

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENT OF RULE 42,
RULES OF THE TENNESSEE SUPREME COURT

FILED

MAY 18 2012

Clerk of the Courts

No. M2012-01045-RL2-RL - Filed: May 18, 2012

ORDER

The Administrative Office of the Courts (“AOC”) has proposed expanding and updating the provisions of Rule 42, Rules of the Supreme Court, governing the appointment and compensation of court interpreters and translators in this state. To that end, the AOC has proposed substantial revisions to the current Rule 42, as well as a related amendment to Rule 13, section 4(d).

After considering the AOC’s proposed amendments, the Court hereby publishes the proposed amendments and solicits written comments concerning the amendments from the bench, the bar, interested organizations, and the public. *See* Appendix A (proposed amendments to Tenn. Sup. Ct. R. 42) and Appendix B (proposed amendments to Tenn. Sup. Ct. R. 13, § 4(d)). Written comments shall be submitted and *received by the Clerk* on or before Friday, June 15, 2012. Comments should be addressed to:

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

and should reference the docket number set out above.

The Clerk shall provide a copy of this order to LexisNexis and to Thomson Reuters. In addition, this order shall be posted on the Tennessee Supreme Court’s website.

IT IS SO ORDERED.

PER CURIAM

APPENDIX A

Proposed Amendments to Tenn. Sup. Ct. R. 42

The proposed amendments to Rule 42 would amend each of the following sections as indicated below. The remaining provisions of the current Rule 42 would not be changed.

[amend Section 1 to read, in its entirety:]

Section 1. Scope. This rule, except where noted, shall apply to all courts in this state, including without limitation, municipal court, general sessions court, juvenile court, probate court, circuit court, chancery court, criminal court, and the appellate courts.

[amend Section 2, Definitions, by adding the following two new definitions:]

(10) Court Proceedings – any hearing, trial, or other appearance before any Tennessee general sessions court, or municipal court exercising general sessions jurisdiction, or any juvenile, probate, circuit, chancery, criminal, or appellate court, in an action, appeal, or other proceeding, including any matter conducted by a judicial magistrate.

(11) Indigent Party – A party found by a court to be indigent pursuant to the provisions of Tennessee Code Annotated section 40-14-202 or other applicable statute, which finding shall be evidenced by a court order.

[amend Section 4 to read, in its entirety:]

Section 4. Procedures.

(a) Appearance by Interpreter. — Appearances by interpreters appointed pursuant to this rule shall be arranged by the attorney, party, court clerk, or judicial assistant, as determined by the local rules or at the direction of the court.

(b) Waiver of Interpreter. — The LEP participant may at any point in the proceeding waive the services of an interpreter. The waiver of the interpreter's services must be knowing and voluntary, and with the approval of the court. Granting such waiver is a matter of judicial discretion, subject to the procedural requirements of section 4(b)(1).

(1) Waiver Procedure.

(i) Before approving a waiver, the judge, in open court, must first explain to the LEP person through an interpreter the nature and effect of the waiver; and

(ii) the judge must determine in open court that the waiver has been made knowingly, intelligently, and voluntarily.

(iii) If the LEP person is the defendant in a criminal matter, the court must further determine that the defendant has been afforded the opportunity to consult with his or her attorney.

(2) At any point in any proceeding, for good cause shown, the LEP person may retract his or her waiver and request an interpreter.

(c) Interpreter Oath. — All interpreters, before commencing their duties, shall take an oath that they will make a true and impartial interpretation using their best skills and judgment in accordance with the standards and ethics of the interpreter profession. The court shall use the following oath:

“Do you solemnly swear or affirm that you will interpret accurately, completely and impartially, using your best skill and judgment in accordance with the standards prescribed by law and the Rules of Ethics for Spoken Foreign Language Interpreters in Tennessee Courts; that you will follow all official guidelines established by this court for legal interpreting or translating, and discharge all of the solemn duties and obligations of legal interpretation and translation?”

Commentary.

Section 4(a). Comment. The person(s) responsible for arranging for the services of the interpreter and making sure the interpreter is available for appointment to provide services for the court hearing(s) shall be left to the local courts to decide. It is recommended that local rules reflect the arrangement process to assist those appearing before the courts.

Section 4(c). Comment 1. It is common practice for interpreter oaths to be sworn to and maintained on file for all interpreters who are regularly employed by a court. This simplifies the court’s inquiries in open court during procedural hearings.

It is recommended, however, that an oath be read and sworn to in open court in all proceedings conducted before a jury.

Section 4(c). Comment 2. The Rules of Ethics for Spoken Foreign Language Interpreters in Tennessee Courts address the various ethical responsibilities of interpreters for accuracy and completeness, impartiality, confidentiality, and other matters relating to the professional conduct of interpreters. The court should be alerted to potential conflicts of interest or other violations of the Rules of Ethics. The sanction of removal from the case is justified for any violations of the Rules of Ethics. See Tennessee Supreme Court Rule 41 for additional information.

[amend Section 7 to read, in its entirety:]

Section 7. Cost of Interpreter Services. The reasonable costs associated with an interpreter's and/or translator's services will be compensated pursuant to this section 7 when a general sessions court, or a municipal court exercising general sessions jurisdiction, or a juvenile, probate, circuit, chancery, criminal, or appellate court, finds, on motion of a party or on the court's own initiative, that a party has limited English proficiency. 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.

This section 7 shall not apply to costs associated with an interpreter's and/or translator's services in a municipal court not exercising general sessions jurisdiction. In such cases, costs associated with an interpreter's and/or translator's services will be paid in accordance with the municipal court's local rules or by order of the municipal court judge.

(a) Rates of Compensation. Compensation rates for services provided by spoken Spanish foreign language interpreters shall not exceed the following: Certified Interpreter – \$50 per hour; Registered Interpreter – \$40 per hour; Non-Credentialed Interpreter – \$25 per hour. Compensation rates for services provided by spoken foreign language interpreters for languages other than Spanish shall not exceed \$75 per hour. Compensation for interpreters or translators shall not exceed the following: Certified Interpreter – \$500 per day; Registered Interpreter – \$400 per day; Non-Credentialed Interpreter – \$250 per day. An amount in excess of the rates set forth herein may be sought by filing a motion in the court in which the services are sought. The motion shall include specific factual allegations demonstrating that the higher rates are necessary. If the motion is granted, an order shall be forwarded to the Director of the AOC (“director”), and the order shall recite the specific facts supporting the finding. The director shall review for approval prior to the services being rendered. If the

director denies prior approval of the request, the claim shall be transmitted to the chief justice for disposition. The determination of the chief justice shall be final.

(b) Translation of Documents. 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 a rate of twenty cents (\$0.20) per word. If the court finds that this rate is 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.

(c) Translation of Audio or Video Media. Services associated with the review or transcription/translation of audio or video tapes that include languages other than English shall be compensated at the same rate provided for spoken foreign language interpreters in section 3 of this rule.

(d) Expenses. The following expenses shall be paid as indicated:

(1) 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;

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

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

(4) Parking at actual costs up to ten dollars per day, if supported by a receipt.

(e) Other Expenses and Compensation for Travel Time. Expenses not listed in this section 7 and compensation for time spent traveling to and from assignments will not be reimbursed or paid. However, payment for expenses not listed or compensation for travel time may be sought by a motion filed in the court in which the services are sought. The motion shall be filed prior to incurring the requested expenses and shall include specific factual allegations demonstrating that the requested expenses are necessary. If the motion is granted, the court's order shall recite the specific facts supporting the finding, and the court's order shall promptly be forwarded the director of the AOC. If the order authorizes payment for travel time, the maximum amount paid for time spent traveling shall not exceed fifty percent (50%) of the applicable hourly rate set out in section 7(a). The order and any attachments shall be submitted to the director before any expenses are incurred. If the

director denies prior approval of the request, the claim shall be transmitted to the chief justice for disposition. The determination of the chief justice shall be final.

(f) Prior Approval Required for Services Exceeding \$5,000. If the court approves an amount in excess of five thousand dollars (\$5,000) for interpreter/translator services, the order(s) and any attachments must be submitted to the director for prior approval. If the director denies prior approval of the request, the claim shall be transmitted to the chief justice for disposition. The determination of the chief justice shall be final.

(g) Claims Procedures.

(1) Claims for compensation of interpreters and translators shall be submitted by interpreters to the AOC on forms (electronic or paper) as determined by the AOC. The forms must be signed by the court. The interpreter's submission to the AOC must also include a copy of the court's order appointing the interpreter/translator. The AOC shall examine and audit all claims for compensation and reimbursement to insure compliance with this rule and other statutory requirements. 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.

(2) The AOC is authorized to establish and implement a system for the electronic submission of claims for payment of fees and expenses incurred pursuant to this rule.

(i) Electronic claims that total less than two hundred dollars (\$200.00) shall be exempt from the judicial review and approval requirement. Such claims, however, shall be subject to the AOC's examination and audit pursuant to sections 7(g)(1) and 7(j).

(ii) Until the electronic claims system is implemented, claims for payment of fees and expenses under this rule may be filed by using paper claim forms. The AOC, however, is authorized to require the use of the electronic claims system for all claims submitted after implementation of the system, unless the AOC authorizes the submission of a claim in some other form because of exigent circumstances in a particular case.

(h) Contract Services and Pilot Projects. To facilitate the prompt and efficient disposition of proceedings which involve individuals with LEP, the AOC director may

contract with interpreters for half day and full day rates. If the AOC director does so, the courts shall use those contracted interpreters unless those interpreters are unavailable. Courts may wish to utilize credentialed interpreters on a full-time or part-time basis with reimbursement for those services from the AOC. A request by a court to do so shall be made to the director of the AOC. The rate of compensation shall not exceed, under any circumstances, the rates provided for in this rule. Counties wishing to be reimbursed for these expenses shall contact the AOC, which will determine in what amounts and by what method said reimbursement shall be made. In addition, the AOC is authorized to establish pilot projects that may include, but are not limited to, pilot projects for alternative methods of payment for interpreters' services, for video or audio remote interpretation, for regional interpreter centers, and for the use of independent contractors.

(i) Time for Submitting Claims. Claims for compensation under this rule shall be submitted within 180 days of the day the services were rendered. Claims submitted more than 180 days after the services were rendered shall be deemed waived and shall not be paid. The time limitation imposed by this section 7(i) shall become effective on October 1, 2012.

(j) Examination and Audit by AOC.

(1) The AOC shall examine and audit all claims for compensation and reimbursement to insure compliance with this rule and other statutory requirements. The AOC may decline to make any payment should there be a failure to comply with the requirements of Rule 13, this Rule or any other statutory requirements

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

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

(4) The determination by the director shall be final, except where review by the chief justice also is required. In those instances, the determination of the chief justice shall be final. The chief justice may designate another justice to perform this function if the chief justice determines that a designation is appropriate or necessary.

(5) If the director denies a fee claim in whole or substantial part, such denial shall be forwarded to the chief justice for review. The determination of the chief justice shall be final. Reductions made during the process of auditing a fee claim

which are due to mathematical miscalculations or result from requests for payments not permitted by this rule shall not be forwarded to the chief justice for review.

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

(k) Eligible Cases and Covered Proceedings. Interpreter costs pursuant to this rule shall be paid in the following cases:

(1) In the following cases in which an indigent party has a statutory or constitutional right to appointed counsel:

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

(ii) Contempt of court proceedings in which the defendant is in jeopardy of incarceration;

(iii) Proceedings initiated by a petition for habeas corpus, early release from incarceration, suspended sentence, or probation revocation;

(iv) Proceedings initiated by a petition for post-conviction relief, subject to the provisions of Tennessee Supreme Court Rule 28 and Tennessee Code Annotated sections 40-30-101 et seq.;

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

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

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

(vii) 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;

(viii) 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;

(ix) 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;

(x) Reports of abuse or neglect or investigation reports under Tennessee Code Annotated sections 37-1-401 through 37-1-411;

(xi) Proceedings to terminate parental rights;

(xii) Cases alleging unruly conduct of a child which place the child in jeopardy of being removed from the home pursuant to Tennessee Code Annotated section 37-1-132(b).

(2) In cases where an indigent party has a statutory or constitutional right to appointed counsel, as defined in 7(k)(1), interpreter costs will be paid for the following proceedings:

(i) All court hearings;

(ii) Pre-trial conferences between defendants and district attorneys in order to relay a plea offer immediately prior to a court appearance or to discuss a continuance;

(iii) Communication between client and state funded counsel appointed pursuant to Supreme Court Rule 13;

(iv) Completion of evaluations and investigations ordered by and performed for the purpose of aiding the court in making a determination.

(3) In cases where a party has a statutory or constitutional right to appointed counsel, as defined in section 7(k)(1), and is not found to be indigent, interpreter costs will only be paid in "court proceedings," as defined in section 2.

(4) If a party does not have a statutory or constitutional right to appointed counsel, interpreter costs will only be paid in “court proceedings,” as defined in section 2.

(5) At no time will the AOC pay for the costs of interpreters in the following situations, unless pursuant to section 7(k)(2) above:

(i) Communication with attorneys, prosecutors, or other parties related to a case involving LEP individuals for the purpose of gathering background information, investigation, trial preparation, witness interviews, or client representation at a future proceeding;

(ii) Communications relating to probation treatment services;

(iii) Any other communication which is not part of a court proceeding (including but not limited to parent education courses, batterers intervention classes, mediation, or DUI classes);

(6) All programs in which parties are statutorily required to attend or are ordered to attend, including but not limited to batterers intervention programs, parent education courses, or mediation prior to a divorce being granted, shall be paid for by the independent provider of the services or by the parties.

Commentary. Interested persons should contact the Tennessee Administrative Office of the Courts to determine the circumstances in which interpreter services may be approved and paid for by the Administrative Office of the Courts.

APPENDIX B

Proposed Amendments to Tenn. Sup. Ct. R. 13, Section 4(d)

[The following proposed amendments to Tenn. Sup. Ct. R. 13, § 4(d) would be considered if the Court were to adopt the proposed amendments to Tenn. Sup. Ct. R. 42, as set out in Appendix A.]

[If the Court adopts the amendments to Rule 42, as set out in Appendix A, amend Rule 13 by deleting section 4(d) in its entirety and replacing it with the following new section 4(d):]

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

[In addition, amend the Explanatory Comment to Rule 13, § 4 as indicated below (new text indicated by underlining, deleted text indicated by overstriking):]

EXPLANATORY COMMENT: Section 4(a) provides uniform guidelines and certainty as to expenses that will be reimbursed and delineates the documentation that must accompany a claim for reimbursement. Section 4(a)(3) permits reimbursement without prior approval of certain expenses and is intended to eliminate time previously spent by attorneys and judges considering such expenses. Section 4(a)(3)(F)(iv) clarifies that attorneys will not be reimbursed for the costs of copying the record since the record belongs to the indigent party. Section 4(b) delineates the expenses for which prior approval is required and sets out the requirements and procedure for obtaining prior approval. Section 4(b) dispenses with the former requirement that prior approval be obtained from both the director and the chief justice and makes prior approval of the director essential and final. Section 4(d) cross-references Tenn. Sup. Ct. R. 42, which provides the mechanism and method for compensating spoken foreign language interpreters and translators. ~~Section (4)(d)(10) provides a mechanism for reimbursing counties that choose to utilize credentialed interpreters on a full-time or part-time basis.~~