



# Tennessee Bar Association

## Time for Reform

By [Lucian Pera](#) on Mon, 01/01/2018 - 12:00am

Right now, in early January 2018, the Tennessee justice system, led by the Tennessee Supreme Court, is poised at the brink of major reform. I've personally pledged to the Court and, more importantly to you as members, that achieving this reform is our highest priority this year. We need your help.

The goal is better and more effective indigent representation, as mandated by the U.S. and Tennessee Constitutions. In its April 2017 report, the Court's Indigent Representation Task Force clearly mapped out the absolutely necessary reforms. The Court has signed on in support, and so has the Tennessee Bar Association. ([For more on the report, see the great article by Liz Todaro.](#)) Informed observers assure me that, based on the Task Force's hard work and its thoughtful and comprehensive report, we have a once-in-a-generation opportunity to put indigent representation on a path to real and lasting reform.

As lawyers, we know that Tennessee's poor are constitutionally guaranteed free and competent legal counsel in such life-changing brushes with the law as criminal matters, juvenile cases in which they risk losing their children, and civil proceedings to commit them to mental health facilities. Even the casual reader of the Task Force's report will learn what Tennessee's public defenders and appointed lawyers know too well: Tennessee's current system, staffed by remarkable lawyers and other professionals, is under immense stress. The constitutional guarantee of counsel to Tennessee citizens is at risk.

## Why We Care and What Can Be Done

Reform matters, especially to us as lawyers because of the special commitment we all made in the admission oath we each swore. It also matters especially to us because the system won't work without the full participation of lawyers. The full participation of lawyers depends in part on the system's fair compensation of lawyers who accept appointments to represent the indigent. That compensation has not been adequate in decades. In fact, the current rates for appointed lawyers — either \$40 or \$50 an hour in most cases, under strict caps — have not changed since 1997.

The Task Force, chaired by former Tennessee Supreme Court Justice and now Nashville School of Law Dean Bill Koch, spent more than two years studying the issue, crisscrossing the state, listening to those most knowledgeable of our system and to national experts. The report they produced is bracing, but hopeful: it points out many serious deficiencies in our current system and lays out a clear path forward.

At 195 pages, I can't do justice to the report, but two crucial elements stand out: the establishment of an independent statewide commission to oversee indigent representation and long-needed increases in pay to appointed counsel, including significant hourly rate increases and elimination of caps on amounts paid in individual cases.

Nothing could improve indigent representation today more than the creation, as many of our sister states have done, of an independent statewide commission that would instantly become the guardian of effective indigent representation and the voice for continual improvement in the years ahead.

Problems to be addressed by a commission — with specific recommendations from the Task Force to build on — range from the need in most parts of the state for a committed appellate defender resource,

developing and implementing uniform criteria and procedures for determining indigency and approving the use of experts, setting training and performance standards, oversight of training, and, of course, evaluating and setting compensation of appointed lawyers.

One crucial task for a new commission would be the regular collection and analysis of consistent data about how the system works (or doesn't) so that someone — the commission, I hope — can rely on that data to make the case for improvements to the system to the Court and the legislature. Remarkably, the report suggests that the mundane task of getting good data appears to be nearly impossible today.

Nearest and dearest to our lawyers' hearts, though, is inadequate compensation for appointed Tennessee lawyers. Appointed lawyers are now paid \$40 an hour for most out-of-court work and \$50 an hour for most in-court work. In death penalty cases, appointed counsel are paid more, topping out at \$100 an hour for lead counsel. Worse yet for these hard-working lawyers, there's a per-case cap for most cases of \$1,000 or \$1,500. That can reduce the compensation for an appointed lawyer for a juvenile to single digits as that representation stretches for years.

The Task Force concluded that "[t]he combined effect of the stagnation of compensation rates for the past 20 years and the Court's additional compensation limitations has resulted in compensation rates that are currently below the market rate for similar legal services." It's actually worse than that.

The "additional compensation limitations" the Task Force pointed to include often slow and burdensome payment processes. More than a few appointed lawyers tell me they often don't even bother to put in for payment for this reason.

Some appointed lawyers report that they're consistently the lowest-paid people in the courtroom. For example, interpreters are now paid \$75 an hour. One member of our Court recently commented that the current proposed hourly pay for *Tennessee Code Annotated* proofreaders is \$75 an hour. It's hard to argue that a lawyer fighting to protect a Tennessee citizen from prison or from losing her child is worth less.

The Task Force recommended that these rates be increased to at least \$75 and no more than \$125. Approving and endorsing many of the Task Force's specific proposals in October 2017, the Supreme Court committed to seeking an increase in rates to \$65 an hour, plus an increase in the caps of \$500 on all felonies and \$250 on juvenile matters.

The TBA has enthusiastically joined the Court in its support for many of the key recommendations of the Task Force report, especially an independent statewide commission. For many years, though, the TBA has advocated for a \$100 rate for appointed counsel, and we will continue to push for this increase in this process. The TBA will also push — as did the Task Force — for elimination of the caps. As the TBA leadership has told the Court, don't think for a minute that our advocacy for higher, fairer, more market-based rates means that we will not push strongly for adoption of the key points of the Task Force's recommendations. And that's where you come in.

## What You Can Do, With Help

By the time you read this, the General Assembly will probably be back in session. Facing a short election-year session, we all need to do what we can to reach out to our legislators to educate them on the importance of indigent representation reform.

If you know a lawmaker, reach out now. Call them; talk with them at your civic club; email them; or write them a letter — they get so few paper letters that U.S. Mail from a constituent has a big impact. If you can't recall who your legislators are, use TBAImpact to find out. And to get the best talking points, visit the TBA's dedicated web page at [www.tba.org/tba-group/indigent-representation-reform-group](http://www.tba.org/tba-group/indigent-representation-reform-group) to read our talking points and background information, including the entire Task Force report.

You may think that, as a real estate or in-house lawyer, you don't know enough to help. That's wrong. You're a lawyer. However little you think you may know about indigent representation, our legislators need and want to hear the truth about indigent representation from a lawyer. They appreciate hearing from you, and they'll appreciate it more because you're a lawyer. And we'll arm you with the best arguments.

Join with your brother and sister lawyers, and the Tennessee Supreme Court, on this. It's time for reform.

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