

Tennessee's Indigent Defense Fund:  
A Report to the 107<sup>th</sup> Tennessee General Assembly

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Prepared by the  
Tennessee Administrative Office of the Courts

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## Introduction

The state budget passed by the Tennessee General Assembly last year (Public Chapter 1108) contained the following directive to this office:

“From the funds appropriated to the Administrative Office of the Courts, there is earmarked a sum sufficient for the sole purpose of conducting a study of the rising costs of indigent defense in the state and to develop a plan to reduce such costs. Such study shall examine, at a minimum, eligibility requirements, fee rates including sliding scale options, limits, verification processes, and utilization by judicial districts. The District Attorneys General Conference, District Public Defenders Conference, Post-Conviction Defenders Conference, Attorney General's Office, members of the Judiciary Committees of the Senate and House of Representatives, and any other participant in the criminal justice system as requested by the Administrative Office of the Courts shall participate in such study. The Judicial Council may participate in such study as directed by the Administrative Office of the Courts. The Administrative Office of the Courts shall report its findings, including any recommended legislation, to the General Assembly no later than January 15, 2011.”

Taken literally, this charge does not include a mandate to examine corresponding cost increases in many non-criminal legal proceedings for which counsel must be provided from indigent defense funds. However, an accurate perspective of the overall fund must necessarily include information concerning additional services paid for from this fund: expenditures for services of a guardian ad litem (“GAL”) for children involved with abusive or neglectful parents or other caregivers, attorneys appointed to represent mentally ill individuals facing involuntary commitment to a mental institution, and parents facing charges of abuse or neglect, or a termination of their parental rights.

Expenditures from Tennessee’s indigent defense fund have increased significantly in the past several years. It is appropriate for the General Assembly to take note of this fact and to request an inquiry into the reasons for this. It is also reasonable for the legislature to expect suggestions for improving the efficiency of the process of discharging the state’s constitutional obligation to provide legal representation to individuals who are unable to afford counsel.

This report will focus on the task at hand, despite the fact that, at the same time it is being submitted, many individuals and organizations are bemoaning the *lack* of resources being allocated for indigent representation. For example, the Tennessee Supreme Court has just closed a public comment period for a petition it received last year from the Tennessee Association of Criminal Defense Lawyers requesting that compensation rates for court-appointed counsel be increased. On a national level, the American Bar Association conducted a study of indigent systems forty years after the Supreme Court announced the constitutional right to counsel in

*Gideon v. Wainwright*. The report is entitled *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*. Among this report's findings are that "Indigent defense in the United States remains in a state of crisis", that "funding for indigent defense services is shamefully inadequate", and that "state governments should provide increased funding for the delivery of indigent defense services in criminal and juvenile delinquency proceedings in a manner that ensures the provision of uniform, quality representation". The list of other examples is lengthy.

The AOC decided to enlist the assistance of representatives of as many groups as possible who are involved in providing legal services to indigent litigants (the Judicial Council ceased to exist on June 30, 2010, and therefore did not provide input). All groups willingly provided attendees at the five meetings held during the fall of 2010, each of whom provided valuable insight. Collectively, the group spent hundreds of hours of its time discussing the issues and suggesting improvements to the current system

Senator Mike Faulk served as unofficial chair for the group, and led most of the discussions. The AOC wishes to publicly thank him for this leadership, as well as the rest of the individuals who participated in this project:

Senator Mark Norris

Representative Vance Dennis

Representative Henry Fincher

Justice Gary Wade (Tennessee Supreme Court)

Judge Kenneth Bailey (Greene County General Sessions Court)

Judge Donna Scott Davenport (Rutherford County Juvenile Court)

Judge Leon Ruben (Davidson County General Sessions Court)

Judge Steve Dozier (Davidson County Criminal Court)

Judge Richard Baumgartner (Knox County Criminal Court)

Judge Lee Coffee (Shelby County Criminal Court)

Roark Brown (Legislative Budget Office)

Mark Fulks (Senior Counsel, Office of the Attorney General)

Jeffrey Henry (Executive Director, District Public Defenders Conference)

Guy Wilkinson (24<sup>th</sup> Judicial District Public Defender)

Gerald Melton (16<sup>th</sup> Judicial District Public Defender)

James Simmons (Tennessee Association of Criminal Defense Lawyers)

Isaiah "Skip" Gant (Tennessee Association of Criminal Defense Lawyers)

Wally Kirby (Executive Director, District Attorney Generals Conference)

Mike Bottoms (22<sup>nd</sup> Judicial District Attorney General)

Don Dawson (Post-Conviction Defender)

Paul Morrow (Assistant Post-Conviction Defender)

Heather Hines Duncan (Coffee County Circuit Court Clerk)

Marjorie Bristol (Private Attorney)

Bridget Willhite (Private Attorney)

Allan Ramsaur (Executive Director, Tennessee Bar Association)

Libby Sykes (Administrative Director of the Courts)

David Haines (AOC General Counsel)

Karen Yacuzzo (AOC Deputy General Counsel)

David Byrne (AOC Assistant General Counsel)

Jeana Hendrix (AOC Indigent Defense Fund Manager)

Leslie Barrett Kinkead (Court Improvement Program Coordinator)

Also attending: Dawn Deaner (20<sup>th</sup> Judicial District Public Defender), Mark Stephens (6<sup>th</sup> Judicial District Public Defender), Stephanie Edwards (Private Attorney), David Grimmett (Private Attorney), and Callen Wilkerson (Legislative Analyst for Senator Mae Beavers).

This report includes topics discussed by this group, as well as other research and analysis done by AOC staff. Observations and recommendations from one or more group members on a particular topic are highlighted.

This report does not address spending issues in capital murder cases. The reason for this is that spending in capital cases has not increased over the period being examined. In fact, they have decreased. Prosecutors appear to be seeking the death penalty less often, and it is doubtful that the legislature would want to embark on any serious cost-cutting in an area where so much is at stake.

## Why People are Entitled to Lawyers

### *Criminal Cases*

The basic right to counsel in criminal cases was announced in 1963 by the United States Supreme Court (“USSC”) in the well known case of *Gideon vs. Wainwright*, 372 U.S. 335 (1963) which declared that defendants who are charged with a serious crime and cannot afford to hire a lawyer are entitled to the appointment of a lawyer at the state’s expense. Thereafter, the Court elaborated on the types of cases that include a right to counsel: *Douglas v. California*, 372 U.S. 353 (appeals in states that provide for them); *Miranda v. Arizona*, 384 U.S. 436 (1967) (custodial interrogation); *In re Gault*, 387 U.S. 1 (1967) (juvenile charges involving possibility

of detention); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (any crime, including misdemeanors that actually result in imprisonment); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation and parole revocation hearings); *M.L.B. v. S.L.J.*, 519 U.S. 102 (defense against state petition to terminate parental rights); and most recently *Alabama v. Shelton*, 122 U.S. 1764 (2002) (any crime whatsoever where a defendant receives a suspended or probated sentence that could eventually lead to imprisonment). Tennessee's Constitution (Article VI Section 14), and the statutes and rules implementing it, are even broader. Tennessee Code Annotated section ("TCA §") 40-14-102 declares that "[e]very person accused of any crime or misdemeanor whatsoever is entitled to counsel in all matters necessary for the person's defense, as well to facts as to law." Additionally, Rule 44 of the Tennessee Rules of Criminal Procedure provides that "[e]very indigent defendant is entitled to have assigned counsel in all matters necessary to the defense and at every stage of the proceedings, unless the defendant waives counsel". Whether punishment for an offense includes the possibility of incarceration does not appear to be a necessary component to entitle a defendant to representation in Tennessee pursuant to any of these provisions.

### *Juvenile Delinquency*

Individuals under the age of eighteen who are charged with an offense that could result in detention are entitled to be represented by counsel. The same test and procedure for determining indigency applies in these cases.

### *Child Welfare Matters*

Tennessee receives federal funding under part B of title IV of the Social Security Act and therefore must comply with the Child Abuse Prevention and Treatment Act of 1974 (CAPTA). The Act provides:

In every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings. 42 USC § 5106a(b)(2)(A)(xiii). (Amended in 2003 to add the training requirements.)

Tennessee law provides that the GAL in dependent and neglected or abuse cases must be an attorney. Tennessee Supreme Court Rule 40 and Tennessee Rules of Juvenile Procedure Rule 2(7). TRJP Rule 2 also applies to termination of parental rights proceedings brought in juvenile court.

TCA § 37-1-126 provides for the right to an attorney for parents in both termination of parental rights and child dependency cases, and is consistent with court decisions declaring the right to counsel in these types of cases necessary to satisfy due process requirements. The controlling case for the appointment of a parent's attorney in a termination of parental rights

proceeding is *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), holding that the right to appointed counsel under the Due Process Clause of Fourteenth Amendment is not absolute but should be decided on a case by case basis, subject to appellate review. *Lassiter* applied the test in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) to termination of parent rights proceedings, specifically providing that three elements must be evaluated when deciding whether due process requires the appointment of an attorney. Those elements are the private interests at stake, the government's interests and the risk of an erroneous decision, i.e., erroneously depriving a parent of his or her child. In weighing the risk of an erroneous decision, the court looked to certain factors discussed below.

The only federal case regarding the appointment of counsel in dependency proceedings that is specific to Tennessee is *Smith v. Edmiston*, 431 F.Supp. 941 (W.D. Tenn. 1977). The relief sought was a writ of habeas corpus and “to enjoin and to have declared unconstitutional the practice in the Memphis and Shelby County Juvenile Court, of conducting dependency and neglect hearings without providing counsel to indigent parents and without affording minimal due process.” *Id.* at 942. The Western District held that parents whose children are alleged dependent and neglected are entitled to counsel pursuant to the Due Process Clause of the Fourteenth Amendment and, if indigent, must be appointed counsel unless the right is knowingly waived. It is interesting to note that in the *Lassiter* case, the USSC cited *Smith* in a footnote explaining that other courts had held that indigent parents have a right to appointed counsel in dependency proceedings.

*State ex rel. T.H. v. Min*, 802 S.W.2d 625 (Tenn. Ct. App. 1990) summarized both the *Lassiter* and *Davis* cases. In applying the *Mathews* test, the court held in order to “help assess the risk of an unfair proceeding resulting in an erroneous decision...several factors bear on the question. They include:

- (1) whether expert medical and/or psychiatric testimony is presented at the hearing;
- (2) whether the parents have had uncommon difficulty in dealing with life and life situations;
- (3) whether the parents are thrust into a distressing and disorienting situation at the hearing;
- (4) the difficulty and complexity of the issues and procedures;
- (5) the possibility of criminal self-incrimination;
- (6) the educational background of the parents; and
- (7) the permanency of potential deprivation of the child in question. *Lassiter*, 101 S. Ct. at 2161-2163; *Davis*, 714 F.2d at 516-517.” *Id.* at 627.

### *Judicial Hospitalization*

People who pose a threat of harm to themselves or others because of mental illness are subject to involuntary commitment in a mental hospital. Involuntary commitment is a drastic measure, and a process exists to ensure that only those individuals who truly pose such a threat are held against their will. Anyone facing involuntary commitment is entitled to be represented

by counsel (see TCA § 33-3-503), and is entitled to a hearing to review their status within a very brief period after they are initially committed. Public Defenders do not represent patients in commitment hearings in Tennessee.

Because involuntary commitment involves confinement in mental hospitals, review hearings are only held in a few counties in Tennessee. In those counties, the procedures are similar: as patients are admitted, review hearings are immediately scheduled for two or three days later. Private counsel is immediately appointed for the people who have been admitted. A docket is compiled, and one attorney usually handles the entire docket, which may initially consist of between 10 to 30 patients. Between the time individuals are admitted and the time set for a hearing, however, many of the cases on a docket resolve themselves. Some patients can be quickly stabilized on medication and discharged. Others regain enough lucidity to voluntarily agree to remain hospitalized to receive treatment.

### *Contempt*

Contempt proceedings are a category of cases involving non-payment of child support. When a parent is ordered by a court to pay child support and does not do so, this failure may constitute criminal contempt, which can result in incarceration. Most contempt actions are brought by the state against the parent. Title IV-D of the Social Security Act gives states a mechanism (and funding for the infrastructure) to locate parents, establish paternity, and cause child support orders to be entered. A parent's non-payment of child support will usually result in a request to the state for assistance from the custodial parent in the form of food stamps, TANF funds, and other social services. Contempt proceedings are the remedy for non-payment and can result in fewer requests for state funds to raise children who should be supported by parents as opposed to the state.

As shown by the chart (see Spending for Indigent Representation, below), child support enforcement efforts have increased significantly over the past few years (It should be noted that the designation of cases as "adult" vs. "juvenile" contempt is immaterial, as this only refers to the court where the action is filed). These cases are currently all handled by private counsel.

### *Experts and Investigators*

The right to effective assistance of counsel in criminal cases includes the right to properly investigate a case, and to call witnesses for a defendant, some of whom may be needed to give expert opinions regarding, for example, a defendant's mental capacity at the time of an offense. Investigators and experts are most often employed in capital cases, and doing so helps to avoid a finding of ineffective assistance of counsel in a post-conviction proceeding.

## Interpreters

People entitled to court-appointed counsel because they are indigent are also entitled to interpreter services if they have limited proficiency speaking English (LEP). Tennessee has historically funded these interpreter services from the indigent defense fund. Last fiscal year, the AOC spent \$1.26 million on these services. However, Title VI of the Civil Rights Act of 1964 requires states to provide these services to any person accessing a government program or facility, regardless of the person's financial status. In correspondence dated August 16, 2010, Assistant United States Attorney General Thomas E. Perez advised each state's Chief Justice and State Court Administrator that failing to take reasonable steps to ensure meaningful access for LEP person is a form of national origin discrimination prohibited by Title VI regulations. The AOC will request a budget improvement this year to facilitate full compliance with Title VI.

EXPENSE TYPE	Legal Authority/Mandate		
Adult Crimes	<u>Gideon v. Wainwright</u>	U.S. Supreme Ct.	TCA § 40-14-102, 103
Juvenile Delinquency	<u>In re Gault</u>	U.S. Supreme Ct.	TCA § 37-1-126 (c)(i)
Contempt (Child Support)	<u>Gideon v. Wainwright</u>	U.S. Supreme Ct.	Supreme Ct. Rule 13
Judicial Hospitalization		State Statute	TCA § 33-3-503 c
Termination of Parental Rights	<u>Lassiter v. Dept. Soc. Svcs</u>	U.S. Supreme Ct.	TCA § 37-1-126
Dependency & Neglect GAL		Federal Statute	42 USC 5106
Dependency & Neglect Parents	<u>State ex rel. T.H. v. Min</u>	Federal District Court	TCA § 37-1-126
Experts , Investigators (Approx. 50% each)	<u>State v Edwards</u>	Tenn. Supreme Ct.	Supreme Ct. Rule 13
Interpreter	Title VI Civil Rights Act	Federal Statute	Supreme Ct. Rule 13

## How Tennessee Does It

Prior to 1987, all indigent persons entitled to court-appointed counsel in Tennessee were represented by private counsel, except in Shelby and Davidson Counties (The Davidson County Public Defender's office was created by a Private Act of the legislature in 1961 and the first Davidson County Public Defender was elected in 1962. Shelby County's Office of the Public Defender was founded in 1917, and is the third oldest such office in the United States). In 1987 a pilot program providing indigent services via a public defender system was undertaken in seven of Tennessee's 31 judicial districts.

A statewide public defender system was created by the General Assembly in 1989. The system includes a popularly-elected district public defender in each judicial district, assistant



public defenders and district investigators for each judicial district. Shelby and Davidson Counties receive both state and local funding for their offices. In cases in which the public defender has a conflict of interest which prevents representation, private attorneys are appointed. Private attorneys are also appointed if the public defender makes a clear and convincing showing that that adding the appointment to his or her current caseload would prevent the rendition of effective representation.

### Spending for Indigent Representation

There are two different line items in the budget used for payment of indigent representation. One line item is used strictly for GALs in dependency and neglect and termination of parental rights cases. The other line item is used for all other spending, such as parents' attorneys in the dependency and neglect and termination of parental rights cases, as well as all criminal cases, whether adults, juveniles, felonies, or misdemeanors. The second line item also contains appropriations for capital cases, experts and investigators, and interpreters.

Historical budget data beginning in fiscal year 2004-05 is included in this report. This is the year the AOC converted its indigent compensation payments to the Tennessee Indigent Expense System (TIES).

### Total Spending from the Indigent Defense Fund 2004-2010

Year	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10
Adult Felony	\$5,173,166.85	\$5,565,170.92	\$6,146,659.18	\$6,270,614.64	\$7,145,522.94	\$9,429,428.30
Adult Misdemeanor	\$1,267,225.83	\$1,556,727.79	\$1,800,896.12	\$1,970,671.94	\$2,345,531.92	\$3,520,383.93
Juvenile Felony	\$383,135.72	\$540,970.74	\$526,420.03	\$473,820.67	\$705,124.35	\$871,128.72
Juvenile Misdemeanor	\$733,330.40	\$718,733.62	\$771,267.66	\$874,918.54	\$812,752.47	\$981,876.15
Capital Case Attorney Claims	\$1,584,374.70	\$1,429,608.49	\$855,571.85	\$822,155.16	\$866,747.13	\$1,031,095.12
Capital Supreme Court Appeals	\$16,204.17	\$53,578.83	\$33,703.67	\$29,519.72	\$16,226.95	\$13,134.81
Probation Revocation	\$567,894.12	\$766,749.77	\$857,785.19	\$910,433.58	\$760,345.18	\$1,078,918.04
Parole	\$2,868.87	\$1,185.00	\$1,744.00	\$3,230.00	\$2,096.04	\$3,430.42

Year	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10
Adult Contempt	\$260,525.18	\$307,366.33	\$360,813.85	\$400,731.24	\$500,624.22	\$706,357.42
Court of Criminal Appeals	\$203,922.73	\$282,269.81	\$199,677.50	\$192,285.78	\$210,662.23	\$284,593.28
Supreme Court	\$30,134.98	\$50,442.80	\$47,686.54	\$41,182.74	\$35,119.26	\$45,678.58
Petition for Early Release	\$36,000.08	\$58,208.75	\$46,682.58	\$40,922.79	\$47,634.35	\$36,742.71
Post Conviction Relief	\$254,961.20	\$299,169.30	\$228,427.20	\$258,964.00	\$274,296.35	\$295,677.12
Judicial Hospitalization	\$2,223,098.17	\$2,294,509.33	\$1,819,048.08	\$1,857,378.34	\$1,642,967.39	\$1,828,943.45
Guardian ad Litem - Appeal to Circuit	\$22,297.10	\$17,033.53	\$9,091.07	\$23,470.62	\$91,263.07	\$85,599.05
Guardian ad Litem - Termination	\$190,130.78	\$245,264.13	\$248,810.25	\$288,176.32	\$352,850.90	\$358,132.97
Guardian ad Litem - Dep / Neg / Abuse	\$2,003,414.93	\$2,559,216.75	\$2,701,209.24	\$3,864,443.05	\$4,348,315.08	\$5,273,618.24
Parent's Attorney - Termination	\$286,447.40	\$281,123.95	\$335,508.81	\$384,817.51	\$449,084.39	\$487,226.74
Parent's Attorney - Dep / Neg / Abuse	\$1,231,482.99	\$1,674,309.52	\$1,732,992.94	\$2,543,143.20	\$2,687,585.31	\$3,831,548.89
Attorney ad Litem - Appeal to Circuit		\$795.00	\$409.40	\$345.00	\$1,559.84	\$1,941.78
Attorney ad Litem - Termination	\$197.00	\$3,184.54	\$3,042.90	\$2,723.84	\$6,360.95	\$4,299.12
Attorney ad Litem - Dep / Neg / Abuse	\$3,805.47	\$23,847.15	\$36,319.93	\$36,525.81	\$72,878.69	\$63,645.12
Expert Witness Claims	\$1,235,264.20	\$1,312,206.81	\$1,238,312.08	\$1,323,000.62	\$1,396,402.02	\$1,757,284.37
Interpreter Claims	\$330,348.76	\$574,010.36	\$725,247.55	\$926,857.44	\$1,058,673.96	\$1,265,185.41
Investigator Claims	\$1,166,697.63	\$1,326,322.47	\$1,328,919.63	\$1,449,537.98	\$1,907,255.17	\$1,841,600.98
Other	\$10,573.65	\$32,866.44	\$6,124.59	\$8,987.09	\$4,188.78	\$31,865.01
<b>TOTAL</b>	<b>\$19,909,892.15</b>	<b>\$22,781,538.67</b>	<b>\$22,838,119.54</b>	<b>\$25,877,693.03</b>	<b>\$28,830,910.98</b>	<b>\$36,777,970.90</b>

## *Criminal Cases*

The largest portion of expenditures from the indigent defense fund is for legal representation of people charged with crimes. Counsel is usually appointed the first time a defendant appears in court after being charged with an offense. Defendants are required by law to complete an Affidavit of Indigency, which lists assets and liabilities, and can be used by the judge to assess whether the defendant is entitled to court-appointed counsel. The test for determining indigency involves a review of the accused's ability to pay for the type of services needed in the case at the customary rate of an attorney in the community for rendering such services.

If a defendant is deemed indigent, the court should first attempt to appoint the public defender. The public defender should accept the appointment unless (1) it would create a conflict of interest with another client represented by the public defender or (2) adding the case to the public defender's current workload "would prevent counsel from rendering effective representation in accordance with constitutional and professional standards" (See Supreme Court Rule 13).

An indigency form is not always completed by a person who is seeking the appointment of counsel, particularly if the offender did not make bond because some judges assume that an offender who does not possess adequate resources to post bond would not possess adequate resources to compensate private counsel. Moreover, one public defender noted that neither the courts nor the attorneys have the time or resources to verify the accuracy of the information provided by the offenders who do complete the form. The judges often put the offenders under oath, make them swear that the information is accurate, and then assume that the offenders are being truthful.

A large majority of criminal cases originate and are disposed of in Tennessee's general sessions courts. The sheer volume of these cases places one of the greatest demands on the indigent defense fund. Unfortunately, accurate statistics for activities in general sessions courts are not available. Despite recommendations from the Comptroller's Office and requests from the Administrative Office of the Courts ("AOC"), the legislature has never provided funding to gather and analyze this data. As a result, the typical general sessions case can be described based only on anecdotal information. However, judges and lawyers from numerous jurisdictions across the state report a similar experience: crowded dockets consisting of numerous defendants, some of whom have made bail, and some who have not. Time does not permit a thorough review of information provided by defendants in support of their claim of indigency, and counsel is appointed in most cases where requested.

Depending on the jurisdiction, public defenders are assigned some, but not all cases. Private attorneys are appointed for the rest. District attorneys and defense counsel then confer with each other to discuss a possible resolution of the case. Defense counsel conveys the plea

offer to the defendant and discusses his or her options. In many cases, plea agreements are reached, and this is announced to the court, which then receives the guilty pleas. In cases where agreements are not reached, the case will either proceed to a preliminary hearing or be bound over to the grand jury.

The majority of judges appoint private counsel to represent indigent offenders when caseload issues or conflicts preclude public defenders from representing the offenders. Occasionally, however some judges appoint private attorneys as a matter of convenience when lengthy dockets require numerous appointments. If a general sessions judge appoints a private attorney (as opposed to the public defender) when neither conflicts nor caseload issues justify the appointment and the case is not resolved in general sessions court, the trial court judges may allow the attorney to continue representing the defendant in circuit/criminal court because the attorney has already developed a relationship with the defendant, conducted a preliminary investigation, etc. A newly-appointed public defender would need additional time to become familiar with the case.

#### Fee Claims in Criminal Cases

	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10
Adult Felony	10,267	11,225	11,549	11,952	13,465	17,888
Adult Misdemeanor	5,631	6,587	7,425	8,888	10,164	14,685
Juvenile Felony	1,408	2,392	2,008	1,898	2,785	3,260
Juvenile Misdemeanor	4,934	4,702	4,763	5,422	4,438	5,299
Capital Case Attorney Claims	227	251	159	157	174	154
Capital Supreme Court Appeals	7	19	12	6	4	8
Capital PC/Death Penalty	-	-	1	-	-	-
Probation Revocation	2,393	3,093	3,220	3,644	3,071	4,062
Parole	12	5	13	16	6	15
Adult Contempt	819	977	1,191	1,433	1,764	2,418
Juvenile Contempt	3,616	4,679	5,106	5,628	5,793	7,194
Court of Civil Appeals	51	70	46	41	65	90
Court of Criminal Appeals	228	322	214	205	223	300
Supreme Court	59	86	87	69	72	96
Petition for Early Release	125	190	155	145	148	113

### Fee Claims in Criminal Cases

	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10
Post Conviction Relief	289	324	249	263	291	297
Expert Witness Claims	451	463	513	671	777	1,268
Interpreter Claims	3,258	6,411	8,439	10,429	11,557	11,660
Investigator Claims	417	457	545	650	873	888
<b>TOTAL</b>	<b>34,192</b>	<b>42,253</b>	<b>45,695</b>	<b>51,517</b>	<b>55,670</b>	<b>69,695</b>

### *Child Welfare (Abuse, Neglect, Parental Rights, Custody)*

A large portion of the recent increases in indigent fund expenditures can be attributed to the growing demand for legal services in cases involving the welfare of children, both in juvenile courts and trial courts. In these cases, the indigent defense fund bears a heavily disproportionate share of the overall cost of providing representation to those entitled to it. Public defenders appear in these types of cases in only a very few courts in the state, but even in those counties, representation is limited to allegations of juvenile delinquency or unruliness, as opposed to matters involving dependency, neglect, abandonment, custody, child support or termination of parental rights (Davidson County does provide GAL representation through the public defender's office, but is the only county known to do so.). The average amount per claim in these types of cases is also consistently higher than claims for services in criminal cases. As a result, spending in child welfare proceedings now accounts for almost 35% of total spending from the fund.

### Attorney Fee Claims in Child Welfare Cases

Case Type	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10
Guardian ad Litem - Appeal	43	31	14	40	128	147
Guardian ad Litem - Termination	347	442	430	511	498	550
Guardian ad Litem - Dep / Neg / Abuse	5,564	6,442	6,017	8,077	8,340	9,806
Parent's Attorney - Appeal	27	45	13	39	98	146
Parent's Attorney - Termination	427	456	482	554	537	615
Parent's Attorney - Dep / Neg / Abuse	3,274	4,147	3,987	5,350	5,342	7,458
Attorney ad Litem - Appeal	-	1	1	1	3	3
Attorney ad Litem - Termination	1	6	6	5	12	7
Attorney ad Litem - Dep / Neg / Abuse	13	73	80	67	131	117
<b>TOTALS</b>	<b>9,696</b>	<b>11,643</b>	<b>11,030</b>	<b>14,644</b>	<b>15,089</b>	<b>18,849</b>

## Expenditures for Child Welfare Proceedings

Year	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10
Guardian ad Litem - Appeal to Circuit	\$22,297.10	\$17,033.53	\$9,091.07	\$23,470.62	\$91,263.07	\$85,599.05
Guardian ad Litem - Termination	\$190,130.78	\$245,264.13	\$248,810.25	\$288,176.32	\$352,850.90	\$358,132.97
Guardian ad Litem - Dep / Neg / Abuse	\$2,003,414.93	\$2,559,216.75	\$2,701,209.24	\$3,864,443.05	\$4,348,315.08	\$5,273,618.24
Parent's Attorney - Appeal to Circuit	\$10,550.86	\$31,973.33	\$5,024.04	\$23,734.88	\$70,735.73	\$103,645.84
Parent's Attorney - Termination	\$286,447.40	\$281,123.95	\$335,508.81	\$384,817.51	\$449,084.39	\$487,226.74
Parent's Attorney - Dep / Neg / Abuse	\$1,231,482.99	\$1,674,309.52	\$1,732,992.94	\$2,543,143.20	\$2,687,585.31	\$3,831,548.89
Attorney ad Litem - Appeal to Circuit		\$795.00	\$409.40	\$345.00	\$1,559.84	\$1,941.78
Attorney ad Litem - Termination	\$197.00	\$3,184.54	\$3,042.90	\$2,723.84	\$6,360.95	\$4,299.12
Attorney ad Litem - Dep / Neg / Abuse	\$3,805.47	\$23,847.15	\$36,319.93	\$36,525.81	\$72,878.69	\$63,645.12
<b>TOTALS</b>	<b>\$3,748,326.53</b>	<b>\$4,836,747.90</b>	<b>\$5,072,408.58</b>	<b>\$7,167,380.23</b>	<b>\$8,080,633.96</b>	<b>\$10,209,657.75</b>

A suggestion was made that the AOC could have “criminal” and “non-criminal” line items in the budget. A member stated that GALs are under-funded. He suggested that the AOC separate the costs so legislators can see which costs are rising, and proposed that the group ask Finance & Administration to separate them as well.

Allan Ramsaur suggested that the fund be referred to as indigent representation as opposed to indigent defense. Mr. Ramsaur also suggested that investigator/expert service fees be separated from attorney fees. Finally, Mr. Ramsaur suggested that capital cases be considered separately

Some participants thought the legislature would be less likely to cut non-criminal spending than criminal defense spending, and stated that civil proceedings are greatly under-funded. The criminal law practitioners felt that separating the items would make it too difficult to secure funding for criminal cases

The GAL fund was transferred from the Department of Children's Services to the AOC in 1999. The transfer consisted of \$800,000, and was likely due to the fact that the AOC was already paying for the parents' attorneys in these cases. Although only \$800,000 was transferred to the AOC, the AOC currently is paying \$5 million per year for GALs. The appointment of guardians became a federal mandate in 1974, but many courts were not complying as of 1997. After the AOC reinforced the requirement, the appointments increased greatly. As a result, the AOC's expenditures increased as well. Moreover, the mother and father often have separate attorneys, thus increasing the costs per case.

The group questioned why Tennessee requires GALs to be attorneys. Courts have historically required attorneys to serve in this capacity even though the statute authorized an attorney or "responsible adult" to serve. Representative Vance Dennis stated that the guardian must be an attorney because he or she is providing legal representation and will be arguing in court. Judge Kenneth Bailey added that a non-lawyer would not have the necessary expertise to adequately represent a child. For example, such a person would not have the skills or knowledge required to question a DCS employee. Finally, the group concluded that such a person would be practicing law without a license. In North Carolina, lawyers go to court and non-lawyers (CASA volunteers) do the investigatory work. A case-by-case review is often necessary because a GAL may need to be a lawyer in one case but not in another. For instance, if there is a contentious divorce at issue, the GAL's role is to help the child get through the process, but a lawyer may have limited experience in helping children.

### *Experts*

Claims for experts and investigators have risen at rates similar to other services, as shown above. These expenses were once primarily related to capital cases. In recent years, however, attorneys have increased the use of experts in other cases as well.

## Is the Current System that is in Place the Best and Most Cost Efficient?

Despite a lack of adequate staffing, the statewide public defender system in Tennessee provides a very cost-efficient method to satisfy the state's constitutional obligations to indigent defendants. Appointing private counsel in cases where the public defender has a conflict, or in cases where the public defender's caseload is already too high, is a reasonable way to complete that obligation.

The group discussed alternatives to appointing private counsel in cases in which the public defender's office cannot be appointed. Some states have established a "shadow" public defender's office which is used for cases in which the main public defender is conflicted out. Startup costs for such a program would be prohibitive. Other states contract with private attorneys to handle all conflicts in a certain jurisdiction. This method has been criticized as giving an attorney earning a flat rate for a number of cases no incentive to resolve cases in the least amount of time possible even if doing so is not in the best interest of the attorney's clients.

Ultimately, the group agreed that the current system being employed is likely the best system of its kind for the purposes for which it is being used.

## If it is the Best System, What Modifications Can We Make to Help Cut Costs?

The need to cut costs within Tennessee's indigent system should first be put into context. If the state was spending substantially more than necessary to provide these services, drastic measures would be justified. If not, a more moderate approach is warranted. State spending on indigent representation can be compared from one jurisdiction to another by calculating that spending on a per capita basis. Total spending divided by a state's total population yields such a figure. In 2006, the American Bar Association retained the Spangenberg Group to prepare a report titled "State and County Expenditures for Indigent Defense Services in Fiscal Year 2005". Spending for all 50 states was contained in that report. Using population estimates for the same year, the AOC produced the following results showing per capita spending for every state:

State	Total Spending	Population (Est.)	Per Capita
District of Columbia	\$ 59,535,000.00	582,000	\$102.29
Alaska	\$ 27,183,800.00	670,000	\$40.57
Oregon	\$ 88,123,000.00	3,701,000	\$23.81
New York	\$ 402,479,830.00	19,306,000	\$20.85
Massachusetts	\$ 120,033,457.00	6,437,000	\$18.65
Arizona	\$ 103,990,243.00	6,166,000	\$16.87



State	Total Spending	Population (Est.)	Per Capita
West Virginia	\$ 29,565,099.00	1,818,000	\$16.26
New Mexico	\$ 30,798,000.00	1,955,000	\$15.75
California	\$ 572,877,808.00	36,458,000	\$15.71
Montana	\$ 13,786,495.00	945,000	\$14.59
Iowa	\$ 43,194,649.00	2,982,000	\$14.49
Vermont	\$ 9,019,910.00	624,000	\$14.45
Nebraska	\$ 23,539,687.00	1,768,000	\$13.31
Washington	\$ 84,727,200.00	6,396,000	\$13.25
Florida	\$ 232,700,000.00	18,090,000	\$12.86
Minnesota	\$ 65,610,000.00	5,167,000	\$12.70
Maryland	\$ 70,330,970.00	5,616,000	\$12.52
Delaware	\$ 10,621,400.00	853,000	\$12.45
Wisconsin	\$ 68,088,536.00	5,557,000	\$12.25
New Jersey	\$ 104,552,000.00	8,725,000	\$11.98
New Hampshire	\$ 15,718,938.00	1,315,000	\$11.95
Wyoming	\$ 6,155,248.00	515,000	\$11.95
Virginia	\$ 90,129,365.00	7,643,000	\$11.79
South Dakota	\$ 9,001,007.00	782,000	\$11.51
Nevada	\$ 27,532,286.00	2,496,000	\$11.03
Connecticut	\$ 35,547,327.00	3,505,000	\$10.14
Georgia	\$ 94,227,081.00	9,364,000	\$10.06
Colorado	\$ 47,473,830.00	4,753,000	\$9.99
Illinois	\$ 124,777,783.00	12,832,000	\$9.72
Ohio	\$ 111,458,380.00	11,478,000	\$9.71
North Carolina	\$ 85,526,000.00	8,857,000	\$9.66
Tennessee	\$ 55,460,308.00	6,039,000	\$9.18
Alabama	\$ 41,791,344.00	4,599,000	\$9.09
Rhode Island	\$ 9,326,000.00	1,068,000	\$8.73
Kansas	\$ 23,422,991.00	2,764,000	\$8.47
Maine	\$ 10,841,372.00	1,322,000	\$8.20
Hawaii	\$ 10,530,386.00	1,285,000	\$8.19
Pennsylvania	\$ 100,652,582.00	12,441,000	\$8.09

State	Total Spending	Population (Est.)	Per Capita
Oklahoma	\$ 28,440,098.00	3,579,000	\$7.95
Michigan	\$ 78,856,113.00	10,096,000	\$7.81
Idaho	\$ 11,186,992.00	1,466,000	\$7.63
Kentucky	\$ 31,498,410.00	4,206,000	\$7.49
Indiana	\$ 42,467,000.00	6,314,000	\$6.73
Texas	\$ 144,683,654.00	23,508,000	\$6.15
Louisiana	\$ 25,943,529.00	4,288,000	\$6.05
Arkansas	\$ 16,472,395.00	2,811,000	\$5.86
South Carolina	\$ 22,640,113.00	4,321,000	\$5.24
Missouri	\$ 30,156,416.00	5,843,000	\$5.16
Utah	\$ 12,896,632.00	2,550,000	\$5.06
Mississippi	\$ 12,821,040.00	2,911,000	\$4.40
North Dakota	\$ 2,549,663.00	636,000	\$4.01
<b>State Total</b>	<b>\$ 3,520,941,367.00</b>	<b>299,403,000</b>	<b>\$11.76</b>

The same calculation using population estimates for 2009 shows that Tennessee's per capita spending has risen from \$9.01 to \$11.81. This figure, although higher than 2005, is still in the mid-range of states, and it is probably safe to assume that other states have had some increase as well. The following chart also shows an increasing imbalance between funds appropriated for public defender offices and funds appropriated for representation by private counsel. While the District Public Defender's Conference overall budget has remained relatively flat since 2006-07, costs to the indigent fund have increased by over 50%. Demands for additional resources for indigent representation have been addressed by increasing state spending from the indigent fund rather than creating additional public defender positions, or expanding the duties of the public defender to cases currently only handled by private counsel:

## Per Capita Spending in Tennessee

Year	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10
Indigent Fund Total	\$19,490,778.00	\$22,781,538.67	\$22,838,119.54	\$25,877,693.03	\$28,830,910.98	\$36,777,970.90
Public Defender	\$28,149,100.00	\$31,877,500.00	\$34,801,700.00	\$37,098,900.00	\$36,508,600.00	\$37,881,200.00
GRAND TOTAL	\$47,639,878.00	\$54,659,038.67	\$57,639,819.54	\$62,976,593.03	\$65,339,510.98	\$74,659,170.90
Population	5,983,211	6,068,306	6,149,166	6,214,888	6,296,254	6,322,073
Per Capita Spending	\$7.96	\$9.01	\$9.37	\$10.13	\$10.38	\$11.81

One component of the indigent fund has remained level since 1994: the hourly rate paid to attorneys for legal representation has stayed fixed at \$40 per hour for out-of-court work, and \$50 per hour for work in the courtroom. By way of comparison, Tennessee attorneys doing the same work in the federal system are paid a maximum rate of \$125 per hour. Because claims for legal fees constitute the largest portion of the indigent fund's budget, and because hourly rates are so low, finding savings from the remainder of the system is difficult, but not impossible.

All participants agreed that the hourly rates provided in Supreme Court Rule 13 for work performed by attorneys are too low. Indeed, in some cases the AOC pays for private investigators to perform work traditionally performed by attorneys because the attorneys decline to provide this service at the applicable rates. The AOC and other indigency study participants feel strongly that any savings which result from the group's efforts should be used to increase Rule 13's rates. Increasing those rates will encourage greater participation by lawyers who are currently unwilling to take appointments.

### *Criminal Cases*

Funding for the state's public defender system comes from the legislature, and each office should be staffed by enough defenders to represent eligible indigent clients in all cases except those where such representation would create a conflict of interest with another client represented by the public defender. And although local governments are required to fund public defenders at a rate of three positions for every four district attorneys, the state itself does not fund these offices at that level. TCA § 16-2-518 mandates that any local funding for public defenders be at a rate of 75% of funding for the corresponding district attorney general's office, it being generally agreed that approximately 75% of those being prosecuted by the district attorney will be indigent. However, at the state level, 228 full time assistant public defenders are funded, and 379 assistant district attorneys are funded, a ratio closer to three to five.

This imbalance is important, because the lack of public defenders to handle non-conflict cases results directly in a demand on the indigent defense fund for private legal services. The result is exacerbated by the fact that, on average, public defenders can handle cases for a lower overall cost to the state than private attorneys. For example, the average claim for representation by private counsel of a person charged with a felony was \$527 in fiscal year 2009-10. The average in a misdemeanor case was \$240. When the Comptroller's Office conducted the first weighted caseload study for public defenders in 1999, each attorney kept track of the time he or she spent on these cases, for a period of 21 days. Presumably, public defenders had no incentive to under-report this information, because doing so would result in data establishing inadequate staffing needs.

The results of this effort indicated that, on average, a public defender devoted approximately seven hours on a felony case, and approximately 2 hours on a misdemeanor case. If those same amounts of time were claimed by private attorneys, average claims for felonies would be approximately \$300, and misdemeanors would be approximately \$100. Even factoring in overhead and benefits for public defenders, utilization of private attorneys usually costs the state more than if public defenders handled the same cases.

The average claim for legal services also varies from place to place. For example, a first offense DUI prosecuted in Knox County in 2009 resulted in an average indigent fund fee claim of \$410.00. That same offense prosecuted in Sumner County in the same year resulted in an average claim of \$110.00. The statewide average for the offense is \$302.00. Obviously there are operational characteristics in each of these counties' courts that result in such disparate figures. For example, time spent by appointed counsel waiting in court for a case to be called may vary from place to place. Some courts make a conscious effort to call these cases first. Others do not. The AOC intends to examine the differences in more detail and attempt to assist jurisdictions in adopting best practices so that claims costs based on "down time" can be reduced.

The most recent weighted caseload study of public defender staffing needs was performed by the Comptroller's Office in 2005-06. That study is of dubious accuracy because of a lack of reliable data from general sessions courts, as well as inconsistencies in data reporting. Nonetheless, the results showed a need for over 100 additional public defender positions at that time. Even with a wide margin for error, the study demonstrates that additional positions are needed.

This imbalance (and the resulting expense to the indigent fund) is also reinforced by the fact that private counsel are being appointed much more frequently in some areas, and at a moderately higher rate statewide over the past several years. The AOC has already begun efforts to meet with courts and staff where private attorney appointments are highest and to attempt to identify whether changes can be made to bring them more in line with the norm.

The AOC did not see a noticeable decrease in the indigent defense fund's expenditures when the legislature approved 19 new positions for the District Public Defenders' Conference in 2008. If some of the AOC's indigent defense money is reallocated to the public defenders for new positions and the indigent defense fund claims do not decrease, the AOC will run out of money earlier in the year. A public defender explained that there was not a decrease as a result of the new positions because the lawyers were so overworked that the existing work was merely distributed to the new lawyers. Public defenders are now adequately representing their clients instead of taking a greater number of appointments. If any new positions are added in the future, merely easing the existing caseload on current public defenders will not produce the savings that this report anticipates.

Dogged reliance on the public defender to handle the most cases possible can, however, have a negative effect on state and local budgets overall, as well as the ability of courts to manage their dockets. One district reported felony cases being handled by public defenders in only one of every four cases. This ratio of was initially alarming. Upon closer examination and inquiry, however, it appears that the initial appointment of private counsel in a crowded general sessions court can often result in a quicker resolution of cases, which translates into fewer continuances and fewer days in jail for defendants waiting for court. Heaping dozens of cases onto one or two assistant public defenders could result in a significant waste of time for the court and defendants whose case is not *the* case being worked on by that public defender at a particular time. Spreading the job to several private lawyers comes at a cost, but that cost may be partially or fully offset by the prompt disposition of those cases. It also can prevent court from consistently running into the evening hours. The average fee claim for a misdemeanor in Sumner County is \$100.54. The statewide average is \$239.73, and can run as high as \$375.00 in some counties. This appears to be another example of how identifying best practices from around the state can help inform a more cost-effective system.

### *Juvenile Court*

Although public defenders are statutorily directed to attend juvenile court proceedings and represent children at risk of being placed in detention, they do so in only some counties. Increasing staffing levels and utilizing public defenders in juvenile court should produce the same kind of savings based on efficiency as in criminal cases.

### *Child Welfare*

Public defenders are not currently required to participate in cases involving allegations of abuse or neglect, child custody, or termination of parental rights. As noted above, spending from the indigent defense fund on child welfare matters accounts for an increasing share of overall spending, and each case costs more on average than a criminal or juvenile delinquency case.

One possible alternative to utilizing court-appointed private attorneys or public defenders in child welfare cases is the establishment of a statewide office to represent parents and children. Such an office, staffed by lawyers and social workers, could perform the legal and social work now being done by court-appointed private attorneys. This approach has been adopted in other states, and considering that the total annual budget for this work currently stands at over \$10 million, it may be an approach worthy of additional study and evaluation by the legislature.

### *Judicial Hospitalization*

In the area of judicial hospitalizations, the potential for significant savings has been identified. AOC staff was in the process of auditing attorney fee claims for these cases when this study began. The results of that review disclosed a less than efficient use of resources. By the time a lawyer actually begins to prepare for a hearing date in involuntary commitment matters, most of the cases on his or her docket will have been resolved. In the meantime, however, counsel has had to get involved, at least superficially, in each case. As a result, attorney fee claims for each case, currently averaging around \$42 per case, are submitted to the AOC. Although a single claim is relatively small, they all add up to total spending of around \$1.5 million per year. This appears to be an inefficient use of resources, and the AOC is exploring the possibility of compensating attorneys at a flat rate per docket, with some allowance for upward variation on fees in the rare situation where a particular case takes a significant amount of time.

Another possibility for producing savings in this area is to enter into contracts with private attorneys to handle all cases in a particular location for a negotiated sum. Because hearings are only held in a few counties, getting contracts in place would not be a difficult task, and could result in significant savings.

### *Contempt*

Child support dockets can be as crowded and as hectic as general sessions criminal dockets, particularly in metropolitan areas. Unlike general sessions court, however, public defenders are not available to represent those charged with contempt. Under the circumstances that bring these defendants before the court, indigency is the norm, and private attorneys do all of the legal work. It is probably impossible to quantify the savings to the state as a result of having parents fulfill their legal and moral obligation to their children, but there is undoubtedly some return on the dollars expended from the indigent defense fund in this area. Nonetheless, providing and utilizing public defenders for these cases would likely produce the same savings as in any other case.

## How Do We Reduce Demand on the System?

Utilizing public defenders to represent indigent defendants is clearly a more cost-effective method of providing those services. Bringing clarity and consistency to the process of

evaluating and handling conflicts of interest between or among defendants should result in greater utilization of public defenders in cases involving multiple defendants. If representing multiple defendants does not constitute a *per se* conflict, then a case-by-case analysis of whether a true conflict exists should allow public defenders to ethically represent many of these defendants, thus reducing the need for private counsel appointments. Other states that have confronted the issue have determined that such representation is not a *per se* conflict:

“Public defenders who are subject to a common supervisory structure within an organization ordinarily should be treated as independent for purposes of [imputing conflicts of interest]. The lawyers provide legal services not to the public defender’s office, but to individual defendants. Ordinarily, the office would have no reason to give one defendant more vigorous representation than other defendants whose interests are in conflict. Thus, while individual defendants should be represented by separate members of the defender’s office, the representation of each defendant should not be imputed to other lawyers in an office where effective measures prevent communications of confidential client information between lawyers employed on behalf of individual defendants.

...[Another] reason to avoid an automatic disqualification rule for imputed conflicts of interest among assistant public defenders is fiscal. Paying outside counsel every time there are multiple defendants in a case would, no doubt, be quite an expense for the taxpayers of the state. Where there has been no showing of an actual conflict of interest, and thus no showing of prejudice to the defendants, the minimal benefit of a *per se* rule would not justify the additional expense. While we cannot and should not “put a price on” the legal representation we provide to indigent defendants, the judicial branch of government still has an obligation to be fiscally responsible.” *Bolin v. State of Wyoming*, 137 P.3d 136 (2006) (citing *Asch v. State of Wyoming*, 62 P.3d 945,953 (2003)).

This is an issue that can and will be addressed.

Decriminalizing certain minor offense was discussed. It was noted that the legislature somewhat embraced the concept in the last session when Public Chapter 1090 was enacted. That legislation did not necessarily do away with the need for an appointed attorney, but it stated a preference of not jailing people who commit a first-time minor offense in order to free up space in the penitentiary for armed robbers. A public defender questioned whether certain offenses, such as driving on a suspended license, should even be jailable offenses. Another participant stated that the legislature would be more likely to eliminate incarceration for offenses if the statistics show that persons convicted of those offenses are receiving suspended sentences under current law. The Department of Correction is currently studying this issue. The group agreed that removing incarceration as a penalty for some offenses may not be popular with legislators; however, the

group recommends the formation of a committee to study which offenses should be punished only by a fine.

(Although the group referred to offenses for which an offender is eligible for incarceration, please note that Tennessee Code Annotated section 40-14-102 provides that “[e]very person accused of any crime or misdemeanor whatsoever is entitled to counsel in all matters necessary for the person’s defense, as well to facts as to law.” Therefore, unless the legislature amends this statute, persons in Tennessee are entitled to counsel in every criminal case, regardless of whether incarceration is a potential penalty).

The notion of decriminalization of minor offenses is not new. When the United States Supreme Court expanded the right to counsel to cases involving some minor offense that could result in jail time, the court anticipated the demands its ruling might place on the legal system, and suggested a possible response:

“One partial solution to the problem of minor offenses may well be to remove them from the court system. The American Bar Association Special Committee on Crime Prevention and Control recently recommended, inter alia, that:

"Regulation of various types of conduct which harm no one other than those involved (e. g., public drunkenness, narcotics addiction, vagrancy, and deviant sexual behavior) should be taken out of the courts. The handling of these matters should be transferred to nonjudicial entities, such as detoxification centers, narcotics treatment centers and social service agencies. The handling of other nonserious offenses, such as housing code and traffic violations, should be transferred to specialized administrative bodies." ABA Report, *New Perspectives on Urban Crime* iv (1972). Such a solution, of course, is peculiarly within the province of state and local legislatures.

"Forty thousand traffic charges (arising out of 150,000 nonparking traffic citations) were disposed of by court action in Seattle during 1964. The study showed, however, that in only about 4,500 cases was there any possibility of imprisonment as the result of a traffic conviction. In only three kinds of cases was the accused exposed to any danger of imprisonment: (1) where the offense charged was hit-and-run, reckless or drunken driving; or (2) where any additional traffic violation was charged against an individual subject to a suspended sentence for a previous violation; or (3) where, whatever the offense charged, the convicted individual was unable to pay the fine imposed." Junker, *The Right to Counsel in Misdemeanor Cases*, 43 Wash. L. Rev. 685, 711 (1968).



Of the 1,288,975 people convicted by the City of New York in 1970 for traffic infractions such as jaywalking and speeding, only 24 were fined and imprisoned, given suspended sentences, or jailed. Criminal Court of the City of New York Annual Report 11 (1970). Of the 19,187 convicted of more serious traffic offenses, such as driving under the influence, reckless driving, and leaving the scene of an accident, 404 (2.1%) were subject to some form of imprisonment. Ibid”.

*Argersinger v. Hamlin*, 407 U.S. 25, 38 (1972)

## Can We Generate Revenue to Help Fund the System?

Two sources for revenue already exist. TCA § 40-14-103 requires that courts assess an administrative fee of not less than \$50 and not more than \$200 when an indigent defendant receives appointed counsel (A similar fee is authorized in juvenile cases at TCA § 37-1-126). The fee may be waived or reduced by the court upon a finding that the defendant is unable to pay it. The fee applies to cases involving appointment of a public defender as well as private counsel. Unfortunately, this fee is assessed in slightly less than 60% of cases, and collected at a low rate.

In 2009, 210,294 defendants were appointed counsel. Of those 92,429 (44%) had the fee waived, and 117,865 (56%) were ordered to pay the fee. The Department of Revenue reported receiving \$1,395,245 from court clerks for deposit into the state’s general fund. This equates to an average collection per person ordered to pay the fee of \$11.84 and an average of \$6.64 per all indigent defendants.

Another existing source of revenue is the partial attorney fee assessment authorized at TCA § 40-14-202 and by Supreme Court Rule 13. That statute authorizes a judge who appoints counsel and determines that a defendant can defray a portion or all of the cost of the representation to assess any sum that the court determines a defendant can pay.

Imposition of either of these fees acts as a partial or complete hedge against an erroneous determination of indigency. The AOC has been reinforcing the need to assess one or both of these fees in as many cases as practical, and will continue to do so at continuing legal education events held throughout each year for juvenile, general sessions and trial court judges.

Senator Faulk summarized the group’s proposals as follows: (1) Change the order in which various fees/fines/costs are credited (moving the partial indigency fee and the administrative fee closer to the top of the list); and (2) Increase the percentage which will be retained by the clerks. Either would provide more incentive to pursue and collect fees. There are times when an offender’s financial circumstances preclude payment; however, there are also many people who eventually have resources but are not paying.

## Conclusion

Tennessee faces challenges similar to every other state to provide indigent legal representation. The resources allocated for the task have grown increasingly disproportionate to the ideal combination of utilizing public defenders in as many cases as possible and appointing private counsel only when necessary. Numerous factors have produced this situation.

At the state level, not enough positions have been created to allow public defenders to handle all cases that they are already statutorily required to handle. At the local level, private attorneys are sometimes appointed for the sake of convenience, or because a concern about a public defender conflict of interest that may or may not actually exist in a particular case.

During this project, extremely useful information was gathered, and the AOC intends to put it to good use. Some encouraging events have already occurred as a result of interaction between the AOC and local courts in order to produce this report:

Senator Faulk and Justice Gary Wade addressed the General Sessions Judges Conference at its annual meeting in September to stress the importance of using public defenders whenever a case permits.

The Tennessee Council of Juvenile and Family Court Judges has asked the AOC to make a presentation in February to review the substance and procedure of assessing administrative fees and partial attorney fees in juvenile court cases.

Members of the District Public Defenders Conference and its Executive Director are encouraging local public defenders to discuss how to most efficiently utilize the services of each office, while at the same time maintaining a manageable caseload for each attorney.

The AOC will continue to talk to judges and court staff in areas where private attorney appointments are higher than they should be to determine what is causing this and what can be done to get them to a better ratio of public/private attorney utilization.

Finally, the AOC would like to stress that while savings can and should be realized as a result of these efforts and others yet to come, the compensation rate for private attorneys is low and should be increased. The AOC agrees with the members of the study group: if savings are realized, or if costs are held in check, those compensation rates should be raised by using what would have otherwise been an additional infusion of money into the indigent defense fund to do so.

Any legislator who seeks additional information or has questions should feel free to contact a member of the AOC's legal department at any time.