

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

IN RE RULE 13, SECTIONS 2 AND 3

RULES OF THE TENNESSEE SUPREME COURT

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) No. ADM2018-00796

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I. Introduction

The Tennessee Association of Criminal Defense Lawyers (TACDL) and the National Association of Criminal Defense Lawyers (NACDL) jointly provide this statement encouraging the Tennessee Supreme Court to adopt such amendments to Rule 13 as necessary to assure all those represented by public defense attorneys have counsel who are sufficiently resourced, supported, and trained, who have caseloads that allow them to provide meaningful representation at all stages of the proceedings, and who are adequately compensated to assure that counsel may fulfill all his or her ethical and legal obligations to their appointed clients.

TACDL is a non-profit corporation chartered in Tennessee in 1973, representing over 1,000 members statewide. TACDL seeks to promote study and provide assistance within its membership in the field of criminal law. TACDL is committed to advocating the fair and effective administration of criminal justice. Its mission includes providing education, training, and support to criminal defense lawyers, as well as promoting advocacy before courts and the legislature of reforms calculated to improve the administration of criminal justice in Tennessee.

NACDL is a non-profit voluntary professional bar association that promotes a society where all individuals receive fair, rational, and humane treatment within the criminal justice system. To that end, NACDL seeks to identify and reform flaws and inequities in the criminal justice system, redress systemic racism, and ensure that its members and other in the criminal defense system are fully equipped to serve all accused persons at the highest level. Founded in 1958, NACDL's thousands of direct members and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys, including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges are dedicated to advancing the proper, efficient, and fair administration of justice.

As an organization, NACDL has authored numerous reports relating to the state of public defense, including state focused reports in Louisiana ([State of Crisis](#)), South Carolina ([Summary Injustice](#) and [Rush to Judgment](#)), and Florida ([3 Minute Justice](#)); a three-part examination of public defense in America ([Gideon at 50](#) Parts 1, 2 and 3); and an examination of the Federal Indigent Defense System ([Federal Indigent Defense 2015: The Independence Imperative](#)). NACDL has also served as amicus on numerous filings related to the provision of indigent defense services in state and local courts including [Hurrell-Harring v. State of New York](#), [Tucker v. Idaho](#) and [Kuren v. Luzerne County \(PA\)](#). NACDL hopes that its national perspective drawn from sixty years of advocacy, investigation, training, and public defense reform efforts will be helpful to the Court. As the nation's

preeminent criminal defense bar, NACDL is keenly interested in the issues raised by the proposed amendments to Rule 13 before this Court.

II. Proposed Amendments to Rule 13

The proposed amendments to Tennessee Supreme Court Rule 13, sections 2 and 3 provide only small cosmetic changes to the compensation system currently in place. The modest increase in the case preparation rate and related changes to some of the case compensation fee caps (“fee caps”) do not fully address the more fundamental need to redress Tennessee’s current compensation structure. Both TACDL and NACDL encourage the Court to heed three recommendations of the 2017 Tennessee Indigent Representation Task Force (“Task Force”) report, [*Liberty & Justice for All: Providing Right to Counsel Services in Tennessee*](#) (“*Liberty & Justice*”) relating specifically to Rule 13, to wit:

- (1) Eliminate the distinction between the rate paid for work done outside of court and the work done while the attorney is in court;
- (2) Raise the rate of compensation for court appointed counsel to at least \$75/hour; and
- (3) Eliminate the use of caps and the need for specific “complex case” designations, allowing attorneys to be paid fully for the work they perform.

TACDL and NACDL believe these changes are vital to assuring a healthy, vibrant, and constitutionally effective public defense delivery system in Tennessee.

The Court’s Proposed Changes:

The Court’s current amendments meet the first of these recommendations, raising the rate for case preparation work from \$40 per hour to \$50 per hour, and thus providing a single compensation rate for all work on appointed cases. This change provides not only an increase in payment, but serves as an important recognition that the work done preparing for the case is just as important as the work done in the courtroom itself. This welcomed change will reinforce for all criminal justice actors that keys to effective representation include early, regular, and meaningful contact between the attorney and client, conducting factual and mitigation-focused investigations, conducting research and drafting and filing motions.

Unfortunately the resulting proposed universal rate of \$50 per hour is still woefully inadequate compensation, especially when it is coupled with compensation caps. This low fee, limited hour construct may keep costs down for the locality, but that is done at the expense of assuring meaningful and constitutionally effective representation for the person accused or, alternatively, by forcing a small segment of the legal community to personally subsidized the state’s obligation to provide counsel to all who are eligible.

The Need for Proper Compensation:

From 1994 to the present day, attorneys accepting court appointments have been paid \$40/hour for out of court work and \$50.00/hour for in court work. Over this same 24 year period inflation has grown. As a result, stagnation in the attorney compensation rate has effectively meant an annual **decrease** in pay for those attorneys accepting court appointments.

YEAR	COURT APPOINTED RATE (for in court work)	VALUE BASED ON CONSUMER PRICE INDEX ¹
1994	\$50/hr.	\$50.00/hr.
2004	\$50/hr.	\$39.47/hr.
2015	\$50/hr.	\$31.25/hr.
2018	\$50/hr.	\$29.49/hr.

Several prior filings to this Court regarding the need to increase the court appointed attorney rate have cited a 1992 study by the Spangenberg Group. This report indicated the average overhead costs for a court appointed criminal defense attorney was \$47.26 per hour. In other words, **in 1994**, after expenses, attorneys **earned \$2.74** for every hour they were in court on a court appointed case (paid at a rate of \$40.00 per hour) **and lost \$7.26 per hour** each hour they worked on a case outside of court.

Today the gap between overhead expenses and income has grown from a crack to a chasm. If overhead expenses simply kept pace with the [Consumer Price Index](#), the \$47.26 hourly overhead cost would now be \$124.22, thus widening the gap between expenses and payment from an earned income of \$2.74/hour to a loss of \$74.22 per hour.

Notably, while court appointed counsel rates have remained the same for nearly a quarter century, pay for other key court system actors including public defenders, prosecutors, and judges, have all risen. These other system actors, by statute, receive regular increases in their salaries tied to either pay increases provided to other state employees ([T.C.A. sec. 8-7-201 et. seq.](#) and [T.C.A. sec. 8-14-207](#)) or the Consumer Price Index ([T.C.A. sec. 8-23-103](#)). The fact that these other system participants receive increases to account for increases in daily expenses, makes clear such steps are necessary to retain qualified persons for these positions.

In addition to regular increases in pay based upon changes to the cost of living, the statutory compensation scheme for both Assistant Attorneys General and Assistant Public Defenders provides for increases in pay based upon years of service. In creating this provision for prosecutors, the legislature noted that such was needed to further “the goal of

¹ CPI represents the Consumer Price Index. The CPI values calculated in this table reflect the cost and CPI adjustment on January 1 of the year listed. https://www.bls.gov/data/inflation_calculator.htm (last visited June 23, 2018)

developing a corps of capable and experienced full-time prosecuting attorneys throughout the state, and thus enhancing the state's ability to cope with recent increases in crime and criminal activity in the state.” T.C.A. sec. 8-7-201. The practice reflects recognition that in order to develop and retain high caliber attorneys, the state must provide pay which reflects their growing expertise. Despite this provision’s existence for prosecutors and institutional defenders, no such steps are taken to provide higher compensation rates for court appointed attorneys based upon their years of experience or the complexity of the cases they are handling.²

This inadequate pay rate is further exacerbated by the use of fee caps. These types of barriers, especially as they are now set, serve to further financially burden those defenders who take on court appointed cases and engage in zealous, constitutionally effective representation. Upon reaching the number of hours allotted under the cap, these defenders must either continue to work with no compensation, or attempt to establish their case is one which should be classified as a complex or extended case.

The current criteria for complex or extended cases are such that a lawyer must demonstrate his or her case is an exception. Only a small percentage of cases each year are classified as complex/extended. However, a review of practice standards such as the [ABA's Criminal Justice Section Standards for the Defense Function](#) reveal the myriad of responsibilities placed on defense counsel, from having early and regular communications with clients, to engaging in discovery, investigations, and mitigation; conducting negotiations with the prosecutor; researching and advising clients of collateral consequences of their case; preparing for court proceedings; and conducting hearings. It is unquestioned that the complexity and sheer volume of information being provided in criminal cases has grown—with regularity attorneys are receiving multiple video/audio recordings from body worn cameras, in-vehicle dash cams, and private sources (such as surveillance cameras); being confronted with issues relating to forensic evidence such as DNA, fingerprints, or tool marks; and needing to gather and review a variety of medical and mental health records. This means attorneys must spend significantly more hours on their cases today than they did even just a decade ago. However, the compensation caps have remained largely unchanged. As a result attorneys must choose to either complete the work needed to provide effective representation without compensation or take short cuts to assure they are able to be fully compensated for the work they have done on a case.

While the Court’s proposed changes do call for some increase to the compensation caps, the increases are minor (\$250 to \$500) and do not fully take into account the increasing complexity of criminal defense obligations. Rather, the increases seem to largely be designed to account for the \$10/hour increase in the case preparation rate, although alarmingly, there is no increase in the compensation cap for misdemeanor matters.

² Rule 13 does provide for a higher rate of compensation for lead counsel in a capital case (\$80/hour) and co-counsel in a capital case (\$60/hour) but does not make any additional provisions for increased pay rates for those handling murder or Class A or Class B felony cases.

In misdemeanor cases, just like their felony counterparts, defense attorneys have an obligation to meet with and keep the client reasonably informed about their case, to conduct investigation and legal research, to receive and review discovery, to advise their client on how to proceed in the case, and to prepare for court. Misdemeanors compose a large percentage of criminal cases in which counsel is appointed, yet the Court's proposed changes to Rule 13 fail to reflect an increase in the cap for these cases.

Similarly concerning is that the Court's proposed changes provide minimal compensation for direct appeals and post-conviction and habeas representation. These areas are highly specialized and extremely complex and require additional expertise, experience, and skill. By maintaining low compensation rates, the proposed rule changes can only work to further dissuade individuals to accept these specialized cases and to dissuade other attorneys from gaining any expertise in these fields.

Rather than adjusting the compensation caps, this Court should follow the recommendations of the Task Force and remove the caps and the use of complex/extended case designations, allowing each case to be compensated based on the actual number of hours necessary to assure effective constitutional representation.

III. The Importance of Adequate Compensation for Court Appointed Counsel

"That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command... an accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Majority opinion by Justice O'Connor in [Strickland v. Washington](#), 466 U.S. 668, 686 (1984).

The right to counsel as guaranteed by the Sixth Amendment has various crucial components. Counsel must have the requisite skill, experience, and knowledge to provide meaningful representation in the case to which they are assigned. *Id.* Counsel must also have adequate resources and reasonable caseloads that allow the lawyer to meet the standards for constitutional representation.³

Having adequately resourced, skilled, and trained counsel helps protect against wrongful convictions, because they are able to conduct thorough investigations and make meaningful challenges to improper forensic sciences. Attorneys with proper caseloads and support have the ability to assure meaningful examinations of government conduct, preserving the Fourth, Fifth and Sixth Amendment rights of the community. Counsel with time, education, and experience can assist in identifying and addressing underlying conditions such as substance abuse, mental illness, and trauma, allowing for the use of treatment, services and diversions which help reduce recidivism. The intervention and actions of counsel can help mitigate the myriad of [collateral consequences](#) that often attend

³ Meaningful representation guidelines can be found in the [ABA Standards for Defense Function](#), Standards 4-3.2, 4-3.6, 4-4.1, and 4-1.3(e).

convictions of even the most minor of crimes. Collectively, meaningful representation protects the state's coffers and increases the community's confidence in the justice system.

The right to counsel also encompasses the right to have conflict free counsel. This means not only counsel free of a traditional conflicts of interest but includes having counsel whose commitment to his or her client does not compete against the attorney's financial interests in operating their practice and earning a living wage.⁴

It is easy to understand that excessively low compensation results in poor quality representation. Low rates of pay force many attorneys to take on more cases than they can properly handle in an effort to earn sufficient income. While the Rules provide that an attorney may not take on more than 2000 hours of court-appointed representation annually, there is nothing preventing these attorneys from handling a full-time court appointed caseload (40 hours per week x 50 weeks=2000 hours/year) AND operating a full-time private practice.

Low rates of pay also discourage higher quality, more experienced counsel from accepting court appointments. Moreover, inadequate rates of pay will lead to counsel devoting minimal time to their work if they are losing money throughout the representation, as it appears that the rate of compensation is likely significantly below the hourly overhead cost.

IV. Courts Have the Authority to Act

While this Rule petition falls within the purview of the Court, the funding for any increases in public defense spending must be appropriated by the legislature. This factor can lead courts to be inactive in pursuing public defense reforms, as they see their actions as limited by the appetite of the legislature to provide additional resources. However, across the nation, courts have acted when other branches of government have failed to protect fundamental fairness in the judicial system. State cases where courts have acted regarding assigned counsel rates are discussed in [The Constitution, Compensation, and Competence: A Case Study](#), 27 Am. J. Crim. L.1, Robert Rigg, 1999. Cases demonstrating the court's authority to act include:

- Alabama: [Wright v. Childree](#), 972 So.2d 771 (Ala.2006): Holding attorneys entitled to overhead plus a reasonable fee.
- Alaska: [DeLisio v. Alaska](#), 740 P.2d 437 (Alaska 1987): "Requiring an attorney to represent an individual criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole." The *DeLisio* court found that the state cannot deny

⁴ According to the [ABA's Task Force on the Financing of Legal Education](#), those graduating law school in academic year 2012-2013 had an average student loan debt of \$88,000 if attending a public school and \$127,000 if attending a private school. By contrast, in AY 2005-06, student debt for public and private law school graduates was \$66,000 and \$102,000 respectively.

reasonable compensation to appointed counsel; to do so constitute taking without just compensation.

- Arizona: [*Zarabia v. Bradshaw*](#), 912 P.2d 5 (Az.1996): Court held that a flat fee contracting system used in Yuma County was invalid as it appointed attorneys without consideration of their skill or experience. In so ruling the court also found the contract failed to pay counsel the “reasonable and equitable compensation” the Arizona Rules of Criminal Procedure required because a “compensation scheme that allows lawyers significantly less than their overhead expense is obviously unreasonable.”
- Florida: [*In Re Order on Prosecution of Criminal Appeals by 10th Judicial Circuit Public Defender*](#), 561 So.2d 1130 (Fla.1990): Court directs if legislature did not provide sufficient funds within 60 days to provide counsel the court would entertain habeas petitions and order immediate release of the accused;
- Kansas: [*State v. Smith*](#), 747 P.2d 816 (Kan.1987): Kansas Supreme Court recognized that the state has an obligation to pay court appointed counsel at a rate which includes consideration for both out-of-pocket expenses and overhead. The Court found the current system in place in Kansas violated several provisions of the U.S. and Kansas Constitutions including violating the Takings Clause when legal services are provided without adequate compensation.
- Iowa: [*Hulse v. Wifvat*](#), 306 N.W.2d 707 (Iowa 1981): Case addressed what is “reasonable compensation” as authorized by the statute in effect. The Iowa Supreme Court directed in doing so the trial court must “put itself in the position of a reasonable attorney at the time the services were undertaken. The court must recognize the high standards of diligence and preparation which is [sic] demanded of counsel in criminal cases.”
- Louisiana: [*State v. Peart*](#), 621 So.2d 780 (La.1993): The Louisiana Supreme Court created a rebuttable presumption that certain indigent defendants were not receiving effective assistance of counsel because the attorneys in those areas were carrying excessive caseloads and thus were unable to properly fulfil their obligations. “We take reasonably effective assistance of counsel to mean that the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients.”
[*State v. Wigley*](#), 624 So.2d 425, 429 (La.1993): the Louisiana Supreme Court found that requiring attorneys to represent an accused without compensation (at all) was an abusive extension of their professional obligations and directed such attorneys were entitled to receive reimbursement for out-of-pocket expenses, overhead expenses and a fee for their services. “[B]udget exigencies cannot serve as an excuse for the oppressive and abusive extension of attorneys’ professional responsibilities.”
- Massachusetts: [*Lavallee v. Justices in Hampden Superior Court*](#), 812 N.E.2d 895 (Mass.2004): Low level of compensation for appointed counsel left county with shortage of attorneys willing to accept appointments, resulting

in lengthy delays in appointing counsel. The court concluded there was a high likelihood accused would not receive effective assistance of counsel (and that the current lack of counsel violated his right to assistance of counsel in having bail set and in lost opportunities for investigation). The court found the accused could not meaningfully prove prejudice; therefore the court had to provide prospective protection. The court entered an order for the attorney general to explain why any petitioner held more than seven days without bail should not be released and those charged with felonies without counsel for more than 30 days should not have their charges dismissed without prejudice until counsel is provided.

- Mississippi: [*Wilson v. State*](#), 574 So.2d 1338 (Miss.1990): Counsel was entitled to costs of overhead as part of their “actual expenses” in addition to the hourly rate set by the legislature. The court set the overhead compensation rate at \$25/hour.
- New Mexico: [*State v. Young*](#), 172 P.3d 138 (N.M.2007): Capital counsel operating under flat-fee contracts are so inadequately funded they cannot recoup overhead makes it “unlikely that any lawyer could provide effective assistance of counsel.”
- New York: [*NY County Lawyers Association v. State*](#), 192 Misc. 2d 424 (N.Y.2003): The court raised assigned counsel rates because the current amount did not cover normal hourly overhead expenses.
- Oklahoma: [*State v. Lynch*](#), 796 P.2d 1150, 1163 (Okla.1990): Court appointed counsel challenged the statutory fee caps. The Oklahoma Supreme Court took jurisdiction, setting guidelines for compensation until such time as the legislature acted. In finding it had the authority and obligation to act, the court cited its “constitutional responsibilities relating to the managerial and superintending control of the district courts and the practice of law” and “the inherent power of the court to define and regulate the practice of law.” The Oklahoma Supreme Court also recognized while compensation is something that also lies within the sphere of the legislature, until the legislature acted, the court had a responsibility to address the constitutional claim raised.
- West Virginia: [*Jewell v. Maynard*](#), 383 S.E.2d 536 (W.Va.1989): The court found court appointed counsel were being forced to “involuntarily subsidize the state” when they were paid a rate that was below the cost of overhead.

The national trend in class action litigation has confirmed the court’s role in assuring the criminal justice system operates fairly. Courts therefore have been proactive in assuring systematic flaws do not result in injustice. A movement away from a post-conviction examination of the quality of representation in a single case allows systemic flaws to be examined and addressed. Cases demonstrating this national trend include:

- [*Duncan v. State of Michigan*](#), 775 N.W.2d 745 (Mich. 2009): The court allowed a class action to proceed, rejecting suggestions that the only means by which to consider ineffective assistance of counsel issues is through a post-conviction analysis.

- [*Hurrell-Harring v. New York*](#), 930 N.E.2d 217 (N.Y.2010): Class action permitted to proceed on a claim of constructive denial of effective assistance of counsel due to systemic deficiencies. The case asserted that the mere existence of a public defender office did not meet the minimum requirements of the Sixth Amendment when such office lacked sufficient skill and experience to provide constitutional representation. The resulting settlement included establishing caseload standards, state sharing responsibility for paying for counsel, and an agreement to the timely provision of counsel at first appearance/arraignment.
- [*Wilbur v. City of Mount Vernon*](#), 989 F.Supp.2d 112 (W.D.Wash.2013): The court found a Sixth Amendment violation based on counsel routinely meeting clients for the first time at court and defendants being regularly advised to plead guilty without meaningful communications with their counsel. The court concluded this was “represent[ing] the client in name only . . . having no idea what the client’s goals are, whether there are any defenses or mitigating circumstances that require investigation, or whether special considerations regarding immigration status, mental or physical conditions or criminal history exist.” The court indicated while the majority of defendants may have received reasonable resolutions of their cases, they did not have the meaningful relationship with their attorney required by *Gideon*.
- [*Kuren v. Luzerne County*](#), 146 A.3d 715 (Pa.2016): Constructive denial of counsel lies where systemic deficiencies create an imminent risk that the right to counsel will be violated. The challenges included routine underfunding of the public defender preventing the provision of constitutionally sufficient representation. The court recognized that sufficient facts had been alleged to pursue an injunction to force the county to adequately fund the county public defender office.
- [*Tucker v. Idaho*](#), 394 P.3d 54 (Idaho 2017): Case alleges Idaho fails to provide adequate resources, training and oversight of its public defenders thus neglecting its responsibility to ensure constitutionally adequate representation. Litigation still ongoing. In April 2017 the Idaho Supreme Court ruled that the case could proceed holding “the counties have no practical ability to effect statewide change” so the “state must implement the remedy.” Case was certified as a class action in January 2018.

As these cases demonstrate, as part of its role in assuring compliance with the constitutional right to effective assistance of counsel, courts can act to set a minimum threshold of compensation because the provision of indigent defense services the state’s constitutional obligation. For example, courts may set specific rates as a floor for adequate compensation. Courts could also opt to tie adequate compensation rates to other indicators such as the CJA rate or to call for increases that mirror those provided to other government employed judicial system actors such as prosecutors, public defenders, or judges. Another possibility would be for courts to conclude that when attorney compensation is at or below a particular threshold, there is a presumption that the representation was ineffective and the burden shifts to the state to overcome that presumption. Such a threshold could be

determined by examination of overhead and the average cost of operating a criminal defense practice within the state.

The [Gideon](#) Court made clear the obligation to provide counsel for those unable to afford it lies with the state. Although the court did not prescribe a specific manner in which counsel was to be provided, the responsibility lies with the state.

Low hourly rates are an abdication of the state's responsibility. They force a small segment of the private bar to personally shoulder the true cost of the criminal justice system. Not all lawyers take appointments, nor should they since many lack the requisite training, skill and expertise to handle criminal matters. The burden of inadequate compensation therefore falls on a small segment of the private bar.

While setting flat fee contracts or case caps can appear advantageous by making the defense expenditures more predictable, when a court does so, it merely passes along to individual defenders the responsibility for personally funding the cost of public defense.

TACDL and NACDL urge this Court to follow the recommendations of the Task Force—not only its current proposal to remove the distinction between rates for case preparation and those for court work, but also the removal of case compensation caps and the provision of an hourly rate that will provide adequate compensation for appointed counsel. While the judiciary does not allocate funds, it does bear responsibility for the quality of justice in its courtrooms and for the enforcement and protection of the state and federal constitutions. These require the Court to act to assure every person who stands accused has beside him or her an experienced and capable advocate, who has a manageable caseload and access to the necessary resources to assure the attorney can provide the representation our constitution demands, and who is properly compensated to assure that high quality advocates are able to do this vital work without concerns for the personal financial cost of their representation.



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NATIONAL ASSOCIATION OF
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