

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PROPOSED AMENDMENT TO SUPREME COURT RULE 13

1. Filed September 8, 2003

ORDER

This Court hereby publishes for public comment a proposed amendment to Supreme Court Rule 13, which is attached hereto as [Exhibit A. Section 4\(a\)\(3\)\(K\)](#) of proposed Rule 13 is hereby adopted as the interim rule for payment of Spoken Foreign Language Interpreters and Translators. The Administrative Office of the Courts is hereby authorized to process and pay claims in accordance with this provision.

The Court hereby solicits written comments on the proposed amendment from the bench, the bar, and the public. The deadline for submitting written comments is November 14, 2003. Comments should be addressed to:

Cecil V. Crowson, Jr.
RE: Rule 13 Comments
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

The Clerk shall provide a copy of this order and the proposed amendment to the Tennessee Attorney General's Office, the Tennessee District Public Defenders Conference, and the Tennessee District Attorneys General Conference. In addition, this order and the proposed amendment shall be posted on the Tennessee Supreme Court website.

It is so ORDERED.

PER CURIAM

APPENDIX A - PROPOSED AMENDED RULE 13

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

(a)(1) The purposes of this rule are: (i) to provide for the appointment of counsel in all proceedings in which an indigent party has a statutory or constitutional right to appointed counsel; (ii) to establish qualifications and provide for compensation of appointed counsel in non-capital cases; (iii) to establish qualifications and provide for compensation of appointed counsel in capital cases, including capital post-conviction proceedings; (iv) to provide for payment of expenses incident to appointed counsel's representation; (v) to provide for the appointment and compensation of experts, investigators, and other support services for indigent defendants in criminal cases and petitioners in capital post-conviction proceedings; and (vi) to establish procedures for review of claims for compensation and reimbursement of expenses. This rule is intended 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 40-30-201 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; and

(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.

(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 in which a juvenile is charged upon three (3) or more court proceedings to be unruly as defined in Tennessee Code Annotated section 37-1-126(a).

(e)(1) 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.

(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-conviction 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. 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 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.

(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, e.g., Tenn. Sup. Ct. R. 14 (setting out the procedure for withdrawal in the Court of Criminal Appeals).

Explanatory Comment: Proposed section 1(e)(1) has been revised for simplicity and organization. Proposed section 1(e)(2) states that the finding of indigency must be evidenced by a court order. Proposed section 1(e)(4)(D) includes a specific standard that must be satisfied before counsel may refuse an appointment. Proposed section 1(e)(5) clarifies that appointed counsel is obligated to represent the indigent party until a court allows counsel to withdraw.

(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: Proposed section 1(f) substitutes “indigent party” for “defendant” and clarifies the rights of indigent parties and the obligations of courts when an indigent party chooses to proceed pro se.

Section 2. Qualifications and 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, 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 shall not be compensated in non-capital cases.

Explanatory Comment: Proposed section 2(b) unequivocally provides that only one attorney will be compensated in non-capital cases.

(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.

Explanatory Comment: Proposed section 2(c) is intended to clarify how attorney time will be compensated. Under this proposed revision, appointed counsel will not

be compensated in-court rates for time spent waiting for a case to be called. In addition, appointed counsel will not be compensated for time spent on Board of Professional Responsibility complaints arising from the appointment.

(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) Cases in which an adult or a juvenile is charged with a misdemeanor and is in jeopardy of incarceration;

(B) 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;

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

(D) Contempt of court cases where an adult or juvenile is in jeopardy of incarceration;

(E) 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;

(F) 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;

(G) Parole revocation proceedings pursuant to the authority of state and/or federal law;

(H) Judicial proceedings under Tennessee Code Annotated, Title 33, Chapters 3 through 8, Mental Health Law;

(I) Cases in which a superintendent of a mental health facility files a petition under the guardianship law, Tennessee Code Annotated, Title 34;

(J) 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;

(K) Cases in which a juvenile is charged upon three (3) or more court proceedings to be unruly as defined in Tennessee Code Annotated section 37-1-126(a);

(L) 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;

(M) 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, for all post-dispositional proceedings, including foster care review board hearings, post-dispositional court reviews, and permanency hearings.

Explanatory Comment: Proposed section 2(d)(2)(B),(C), (E) & (F) reflects the current practice with respect to compensating attorneys in dependency and neglect cases; however, the proposed revisions further define the dispositional and post-dispositional phases at which compensation is appropriate. Proposed section 2(d)(2)(L) & (M) compensates attorneys appointed in dependency and neglect cases pursuant to Supreme Court Rule 40(e)(2).

(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 trial courts in which the defendant is charged with a felony;

(C) Direct and interlocutory appeals;

(D) Cases in which a defendant is applying for early release from incarceration or a suspended sentence;

(E) Non-capital post-conviction and *habeas corpus* proceedings;

(F) Probation revocation proceedings;

(G) Cases in which a juvenile is charged with a non-capital felony;

(H) Proceedings against parents in which allegations against the parents could result in termination of parental rights;

(I) Guardian ad litem representation in termination of parental rights cases in accordance with section 1(d)(2)(D);

(J) 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;

(K) All other non-capital cases in which the indigent party has a statutory or constitutional right to be represented by counsel.

Explanatory Comment: Proposed section 2(d)(3)(J) compensates attorneys

appointed in termination of parental rights cases pursuant to Supreme Court Rule 40(e)(2).

(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 in accordance with Tennessee Code Annotated section 40-14-207(a)(2). 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 witness; (C) the case involved multiple protracted hearings; (D) the case involved novel and complex legal issues. If the motion is granted, an order shall be forwarded to the Director of the Administrative Office of the Courts (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.

(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) Except as provided in section (2)(e)(3)(C), two thousand dollars (\$2,000) in those categories of cases where the maximum compensation is otherwise one thousand dollars (\$1,000);

(C) Three thousand dollars (\$3,000) in cases in trial courts in which the defendant is charged with a felony. Where the felony charged is first-degree murder, the chief justice may waive the three thousand dollar (\$3,000) maximum if the order demonstrates that extraordinary circumstances exist and failure to waive the maximum would result in undue hardship.

Explanatory Comment: *Proposed section 2(e)(1) attempts to better delineate the procedure and factors supporting certification of a case as complex or extended. Proposed section 2(e)(2) has been revised for clarity and consistency. Proposed section 2(e)(3) has been added to reiterate that approval of the director or the chief*

justice is required. Proposed section 2(e)(3)(A)-(C) has been revised to simplify and clarify the language. Proposed section 2(e)(3)(C) has been revised to limit waiver of the \$3,000 maximum to first-degree murder cases, rather than all homicide cases.

(f) Claims for compensation shall be submitted no later than 180 days after disposition of the case in each court in which representation is provided. Claims for compensation submitted after the 180-day period will be deemed waived and will not be paid.

Explanatory Comment: *Proposed section 2(f) mandating submission of claims within a certain period of time is designed to assist with budgeting and auditing concerns.*

(g) Absent extraordinary circumstances that warrant personal delivery, attorneys shall not be compensated for time or expenses associated with traveling to a court in another county for the sole purpose of hand-delivering or filing a document.

Explanatory Comment: *Proposed section 2(g) precludes compensating attorneys for time spent driving to and from a clerk's office to file 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.

Explanatory Comment: *Proposed section 3(a) clarifies that even if a trial court allows two appointed attorneys to remain on a case after a notice of intent to seek the death penalty is withdrawn under proposed section 3(b)(3), counsel will be compensated at non-capital rates for services rendered after the date the notice 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. 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 judge 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.

Explanatory Comment: Proposed section 3(b)(1) has been revised to require that both attorneys appointed be licensed Tennessee attorneys with significant experience in Tennessee criminal trial practice. Proposed section 3(b)(1) also clarifies that the appointment order must specify lead and co-counsel and that the public defender must serve and be designated lead counsel whenever possible. The language in proposed section 3(b)(2) & (3) was added by a recent amendment as section 3(l). This language has been moved to improve the organization of the section.

(c) Lead counsel must:

(1) be a member in good standing of the Tennessee bar;

(2) have regularly represented defendants in criminal jury trials for at least three years;

(3) have completed a minimum of twelve hours of specialized training in the defense of defendants charged with a capital offense; and

(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; or

(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.

Explanatory Comment: Proposed section 3(c) has been revised to limit appointed lead counsel to members in good standing of the Tennessee bar.

(d) Co-counsel must:

(1) be a member in good standing of the Tennessee bar;

(2) have completed a minimum of 12 hours of specialized training in the defense of defendants charged with a capital offense; and

(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.

Explanatory Comment: *Proposed section 3(d) has been revised to limit appointed co-counsel to members in good standing of the Tennessee bar.*

(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, counsel must be members in good standing of the Tennessee Bar and maintain law offices in the state of Tennessee.

Explanatory Comment: *Proposed section 3(f) has been revised to limit appointed appellate counsel to members in good standing of the Tennessee bar who maintain law offices in the state of Tennessee.*

(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 following qualifications: 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) A prisoner who seeks relief from a conviction or sentence in a state trial or appellate court when the prisoner's execution is imminent is entitled to the representation of no more than two attorneys, at least one of whom is qualified as a post-conviction counsel as set forth in section 3(h). For purposes of this rule execution is imminent if the prisoner has unsuccessfully pursued all state and federal remedies for testing the validity and correctness of the conviction and sentence and the Tennessee Supreme Court has set an execution date.

(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 to the Administrative Office of the Courts interim claims for compensation as approved by the court in which such services are rendered. Interim claims shall include services rendered within the previous 180-day period. Compensation requests shall be deemed waived and shall not be paid if the request includes claims 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.

Explanatory Comment: Proposed section 3(j) unequivocally states that compensation of appointed counsel in capital cases is subject to the limitations of this rule and declares these limitations reasonable. Proposed section 3(j) also mandates interim billing in capital cases on a 180-day basis. This proposal is designed to assist with auditing and budgeting.

(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).

Explanatory Comment: Proposed section 3(k)(7) & (8) provides that attorneys appointed pursuant to proposed section 3(i) will be compensated at the same \$60/\$80 rates applicable in other capital post-conviction proceedings.

(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.

Explanatory Comment: Proposed section 3(l) clarifies the activities to which the in-court and out-of-court compensation rates apply. This proposal would preclude compensating appointed counsel at in-court rates for time spent waiting for a case to be called. This proposal would also preclude compensating appointed counsel for time spent defending against a Board of Professional Responsibility action that arises from the appointment.

(m) Absent extraordinary circumstances that warrant personal delivery, attorneys shall not be compensated for time or expenses associated with traveling to a court in another county for the sole purpose of hand-delivering or filing a document.

Explanatory Comment: Proposed section 3(m) precludes compensating attorneys for time spent driving to and from a clerk’s office to file documents.

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 at actual costs, not to exceed the current authorized state rate (\$70), if supported by a receipt, where an overnight stay is required;

(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 .07 per page; (ii) Actual cost of outsourced copying if accompanied by a receipt, at a rate not to exceed .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.

(G) Color Copies - In-house color copying at a rate not to exceed \$1.00 per page. Actual cost of outsourced color copies at a rate not to exceed \$1.00 per page if accompanied by a receipt.

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

(I) Computerized Research at actual cost for case-related legal and internet research if receipts are provided. 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.

(J) Miscellaneous expenses such as postage, 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 total miscellaneous expenses will exceed \$250.

(K) Spoken Foreign Language Interpreters and Translators - (i) The reasonable costs associated with an interpreter's and/or translator's services will be compensated when a trial court finds, upon motion of counsel, or sua sponte when counsel has not been appointed, that an indigent party has limited English proficiency ("LEP"). The term "interpret" refers to the process of transmitting the spoken word from one language to another. The term "translate" refers to the process of transmitting the written word from one language to another. (ii) This section rather than Tennessee Rule of Criminal Procedure 28 applies when an indigent party requires the services of a spoken foreign language interpreter. (iii) Compensation rates for spoken foreign language interpreters shall not exceed the following: Certified Interpreters - \$50 per hour; Registered Interpreters - \$40 per hour; Non-credentialed Interpreters - \$30 per hour. For languages other than Spanish: if the court finds that these rates are inadequate to secure the services of a qualified interpreter, the court shall make written findings regarding such inadequacy and determine a reasonable rate for a qualified interpreter. (iv) Time spent traveling shall be compensated at no greater than fifty (50) percent of the approved hourly rate. (v) Mileage, lodging, meals, and parking expenses may be reimbursed as provided in Section 4(a)(3)(B), (C), (D), and (E). (vi) The court shall determine if it is reasonably necessary for documents to be translated as part of assuring adequate representation of an indigent party with LEP. Document translation shall be compensated at no more than twenty (20) cents per word. For languages other than Spanish: if the court finds that these rates are inadequate to secure the services of a qualified translator, the court shall make written findings regarding such inadequacy and determine a reasonable per word translation rate. (vii) Claims for compensation of interpreters and translators shall be submitted to the Administrative Office of the Courts on forms provided by the Administrative Office of the Courts.

(L) 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.

Explanatory Comment: Proposed section 4(a)(3) is intended to provide uniformity and certainty as to expenses that will be reimbursed. This proposal also sets out the documentation that must accompany a claim for reimbursement. To the extent that proposed section 4(a)(3)(E)-(J) permits reimbursement without prior approval, these proposals are a change from current practice and are intended to eliminate time currently spent by attorneys returning to court to obtain prior approval for these expenses, time currently spent by judges considering such requests, and time spent auditing such requests. Proposed 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. Proposed section (4)(a)(3)(K) provides a mechanism for paying spoken foreign language interpreters and translators and defines the terms "interprets" and "translates." The proposal allows trial courts to increase the rates paid interpreters and translators for languages other than Spanish in certain circumstances. This proposal compensates travel at a reduced rate and reimburses travel expenses, consistent with attorneys, experts, and investigators.

(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.

Explanatory Comment: Proposed section 4(b) clarifies that prior approval is required for every expense not listed in Section 4(a) and delineates the requirements and procedure for obtaining prior approval. Proposed section 4(b) dispenses with the current requirement that prior approval be obtained from both the director and the chief justice and makes the decision of the director final.

(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.

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

(a) In the trial and direct appeals of all criminal cases involving indigent defendants and in the trial and direct appeals of post-conviction proceedings in capital cases involving indigent petitioners, counsel may seek investigative, expert, or other similar services.

(1) When requesting funding for expert or investigative services or other similar services in capital trials, capital direct appeals, and capital post-conviction proceedings, counsel may file *ex parte* the motion seeking such funding. See Tenn. Code Ann. § 40-14-217; Tenn. Code Ann. § 40-30-215; Owens v. State, 908 S.W.2d 923 (Tenn. 1994).

(2) When requesting funding for psychiatric and/or psychological expert assistance in non-capital criminal trials and direct appeals, counsel may file *ex parte* the motion seeking such funding. See Ake v. Oklahoma, 470 U.S. 68 (1985); State v. Barnett, 909 S.W.2d 423 (Tenn. 1995).

(3) In non-capital criminal trials and direct appeals, counsel may file *ex parte* the motion requesting funding for investigative, expert, or other similar services. However, unless the motion is requesting funding of a psychiatric and/or psychological expert, the trial court may determine after reviewing the *ex parte* motion that maintaining the confidentiality of the request is not constitutionally required. See Barnett, 909 S.W.2d at 428 n.4; State v. White, 457 S.E.2d 841 (N.C. 1995); State v. Ballard, 428 S.E.2d 178, 180-81 (N.C. 1993); State v. Phipps, 418 S.E.2d 178, 190-91 (N.C. 1992). In such circumstances, the trial court has the authority to require defense counsel to serve a copy of the motion on the district attorney general and to hold a contested hearing on the request.

(4) 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).

Explanatory Comment: *Proposed section 5(a)(1), consistent with current statutes and case law, allows funding for experts and investigators in capital cases to be sought by an ex parte motion. Proposed section 5(a)(2), also consistent with current case law, allows funding for psychiatric experts in non-capital criminal cases to be sought by an ex parte motion. Proposed section 5(a)(3), again consistent with current case law, affords the trial court discretion in non-capital criminal cases to determine whether hearings on requests for funding of non-psychiatric experts, investigative, or other similar services should be ex parte or open. Proposed section*

5(a)(4), consistent with current law, states that funding for investigative, expert, or other similar services is not available in non-capital post-conviction cases.

(b)(1) Any motion seeking funding for expert or similar services shall itemize: (A) the nature of the services requested; (B) the name, address, and qualifications, 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.

(2) Every effort shall be made to obtain the services of an in-state expert, or if an in-state expert is not available, an expert from a contiguous state. If the person or entity proposed to provide the service is not located in Tennessee or a contiguous state, the motion shall explain the efforts made to obtain the services of an expert in Tennessee or a contiguous state.

(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 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 a hearing on the motion. If the motion is requesting funding pursuant to section 5(a)(1) or (2), the hearing shall be *ex parte*. If the motion is requesting funding pursuant to section 5(a)(3), the trial court has the discretion to determine whether the hearing should be *ex parte* or open and contested.

Explanatory Comment: Proposed section 5(b)(1) delineates the information that must be included in or submitted with a motion requesting funding for experts, investigative, or other similar services. Proposed section 5(b)(2) declares that every effort must be made to obtain an in-state expert or an expert from a contiguous state. Proposed section 5(b)(3) specifically delineates the information that must be included in motions seeking funding for investigators. Proposed section 5(b)(4) is consistent with and implements proposed section (5)(a)(1)- (3), previously explained.

(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, such as interviewing witnesses. 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).

Explanatory Comment: *Proposed section 5(c)(1) has been revised for clarity. Proposed sections 5(c)(2)-(4) are consistent with existing case law on the definitions of particularized need and the standards governing funding requests. These provisions have been included in the proposed rule to assist lawyers and judges.*

(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. Individuals or entities currently providing services at a rate below the maximum shall continue to be compensated at the lesser rate. 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	\$125.00
(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) Time spent traveling shall be compensated at no greater than fifty percent (50%) the approved hourly rate.

(3) Investigators shall not be compensated unless licensed by the Private Investigation and Polygraph Commission of Tennessee, 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 \$20,000 for investigative services. See Tenn. Code Ann. § 40-30-218.

(5) In a post-conviction capital case, a trial court shall not authorize more than \$25,000 for the services of experts. See Tenn. Code Ann. § 40-30-218.

(6) Expert tests whose results are not admissible as evidence shall not be authorized or compensated.

Explanatory Comment: Proposed section 5(d)(1) is intended to provide certainty and guidance to attorneys, service providers, and trial courts. Proposed section 5(d)(1) instructs the director and/or the chief justice to maintain uniformity in the rates paid to individuals for services provided to indigent parties across the state. This proposal is intended to ensure that an expert is paid the same rate in each case. Proposed section 5(d)(1) establishes maximum hourly rates that will be paid for certain services, but provides that individuals or entities currently providing services below these maximum rates will continue to be paid the existing rates and that counsel must seek to retain individuals or entities providing services at a rate less than the maximum. Proposed section 5(d)(2) and (3) are statements which reflect current policy. Proposed section 5(d)(4) and (5) impose maximums on the

amounts which may be approved in capital post-conviction proceedings. Proposed section 5(b)(6) is a statement that reflects current policy.

(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 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 this subsection 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 to the director for prior approval.

(5) If the director denies prior approval of the request, or the request exceeds five thousand dollars (\$5,000) per expert, or the hourly rate exceeds one hundred and fifty dollars (\$150), the claim shall also be transmitted to the chief justice for disposition and prior approval.

Explanatory Comment: *Proposed section 5(e)(1) delineates the information that must be included in or attached to orders authorizing funding. Proposed section 5(e)(4)-(5), consistent with recent amendments, requires that orders authorizing funding under this section be submitted to the director and/or the chief justice for prior approval before the service is provided.*

(f) Interim billing is not permitted for services provided in non-capital cases.

Explanatory Comment: *Proposed section 5(f) is intended to reduce the administrative burden and assist in auditing and budgeting.*

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

(a)(1) Claims for compensation and reimbursement shall be filed on approved forms with the Administrative Office of the Courts.

(2) Time spent by counsel on a single case or single 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, by a copy of the approval of the director and/or the chief justice, where required, and by the certification of counsel that the services

authorized by court order have been rendered.

(4) Counsel will be held to a high degree of care in the keeping of records supporting all claims and in the application 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.

Explanatory Comment: Proposed section 6(a) has been revised to clarify the requirements for claims for compensation and reimbursement. The last sentence of proposed section 6(a)(4) clarifies that counsel is responsible for providing the required documentation. Currently, administrative staff spend a great deal of time contacting attorneys to request the correct documentation.

(b)(1) The Administrative Office of the Courts shall examine and audit all claims for compensation and reimbursement to insure compliance with this rule 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.

Explanatory Comment: Proposed section 6(b) has been revised to declare the determination of the director and/or the chief justice final and to eliminate the opportunity to ask the Supreme Court to review the decision of the director or the chief justice.