

BOARD OF DIRECTORS

Stephen F. Hanlon - Chair
Holland & Knight LLP

Mariano-Florentino Cuéllar
Stanford Law School

Mickey Edwards
The Aspen Institute

Armando Gomez
Skadden, Arps, Slate, Meagher & Flom LLP

Phoebe Haddon
University of Maryland, School of Law

Morton H. Halperin
Open Society Foundations

Kristine Huskey
Physicians for Human Rights

Asa Hutchinson
Asa Hutchinson Law Group PLC

David Keene
The American Conservative Union
Former Chair

Timothy K. Lewis
Schnader Harrison Segal & Lewis LLP

Paul C. Saunders
Cravath, Swaine & Moore LLP

William S. Sessions
Holland & Knight LLP

Virginia E. Sloan
The Constitution Project President

*Affiliations listed for
identification purposes only*

THE **CONSTITUTION PROJECT**



Safeguarding Liberty, Justice & the Rule of Law

August 19, 2011

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

Re: Supreme Court of Tennessee Docket No. M2011-01411-SC-RL2-RL

Dear Mr. Catalano:

I am writing on behalf of The Constitution Project (TCP) to comment on the proposed amendment to Tennessee Supreme Court Rule 13 which would authorize the Administrative Director of the Courts to enter into contracts with attorneys, law firms or associations of attorneys to provide legal services to indigent persons for a fixed-fee. TCP strongly opposes this amendment, because it would undermine the constitutional right to counsel for indigent defendants.

TCP is a constitutional watchdog that promotes and defends constitutional safeguards through constructive dialogue across ideological and partisan lines. In 2004, TCP established the National Right to Counsel Committee—comprising former judges, prosecutors, defense lawyers, law enforcement officials, and scholars—to examine the ability of the American justice system to provide adequate counsel to individuals in criminal and juvenile delinquency cases who cannot afford lawyers.¹ In 2009, the Committee published *Justice Denied: The Continuing Neglect of the Constitutional Right to Counsel*, the most comprehensive examination of our country's system of indigent defense in 30 years.² The Committee recommended that states appropriate sufficient funding to provide quality indigent defense services (Recommendation 1), as well as establish and enforce performance and workload standards (Recommendations 5 & 6). The Committee recognized that “[i]nadequate compensation of court-appointed lawyers and contract attorneys contributes to lawyers accepting a high volume of cases that can be disposed of quickly as a way of maximizing income and may serve as a disincentive to invest the essential time required to provide quality representation.”³

The proposed amendment to Rule 13 would (1) authorize the use of fixed-fee contracts between attorneys and the Administrative Director of the Courts to provide representation for indigent defendants; (2) prohibit fixed-fee

¹ A list of National Right to Counsel Committee members is attached as Appendix A.

² Nat'l Right to Counsel Comm., The Constitution Project, *Justice Denied: America's Continuing Neglect of Constitutional Right to Counsel* (2009), <http://www.constitutionproject.org/pdf/139.pdf>. *Justice Denied* has been praised by Attorney General Eric Holder in speeches to the American Council of Chief Defenders and the Brennan Center for Justice; the *Washington Post* has called it an “excellent report”; and it has been cited and relied upon by numerous state supreme courts, policymakers and news outlets around the country.

³ *Id.* at 195.

compensation greater than that provided to court-appointed attorneys; (3) require that attorneys with fixed-fee contracts be given first priority for appointment in cases where the public defender is not available or eligible to accept the appointment. Fixed-fee contracts would be awarded in a bidding process. Although the proposed amendment provides that contracts not be awarded solely on the basis of cost, the amendment provides no specific guidelines for the weight of other factors, such as the qualifications or workloads of attorneys under a fixed-fee contract.

If enacted, the Rule 13 amendment would threaten the quality of representation for indigent defendants in the State of Tennessee, as more fully explained below. Other states around the country have begun to recognize the shortcomings of fixed-fee contracts for providing indigent defense services, and I hope that upon further consideration of the rule, Tennessee will join this positive national trend.

I. Fixed-Fee Arrangements Threaten the Quality of Representation for Indigent Defendants.

The proposed amendment to Rule 13 would undermine the federal constitutional right to effective assistance of quality counsel by creating a financial disincentive for attorneys to act in their clients' best interests, and by creating a financial race-to-the-bottom in bidding process for contracts, thereby discouraging qualified attorneys from representing indigent defendants and increasing the caseload of those who continue to represent indigent defendants.

a. Fixed-fee arrangements create conflicts of interest between attorneys and indigent clients by incentivizing attorneys to invest minimal effort in these cases. TCP strongly opposes the proposed amendment because fixed-fee arrangements for the provision of indigent defense services remove financial incentives for attorneys to work as many hours as is necessary to adequately defend their clients. Unlike hourly compensation schemes, fixed-fee arrangements place an *ex ante* cap on compensation for attorneys; a fixed-fee contract will compensate an attorney the same amount regardless of how many or how few hours an attorney works on a case. In fact, there is a financial disincentive for an attorney to work as many hours as needed to represent his or her client—especially in complex and time-consuming cases—because of the overhead cost to the attorney or his or her firm. As the National Legal Aid & Defender Association has explained, “[u]nder this type of contract, any work performed by the attorney beyond the bare minimum effectively reduces the attorney’s take-home compensation.”⁴ For this reason, fixed-fee arrangements can result in a conflict of interest for attorneys, who are obligated to act in the interest of their client but who also have a strong disincentive to put adequate time into the cases of their indigent clients, or to engage in the time-consuming research, investigation, and preparation necessary for complex cases.

The conflict of interest created by fixed-fee models have led to the rejection of this model in several states that have previously employed it. For example, a special master appointed by the Michigan Supreme Court to examine fixed-fee arrangements found that a fixed-fee arrangement “encourages attorneys who are not conscientious to persuade clients to plead guilty as attorneys compensation is not improved materially by trial. This discourages use of the full panoply of constitutional rights.”⁵ The special master also found that a fixed-fee arrangement “gives disincentive to file serious motions, as no additional compensation is paid for greater efforts,” and “discourages plea bargaining in that the prosecutor is aware that the defense attorney has no financial incentive to go to trial.”⁶ As a result of these findings and others, the Michigan Supreme Court abandoned the fixed-fee system for the provision of indigent defense.⁷ Washington State recently prohibited indigent defense attorneys from entering into fixed-fee contracts that require those attorneys to pay the cost of conflict counsel, expert

⁴ Nat’l Legal Aid & Defender Ass’n, *Flat Fee Contracts* (2010), http://www.nlada.net/library/article/na_flatfeecontracts.

⁵ *Recorder’s Court Bar Ass’n v. Wayne Circuit Court*, 503 N.W.2d 885 (Mich. 1993).

⁶ *Id.* at 898 n.7.

⁷ Nat’l Right to Counsel Comm., *supra* note 2, at 136.

witnesses, or investigative services.⁸ This prohibition arose from a lawsuit⁹ brought by indigent defendants against a public defender who took on almost three times the amount of cases recommended under ethical guidelines, because he did not want to lose any of his fixed-fee by giving cases to other attorneys.¹⁰ In 2003, the North Dakota legislature commissioned a blue-ribbon task force to study indigent defense delivery systems in that state. The task force concluded that flat-fee arrangements should be abolished in favor of a statewide public defender system that would not allow for fixed-fee arrangements.¹¹

- b. Fixed-fee arrangements discourage attorneys from thoroughly investigating their cases or employing expert witnesses.** Sufficient support services and resources, including access to experts, investigators, and support staff are indispensable to the provision of quality defense representation. As the National Right to Counsel Committee noted, “[i]n their absence, criminal and juvenile proceeding become fundamentally unfair.”¹² However, when the cost of investigators, support staff, or expert witnesses is deducted from an attorney’s flat fee or must be paid for by the attorney, there is a strong financial incentive against thorough investigations, the use of expert testimony when needed, and hiring sufficient support staff. In the National Legal Aid & Defender Association’s *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, contracts under which payment for necessary services such as investigations, expert witnesses, and transcripts would “decrease the Contractor’s income or compensation to attorneys or other personnel” should be prohibited, because of the conflict of interest discussed above.¹³ Similarly, the California Commission on the Fair Administration of Justice has issued a report revealing that indigent defense attorneys working on a fixed-fee basis were less likely to use investigators or expert witnesses than public defenders or appointed counsel compensated on an hourly basis.¹⁴

II. The Proposed Amendment to Rule 13 As Currently Drafted Is Particularly Threatening to the Constitutional Right to Counsel.

Any fixed-fee arrangement creates negative incentives as described above. However, the proposed amendment to Rule 13 is particularly problematic because it contains no specific standards or regulations for the competency of counsel or the structure of the fixed-fee arrangements.

- a. The proposed amendment’s instructions for evaluating quality of representation in the bidding process are vague and inadequate.** The proposed amendment refers to only three factors for evaluating bids for indigent defense contracts—cost, workload, and ability to exercise judgment on behalf of each client. However, the amendment provides no concrete measurements or specific guidelines for evaluating workload and “ability to exercise judgment.” The amendment provides no benchmarks for evaluating whether an attorney’s workload is too burdensome and no standards for measuring other critical factors for determining qualifications of indigent defense counsel. These other

⁸ Wash. State Ct. Rules of Prof’l Conduct R. 1.8,

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garp1.08.

⁹ *Best, et al v. Grant County*, No. 04-2-00189-0 (Wash. Super. Ct. Nov. 2, 2005).

¹⁰ Ken Armstrong, Florangela Davila & Justin Mayo, *Part 2: Attorney profited, but his clients lost*, Seattle Times, Apr 5, 2004, <http://community.seattletimes.nwsourc.com/archive/?date=20040405&slug=defense05>.

¹¹ The Spangenberg Group, State Bar of North Dakota Task Force on Indigent Defense, *Review of Indigent Defense Services in North Dakota* (2004),

<http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/northdakotareport.authcheckdam.pdf>.

¹² Nat’l Right to Counsel Comm., *supra* note 2, at 196.

¹³ *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*. Guideline III-13.

¹⁴ Cal. Comm’n on the Fair Admin. of Justice, *Report and Recommendations on Funding of Defense Services in California* (April 14 2008)

<http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20DEFENSE%20SERVICES.pdf>.

critical factors include a bidder's overall legal experience, their specific experience with criminal litigation and criminal defense work, what kind of support staff is available to a bidder, and their ethical or professional record. Although paragraph (b) of the proposed amendment to Rule 13 provides that cost should not be the sole consideration in the bidding process for the acceptance of indigent defense contracts, the lack of standards for measuring the other factor fails to prevent cost from being the most important or overwhelmingly decisive factor.

Vague or inadequate standards for professional qualifications of indigent defense contractors, such as those in the proposed amendment, undermine the right to effective assistance of counsel.¹⁵ For example, in *State v. Smith*,¹⁶ the Arizona Supreme Court invalidated a county's fixed-fee contract-based system for the provision of indigent defense specifically because the county's contract system did not contain specific or adequate standards for caseload size, attorney competency, and availability of support staff, resulting in an "inference that the adequacy of representation is adversely affected by the system."¹⁷ In the Arizona system, as in the proposed amendment, "No limitation [was] suggested on caseload or hours, nor [was] there any criteria for evaluating ability or experience of potential applicants...[and] No suggestion [was] made that counsel may expect assistance in any way for support personnel."¹⁸ The court also found that because contract bidding system had, like the proposed amendment to Rule 13, no such standards, it "result[ed] in a denial of due process and inadequate representation of counsel."¹⁹

- b. The "race to the bottom" effect of fixed-fee arrangements reduces the likelihood of attracting highly qualified and experienced attorneys to represent indigent defendants.** Paragraph (a) of the proposed amendment to Rule 13 specifically prohibits contracts that would compensate contract attorneys at a higher rate than attorneys providing indigent defense services through any other arrangement. This provision places a ceiling on compensation for contract attorneys, which encourages bidders to compete on the basis of how much more cheaply they can provide representation—regardless of quality—than appointed counsel can. Additionally, paragraph (c) of the proposed amendment provides that attorneys who provide indigent defense services under flat-fee contracts shall be given first priority over appointed counsel for cases in which a public defender is unable to represent the accused, thus incentivizing attorneys who currently rely on the appointment system to participate in the fixed-fee contract system and to bid down the price of representation of the indigent. Incentivizing low bids combined with the compensation ceiling and a competitive bidding process in which cost is the only concrete factor for comparison among bids creates a race-to-the-bottom for indigent defense compensation.

Tennessee already has one of the lowest compensation levels for appointed indigent defense counsel in the country.²⁰ Reducing compensation levels through the use of fixed-fee contracts will only make it more difficult to recruit enough qualified attorneys to represent indigent clients. As discussed in *Justice Denied*, inadequate compensation is a significant factor in the failure to attract experienced, well-qualified attorneys to represent indigent defendants.²¹ Additionally, the proposed amendment to Rule 13 does not contain a mechanism for additional compensation for exceptionally complex or time-consuming cases, as Sections 2 through 4 provide for appointed counsel.²² In this way, fixed-fee arrangements are even more restrictive than fee caps and can easily subject contract attorneys to significant financial losses when representing clients in complex cases.

¹⁵ See generally, History of Indigent Defense Contracting in the United States.

¹⁶ *State v. Smith*, 681 P.2d 1374 (Ariz. 1984).

¹⁷ *Id.*, at 1381.

¹⁸ *Id.*, at 1379.

¹⁹ *Id.*, at 1383.

²⁰ *Id.*, at 1383.

²¹ Nat'l Right to Counsel Comm., supra note 2, at 63.

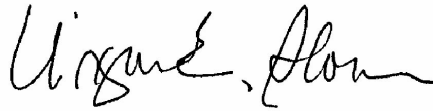
²² Rule 13, Rules of the Sup. Ct. of Tenn. See T.C.A. § 2-4.

August 19, 2011

Page 5

Fixed-arrangements are inherently detrimental to the Sixth Amendment rights of indigent defendants because they create a conflict-of-interest between attorneys, who are incentivized to put minimal effort into defending indigents, and their clients. We respectfully recommend that the Supreme Court of Tennessee oppose the adoption of any fixed-fee contract arrangement for the provision of indigent defense services, like the one provided for in the proposed amendment to Rule 13. If the Court does proceed with the use of fixed-fee arrangements for indigent defense services, we respectfully recommend that it revise the propose amendment to provide specific standards for qualifications of attorneys, workloads, fair compensation, and avoidance of conflicts of interest between attorneys and their clients.

Respectfully,

A handwritten signature in black ink, appearing to read "Virginia E. Sloan". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

Virginia E. Sloan
President, The Constitution Project

APPENDIX A

National Right to Counsel Committee

Honorary Co-Chairs

Walter F. Mondale

Senior Counsel, Dorsey & Whitney LLP; Vice President of the United States, 1977–1981; United States Senator (D-MN), 1964–1977; former Minnesota Attorney General who organized the amicus brief of 23 states in support of Clarence Earl Gideon in *Gideon v. Wainwright*

William S. Sessions

Partner, Holland & Knight LLP; Director, Federal Bureau of Investigation, 1987–1993; Judge, United States District Court for the Western District of Texas, 1974–1987, Chief Judge, 1980–1987; United States Attorney, Western District of Texas, 1971–1974

Co-Chairs

Rhoda Billings

Professor Emeritus, Wake Forest University School of Law; Justice, North Carolina Supreme Court, 1985–1986, Chief Justice, 1986; Judge, State District Court, 1968–1972

Robert M. A. Johnson

District Attorney, Anoka County, Minnesota; former President, National District Attorneys Association; former Chair, American Bar Association Section of Criminal Justice

Timothy K. Lewis

Co-Chair, Appellate Practice Group, Schnader Harrison Segal & Lewis LLP; Judge, United States Court of Appeals for the Third Circuit, 1992–1999; Judge, United States District Court for the Western District of Pennsylvania, 1991–1992; former Assistant United States Attorney, Western District of Pennsylvania; former Assistant District Attorney, Allegheny County, Pennsylvania

Members

Shawn Armbrust

Executive Director, Mid-Atlantic Innocence Project; as a member of the Northwestern University Medill School of Journalism was instrumental in achieving the 1999 death row exoneration of Illinois inmate Anthony Porter

Jay W. Burnett

Former Judge, 351st Criminal District Court, Harris County Texas, appointed 1984; Judge, 183rd Criminal District Court, Harris County, Texas, 1986–1998; Visiting Criminal District Judge, 2nd Judicial Administrative Region of Texas, 1999–2000

Alan J. Crotzer

Probation and Community Intervention Officer, Florida Department of Juvenile Justice; wrongfully convicted and sentenced to 130 years in prison; served 24.5 years in prison; exonerated based on DNA evidence in 2006

Tony Fabelo

Director of Research, Justice Center of the Council of State Governments; former Senior Associate, The JFA Institute; former Executive Director, Texas Criminal Justice Policy Council, 1991–2003

Norman S. Fletcher

Of Counsel, Brinson, Askew, Berry, Seigler, Richardson & Davis LLP; Justice, Supreme Court of Georgia, 1989–2005, Chief Justice, 2001–2005

Monroe H. Freedman

Professor of Law and former Dean, Hofstra University School of Law; nationally-acclaimed scholar of lawyers' ethics

Susan Herman

Associate Professor of Criminal Justice, Pace University; former Executive Director, National Center for Victims of Crime

Bruce R. Jacob

Dean Emeritus and Professor of Law, Stetson University College of Law; former Assistant Attorney General for the State of Florida, represented Florida in *Gideon v. Wainwright*

Abe Krash

Retired Partner, Arnold & Porter LLP; former Visiting Lecturer, Yale Law School; Adjunct Professor, Georgetown University Law Center; represented Clarence Earl Gideon in *Gideon v. Wainwright*

Norman Lefstein

Professor of Law and Dean Emeritus, Indiana University School of Law—Indianapolis (served as one of the Committee's Reporters)

Charles J. Ogletree, Jr.

Jesse Climenko Professor of Law; Executive Director, Charles Hamilton Houston Institute for Race and Justice, Harvard Law School

Bryan A. Stevenson

Director, Equal Justice Initiative of Alabama; Professor of Clinical Law, New York University School of Law

Larry D. Thompson

Senior Vice President, Government Affairs, General Counsel and Secretary, PepsiCo, Inc.; Deputy Attorney General of the United States, 2001–2003; former United States Attorney, Northern District of Georgia

Hubert Williams

President, Police Foundation; former New Jersey Police Director; former Special Advisor to the Los Angeles Police Commission

Reporters

Norman Lefstein

Professor of Law and Dean Emeritus, Indiana University School of Law—Indianapolis; LL.B., 1961, University of Illinois College of Law; LL.M., 1964, Georgetown University Law Center.

Professor Lefstein's prior positions include service as director of the Public Defender Service for the District of Columbia, as an Assistant United States Attorney, and as a staff member in the Office of the Deputy Attorney General of the U.S. Department of Justice. His professional activities include serving as Chair, American Bar Association (ABA) Section of Criminal Justice in 1986–1987; and as Reporter for the Second Edition of ABA Criminal Justice Standards Relating to *The Prosecution Function*, *The Defense Function*, *Providing Defense Services*, and *Pleas of Guilty*. During 1997–1998, Professor Lefstein served as Chief Consultant to a Subcommittee on Federal Death Penalty Cases of the Judicial Conference of the United States, directing preparation of a report on the cost and quality of defense representation in federal death penalty prosecutions. His publications include *Criminal Defense Services for the Poor*, published by the ABA in 1982, and co-authorship of *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, published by the ABA in 2004. He also has served as a member of the ABA's Standing Committee on Legal Aid and Indigent Defendants and for nine years chaired its Indigent Defense Advisory Group. In 2007, Professor Lefstein concluded seventeen years as Chairman of the Indiana Public Defender Commission.

Robert L. Spangenberg

Research Professor and Founder, The Spangenberg Project, Center for Justice, Law, and Society, George Mason University; B.S., 1955, Boston University; J.D., 1961, Boston University School of Law.

Professor Spangenberg specialized in civil legal services early in his career, developing the Boston Legal Assistance Project, a neighborhood civil legal services program, which he headed for nine years. After a two-year foundation study of civil legal services in Boston and a statewide study of indigent defense in Massachusetts, Professor Spangenberg joined Abt Associates in Cambridge, Massachusetts, where for nine years he conducted national and local studies of indigent defense systems across the country. In 1985, he founded The Spangenberg Group to continue the study of indigent defense nationwide. During his 23 years as President of the organization, he visited all 50 states, testified before legislative bodies about the justice system, and served as an expert witness in court proceedings. The Spangenberg Group published hundreds of reports and studies pertaining to the country's system of justice in criminal and juvenile proceedings, and for more than 20 years, Professor Spangenberg has served as a consultant to the ABA Standing Committee on Legal Aid and Indigent Defendants. In February 2009, Professor Spangenberg joined George Mason University, where he will continue his work on indigent defense matters.