreme Court.

Hopefully, the Honorable Justices of the Tennessee Supreme Court will take into account the tremendous experience Billable Hours, Inc.,(BHI) as an organization has in dealing with the administration of indigent representation claims. BHI handles claims administration and payment of claims for indigent work payable by the AOC for over 400 attorneys and has been engaged in providing this service for approximately 7 years now. As such, I would, with all due respect for the Court, state that the Court has before it an organization with great expertise in these issues and the Court should not only rely upon the opinions, advice, and counsel of BHI, but should call upon it for the same. With that said, it is my sincere hope that the Honorable Justices of the Court will consider with thoroughness the commentary provided below prior to making any decision on the pending amendment to Supreme Court Rule 13, Section 2.

BHI has conducted a poll of its clients, and while some are not opposed to the Proposed Amendment, others are. Therefore, BHI does not take a formal position as to whether or not the Court should or should not adopt the Proposed Amendment. However, BHI does desire to point out some issues the Court should consider when making its decision regarding the Proposed Amendment and what systems the Court

should put in place should the Court determine the Amendment is in the best interests of the courts, the attorneys, the indigent litigants, and of course, the taxpayers.

Before providing any further commentary, BHI attorney clients and those who may become clients should know that beginning early in the first quarter of 2013, the formal online claims management portal will be available, and among other things, will provide a time tracking calculator to assist with keeping up with hours in the event the Proposed Amendment passes. In addition to the indigent practice management online tool that will provide many benefits to BHI attorneys, BHI will be providing its attorneys with notifications of when an attorney is reaching the 2000 annual hour cap or other annual cap as may be set by the Court. Further, BHI will have pre populated template orders of withdrawal available at the click of a button for when this cap is reached. BHI's system will analyze other attorneys in the locale of attorneys that have reached a cap and will notify them of potential appointments that may become available when an attorney withdraws due to reaching the annual cap. Along with this feature will be a form order of appointment for the new attorney to take to the court and request appointment and potentially the new appointment order language being included in the form orders of withdrawal.

It is BHI's intention to assist its clients with not working over any cap that the Court determines "threatens" adequate representation, while at the same time, assisting the courts with new appointments in a timely fashion, all the while assisting with the "Re-distribution" of the cases that attorneys have withdrawn from due to having reached a "threatening" threshold. Any attorney who may be interested in having these types of services available to him or her is welcome to contact BHI, all of the staff at BHI will be grateful for the opportunity to be of service to your practice.

The Proposed Amendment must be read as an attempt to ensure adequate representation. However, the Court should analyze the effect on cost savings. The result of the implementation of this Proposed Amendment will likely not be a cost savings, but rather a cost increase requiring the taxpayers to expend more, not less. The "norms" and "standards" will either place the courts in a position for continuances and additional expenditures of time and resources or will place attorneys in untenable positions. The Proposed Amendment will have an effect on the entire legal system because if the

Supreme Court opines that 2000 hours worked or billed threatens adequate representation, then it must be concluded that a threat to adequate representation anywhere is a threat to adequate representation everywhere and the standard should be applied across the board to all attorneys, not just those who accept court appointments.

The Proposed Amendment attempts to mold the indigent representation system after the insurance defense system. If the Court desires to mold the indigent representation in such a fashion, the Court should institute several other systems and changes in order to bring the two systems in line with one another.

I. Is the Proposed Amendment a Cost Savings measure or an ethical "adequate" representation issue?

The proposed Order fleshes out the "norms" or "standards" to be 2000 hours per calendar year of case related activities. The Order states explicitly that hours billed in excess of these norms "threaten" the adequacy of representation provided to indigent clients due to excessive case loads. One must assume that it is not the hours billed in excess of these norms that is the issue, but rather the hours "worked" in excess of these norms regardless of billed, paid, or not billed and/or not paid. It logically follows that the Court has concluded that hours worked in excess of the "norms" is a "threat" to the "adequacy" of representation.

The Order does state that "billing", not necessarily working hours in excess of these norms calls into question the reasonableness of the claims submitted. The proposed rule in section 2(g) states that Counsel "appointed or assigned" to represent indigents shall not be "paid" for any time billed in excess of 2,000 hours per calendar year. If the Court is truly concerned about the adequacy of representation, then the rule should read as follows: that Counsel "appointed or assigned" to represent indigents shall not engage in **work** on behalf of those to which he or she has been appointed or assigned in excess of 2,000 hours per calendar year.

It is difficult to align the language of the Proposed Amendment with the explanatory language of the Order proposing the Amendment. On one hand the Court discusses the "Standards" and the "Norms" in relation to excessive caseloads and "adequacy" of representation, while the other hand speaks directly to the amount of hours an attorney may be "paid" for, not the amount of hours an attorney may work. It would

certainly seem that since the true motive of the Proposed Amendment must be to curtail excessive caseloads and protect the constitutional sanctity of adequate representation, all the language in the Order and the proposed rule should be geared towards the amount of time worked, regardless of whether or not it was billed or "paid".

II. Norms and Standards and their affect on the system.

Since it appears that the real issue is that attorney caseloads be curtailed, then the Proposed Amendment should provide for an automatic and **required** withdrawal of an attorney who reaches the standard and "threatens" the adequacy of representation. This, of course, would be based upon time "worked" regardless of whether the time was billed and paid for. This brings up the question of how to deal with cases that require attorneys to work in excess of the caps and who file an extended and complex that is not paid. These unpaid hours would need to be included in the 2000 hour limitation because it is the working of 2000 hours that threatens "adequate" representation, not whether the attorney was paid for the work. An attorney must bill this time as the claim forms requires an attorney to certify the time and expenses billed are "true, accurate and **complete**"

Should the Court elect not to include a mandatory withdrawal requirement in the Proposed Amendment then there will simply be additional grounds for post convictions, other litigation, and more appeals. If the Court opines that working or billing in excess of 2000 hours "threatens" adequate representation it is simply creating a slippery slope upon which one of two things will occur:

a. Attorneys will be forced to withdraw upon reaching the threshold that "threatens" adequate representation

   or

b. Attorneys will continue to work without being paid, all the while "threatening" adequate representation and creating grounds for post convictions, appeals and other proceedings.

If the Court wants to really "threaten" "adequate" representation, then it should require attorneys to work in excess of 2000 hours without even the chance of being paid for said work. This will result in disgruntled attorneys faced with unreasonable financial

burdens working in excess of the threshold the Court has determined "threatens" adequate representation.

The above seems to create an interesting dichotomy, just as the Proposed Amendment and the language contained in the Order proposing it does. Either A, allow and mandate that attorneys who reach the threshold of "threat" to adequate representation withdraw immediately upon reaching the same, or B, refuse to allow attorneys to withdraw and require them to cross the threshold, and "threaten adequate representation", all the while, doing so for free. If the Court chooses to mandate withdrawal, then the courts will simply be required to appoint new counsel to replace the threshold crossing attorneys. This will require new attorneys billing time to become acquainted with the new cases they were appointed to due to the threatening lawyer's withdrawal. Then if those attorneys reach the "threatening" threshold, the process will begin again. This process just seems to be an unmanageable scenario that will likely have the exact opposite effect of decreasing costs. However, if this is what is necessary to ensure adequate representation is provided, then it a necessary scenario that the courts, the attorneys and the litigants must endure.

The alternative is not to allow a "threatening" attorney to withdraw and require the "threatening" attorney to continue working cases without pay for the work completed. This of course, with the new "norm" or "standard" of "threatened adequate representation" simply puts the attorney in a spot that is untenable. The attorney, with the adoption of the new rule will be told that he or she "threatens adequate representation" when he or she works or "bills" for more than 2000 hours, but yet if he or she is required to continue working a case post crossing the "threatening" threshold because he or she is not allowed to withdraw, the Court will be requiring the attorney to deliver representation that the Court has determined to be "threatening" of adequate representation.

If the attorney is required to continue on a case, without pay, having crossed the "threatening" threshold, there will simply be more post convictions, with this being a ground, there will be more appeals. The potential for litigation against the state aimed at dipping into the pockets of its taxpayers may become ever present. Each of these instances will most likely offset any cost savings and will most likely result in costs in addition to that which the taxpayers currently expend.

It would seem fitting that since the language of the Order proposing the Amendment sets out the "norm" and "standard" and is concerned with adequate representation that the only option would be to mandate an attorney's withdrawal upon reaching the "threatening" threshold and require the courts to accept and approve the withdrawal and appoint new counsel in each of these instances.

With the threshold being set, it appears that an attorney will be required to withdraw upon meeting the threshold per the existing Rules of Professional Responsibility. What is the outcome? Trial judges around November of each year will be required to appoint new attorneys to many cases, and those new attorneys may also be reaching the threatening threshold. This will result in continuances and delays in hearings, and confused and elongated dockets. The likely result will be additional expenditures by the department of children's services, local law enforcement offices, the district attorney's offices, the courts, the clerks, as well as the public defenders' offices.

When continuances are required additional expenditures are necessary from many different areas. These essential continuances upon the withdrawal of attorneys who have met the "threatening" threshold will most certainly exceed the overall cost savings the state may experience from a limitation of 2000 billable hours. Just because one line item in a budget results in a cost savings does not mean that the overall costs are reduced. Oftentimes, reducing, inappropriately, one line item in a budget results in a substantial increase in the requisite outlay of another line item. This would likely be the case in this instance should the Court adopt the Proposed Amendment.

III. How does the Proposed Amendment affect the legal system outside of the indigent system and how should it?

Having concluded that the Order and its Proposed Amendment's overall concern must be adequate representation and considering that the author of the Order and its Proposed Amendment, The Tennessee Supreme Court, is also the author of the Rules of Professional Responsibility, and since the author of said Rules will have determined that hours "billed" in excess of the "norms" or "standards" threatens adequate representation, should the Proposed Amendment be adopted, then the Court should apply this "norm" or "standard" to all attorneys in the state, not just those who choose to engage in substantial representation of indigent folks.

Since it will appear the Supreme Court believes that hours "billed" in excess of the "norm" or "standard" threatens adequate representation, should the Proposed Amendment be adopted, one would be hard-pressed to argue that it only **threatens adequate representation of indigent folks. It would appear that a threat to adequate representation anywhere would be a threat to adequate representation everywhere.** It would also seem fitting that the Court not only require appointed counsel to withdraw upon reaching the "threatening" threshold, but that counsel in all cases, including divorce, personal injury, contract litigation, and all other areas of practice withdraw from representation of all clients upon reaching 2000 hours or put off all work on these cases until the next calendar year, doing otherwise would simply be a "threat" to adequate representation.

With this newly developed "norm" or "standard" is the Court just opening up the door to malpractice lawsuits? Imagine the attorney that billed 3,000 hours in the calendar year in which his or her alleged malpractice occurred. Now imagine the trier of fact hearing the very words of the Supreme Court "hours billed in excess of these norms threatens the adequacy of representation....." The Court cannot, in good faith, say that there is one dangerous threshold; if you are representing an indigent person, and another if you are representing a paying client. It appears that the Court has created a very difficult scenario. Is the Court ready to impose "standards" and "norms" on attorneys across the board? If there is a dangerous threshold, it would necessarily apply across the board, not just to attorneys who engage in indigent representation, but to those attorneys that work 70 hours per week for law firms or in private practice in small or solo firms doing work other than indigent representation. Why would the standards be any different; if 2000 hours worked or billed on cases threatens adequate representation of indigents, it threatens adequate representation for paying clients as well.

IV. Indigent Representation and "Insurance" Defense.

It appears that the Court is attempting to reshape the indigent representation system of Tennessee after the insurance defense model that insurance companies are using today. Should the Court continue to move towards equalizing the two types of representation and remodeling the indigent representation system of the state after the insurance defense model used by insurance companies, then the Court should amend

Supreme Court Rule 13 and other Supreme Court Rules so as to bring the two types of practice areas inline.

First, the Court should substantially increase the hourly rate for indigent representation to bring it more in line with the hourly rate of insurance defense attorneys. Second, the Court should make sure that the hourly rate will cover overhead, including assistants, rent, malpractice insurance, etc. Third, the Court should make available, without limitation, experts, investigators, court reporters and other services providers who are readily available to insurance defense attorneys. Although there are other areas that will need to be brought in line should the Court continue to model the indigent system after the insurance defense system, the Court should most certainly amend the Rules of Professional Responsibility to apply the 2000 hour standard to all attorneys and prohibit any attorney engaged in any type of practice from working or billing for work in excess of 2000 hours as doing so "threatens" adequate representation. This, of course, would include requiring all attorneys to contemporaneously track their time for cases upon which they were paid a flat fee or other fee type and to ensure that regardless of the fee type, flat, contingency, hourly, pro bono, or otherwise that the hours an attorney actually works on cases in a calendar year does not exceed 2000 hours.

V. Conclusion

I implore the Court to consider whether or not the passage of the Proposed Amendment will truly be a cost savings or will it be a cost increase or does it matter if the motive of the Proposed Amendment is to ensure that adequate representation is provided. I would also ask the Court to strongly consider whether or not the "Norm" or "Standard" that threatens adequate representation should be applied across the board, and if not, to please provide a justification for not applying a "norm" or "standard" to all equally. Third, I would suggest to the Court that many changes need to be made should the Court continue to attempt to mold the indigent representation system into a system akin to the insurance defense system beginning with a substantial increase in the hourly rate paid to the attorneys who are accepting court appointments. Should the Court adopt the Proposed Amendment, the Court should include language in the rule that mandates withdrawal when an attorney reaches the "threatening" threshold, as doing otherwise

would be requiring an attorney to provide representation when the Court has stated that doing so "threatens" adequate representation.

Should the Court adopt the Proposed Amendment, the Court should clarify the difference between "hours" worked on cases and "hours" billed on cases. This clarification is necessary because the language of the Order proposing the amendment seem to allude that it is the hours worked on cases is what "threatens" adequate representation, not whether an attorney actually billed for those hours worked or was, or is, paid for those hours. The Court will be hard pressed to reasonably opine that it is the hours that are "paid" that threaten adequate representation regardless of the number of hours actually worked. It would surely seem regardless of whether time worked on a case appears on a claim or whether or not the AOC ultimately pays for the same, more than 2000 hours of work on cases in a calendar year is what "threatens" adequate representation. Under this scenario, an attorney who worked solely pro bono and put in 2100 hours would "threaten" adequate representation. Should the Court adopt the Amendment the Court should take great measures to address the audit procedures and the need to eliminate staff considering the overall annual cap.

The language proposed by the Court's Order is insufficient to clarify the actual "threat" to adequate representation. The language should be modified in proposed section 2(g) to ensure that an attorney who represents indigents should not "work" more than 2000 hours on cases regardless of whether the attorney is actually "paid" for the work. This language would seem to be more appropriate to ensure that adequate representation is not "threatened." This would then take into account all the work that is completed on cases that the AOC denies payment as a result of audits, denial of extended and complex payments, and the like. Furthermore, including such language would include time that was cut out of a claim by a judge as not reasonable or necessary. It would certainly seem that whether the work completed on a case was or was not reasonable or necessary or whether it was paid or not paid by the AOC it was still work completed on the case and therefore should be included in the "threatening" calculation.

In closing, I would again like to offer the assistance of BHI to the AOC and the Justices of the Court concerning any issues related to the administration of indigent representation claims free of charge to the taxpayers of Tennessee. BHI's staff has a

tremendous amount of experience dealing with the real world aspect of this system and would be happy to assist the AOC or the Court at any time on these issues. With that offer having been made, I truly hope the Court will strongly consider whether or not the Proposed Rule Change is in the best interest of the courts, the attorneys, the indigent litigants and the taxpayers. Should the Court determine that an annual cap is necessary, hopefully the Court will ensure that the annual cap is geared toward the "hours" worked, not the "hours" paid as it cannot be said that hours paid is a threat. Finally, should the Court make the determination that there is to be some type of annual cap, the Court should take action to ensure that the annual hourly cap instituted to ensure "adequate representation" in the indigent representation system is applied equally across the board to all attorneys in all aspects of representing clients because the Court would most certainly have to conclude that a threat to "adequate representation" anywhere would be a threat to "adequate representation" everywhere. Surely, the Court does not want to set one "threatening threshold" for the attorney who represents indigents and another for someone who represents paying clients in the same courts on the same cases. This would simply not be just.

Thanking the Justices for their Honorable service to this great State and for consideration of my commentary on behalf of Billable Hours, Inc., I shall remain,

Forever grateful,

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