



## RIGHT TO COUNSEL SELF-HELP TOOLKIT

*(Written for Nashville, Davidson County, Tennessee)*

### INTRODUCTION

This packet is designed to help people who believe their court-appointed lawyer is not meeting their right to effective legal representation in a criminal case. An effective lawyer does the following things:

1. Maintains good communication with their client;
2. Investigates the case and potential defenses; and
3. Zealously advocates for their client's legitimate stated interests and goals within the bounds of the law.

Some problems this packet is designed to help people with are:

1. A lawyer who has not communicated with you for a long time;
2. A lawyer who has not or will not investigate the facts of your case;
3. A lawyer who refuses to file basic motions for you, like a bond reduction motion;  
or
4. A conflict with your lawyer that you think makes it impossible for them to represent your interests.

Some complaints cannot be solved with more communication or investigation. For example, this packet **will not help you if your main problem is:**

1. You are unhappy with the plea offer in your case;
2. You think the prosecutor should dismiss the charges against you;
3. You dislike your lawyer, but they are doing basic work on your case and keeping you informed of what's happening with your case.

## WARNINGS

**This packet is not legal advice.** It is a guide that explains steps you can take to protect your right to an effective lawyer. It is not guaranteed to improve your lawyer's representation of you, or to get you a different lawyer.

**You should only talk about the specific facts or witnesses in your case with your defense lawyer.** Sharing information about the facts of your case with anyone other than your defense lawyer could hurt your case.

**You are responsible for anything you write, mail, or say to anybody, including if you decide to use anything in this packet.** What you write in a letter to the judge will become part of the court file. The prosecutor will get it and can use it against you. If you are in jail, your calls and messages are recorded. What you say can be used against you in your case.

## NEXT STEPS

**The law says you have a right to an effective lawyer.** If you believe your court-appointed lawyer is not meeting that standard, this packet describes what you can do to try to improve that situation. It starts by describing how you can try to improve communication with your lawyer. If that doesn't work, it explains how you can try to get a different appointed lawyer.

**The law places the burden on you to prove why you are entitled to a different appointed lawyer.** Judges in Tennessee generally will not appoint a new lawyer to represent you simply because you don't like your lawyer, or you don't agree with everything your lawyer does.

If you want to use this packet, **read the instructions carefully and follow the steps listed here.** There are forms you can use if you want, and to keep track of important information. **Remember to write "LEGAL MAIL" on any envelope you send to your lawyer from the jail so it will not be read by jail staff.**

## **STEP 1: Tell Your Lawyer Directly and Clearly What You Want**

Sometimes it can help to send your lawyer a letter that says very clearly what you want your lawyer to do, and what kind of response you're expecting. **Here are a few tips for getting started, if you want to do that:**

1. Describe your question or request clearly for the lawyer. If you want more than one thing from your lawyer, describe each separately (for example, in a list). Try to keep your letter short and to the point.
2. Tell your lawyer *when* you want those things done by, and *why* you want them done. For example, if you want your lawyer to visit you, tell your lawyer how soon you would like a visit, and why you want your lawyer to visit you. The more specific you can be, the better. For example, asking your lawyer to visit you "in the next week so you can talk about a bond reduction motion" is more helpful than asking your lawyer to "visit me as soon as possible to talk about my case."
3. Keep a written list of every time you try to reach your lawyer, and every time your lawyer communicates with you. That includes letters, phone calls, and in-person visits. A form you can use to do that is included at the end of these instructions. Keep copies of any letters you send to your lawyer. These records can be used as evidence to support a request for a new appointed lawyer, should you end up asking the judge for that. The better your records, the better your chances of success.

**A sample letter you can use to write to your attorney is included as a guide.** If you write your lawyer a letter, make sure you keep a copy of that letter for yourself. You may need it later to show what you sent to your lawyer.

Hopefully your lawyer will read your letter and resolve the issue, maybe by visiting you or writing a letter with answers to your questions. If so, that's great! You can ignore the rest of this packet.

## **STEP 2: If Your Lawyer Works at the Public Defender’s Office, Talk to Your Lawyer’s Supervisor.**

If your lawyer does not respond to your call or letter within **two weeks** (or your lawyer responds but does not address your concerns), you may want to ask someone else for help. Every lawyer who works at the Public Defender’s Office has a supervisor, and a supervisor may be able to help resolve your problem.

Not all appointed lawyers work at the Public Defender’s Office. If your lawyer does not work there, that office cannot help you, and you should skip to STEP 3. If you aren’t sure if your lawyer works there, you can call that office and ask them (the number in Nashville is 615-862-5730). If you are in jail, you can also ask your case manager to help you find out.

If your lawyer works at the Public Defender’s Office, your lawyer’s supervisor may be able to help you. If you want to try that, you can follow these steps:

1. Call the Public Defender’s Office during business hours (Monday to Friday, 8:30 a.m. to 4:30 p.m.). If you are in jail, the phones there allow you to call them free of charge. Tell them your lawyer’s name, and ask them for the name of your lawyer’s supervisor. You can then ask to talk to that person.
2. If you cannot reach your lawyer’s supervisor by phone, you can write that person a letter. If you write a letter, describe the problem you are having with your lawyer clearly, and explain what you want the supervisor to do.
3. If your lawyer’s supervisor does not respond, or is not helpful, you can ask to speak to the Chief Public Defender. The Public Defender is responsible for all of the Office’s clients. You can try to reach the Public Defender by phone, and you can also write a letter. Again, be as clear as you can about what you want, and what has happened so far.

Hopefully, speaking with your lawyer’s supervisor (or the Public Defender) will fix any issues you have with your lawyer. If so, you can ignore the rest of this packet.

### **STEP 3: Ask the Board of Professional Responsibility for Help with Your Lawyer.**

The Board of Professional Responsibility in Tennessee aids in supervising the ethical conduct of lawyers, and administers the disciplinary process for Tennessee lawyers. To help resolve questions or problems people have with their lawyers that are not serious ethics violations, the Board operates a Consumer Assistant Program (CAP). Complaints that involve serious ethical misconduct are sent to Disciplinary Counsel to investigate.

**The Board uses a form to take complaints or requests for assistance from people who are having a problem with their lawyer, or believe their lawyer has engaged in unethical conduct.** A copy of the form is in this packet, and it is available to the public on the Board's website. The Board created that form, and instructions for what to do with it are on the form. **The Board is an independent agency, and was not involved in creating this packet.**

If you send a request to CAP, they will contact your lawyer on your behalf, and send you a copy of anything they send to your lawyer. CAP cannot give legal advice. CAP also cannot remove your appointed lawyer from your case, and it cannot appoint a different lawyer to represent you. Only the judge hearing your case can appoint a different lawyer.

Hopefully after hearing from CAP your lawyer will resolve the issue, maybe by visiting you or answering your questions. If so, that's great! You can ignore the rest of this packet.

If your concern does not get resolved through the CAP process, and you have tried several times to work with your lawyer with no success, your last resort is asking the judge in your case to replace your appointed lawyer with a different one.

## **STEP 4: Ask the Judge To Replace Your Appointed Attorney.**

Asking the judge to replace your appointed attorney is generally the last option you can try for getting effective representation. If you decide to do this, be very careful about what you say or write to the judge in the process, because it will go in the court's records and be shared with the prosecutor.

**If you are in contact with your appointed lawyer, you can ask your lawyer to file a Motion to Be Relieved from representing you, and for appointment of new counsel.** The judge will likely hold a hearing on a motion filed by your lawyer. If you choose to do this, you should still be prepared to prove at the hearing why you are entitled to a different lawyer. Tips for doing that are stated below.

**If you are not in contact with your appointed lawyer, or do not feel comfortable asking your lawyer to file a motion to be relieved, you can ask the judge in your case to appoint a different lawyer. This packet contains a sample motion you can use to do that.** If you choose to do that, do not discuss the facts of your case in what you send. Nearly all defense lawyers agree that it hurts an accused's case to send information about the facts of the case to the court or the prosecutor. Things to avoid discussing include witness names, evidence in the case, what defense you plan to use, or what happened leading up to the charges.

To replace your appointed lawyer, you will need to prove to the judge that there's a good reason for replacement. The legal resources in this packet are a guide to some of what criminal defense lawyers are expected to do when representing a client. Focusing on them may help you explain to the judge how your lawyer's representation is inadequate.

If the judge gives you a hearing, you will need to be prepared to present evidence you have in support of your claim. That evidence could include a copy of letters you wrote to your lawyer, a list of everything you've done to try to communicate with your lawyer, or a copy of letters between you and the Consumer Assistance Program.

From the sample motion included in this packet, you will see that in addition to asking the judge to replace your appointed lawyer, you can also ask the judge to:

1. Hold a hearing on your request, so you can show why you are entitled to a different appointed lawyer.
2. Allow a lawyer who is not your appointed lawyer to represent you at the hearing, if you can find one willing to represent you.
3. Appoint a specific attorney, if you know an attorney you want to represent you.  
**NOTE: The law does not currently say you have a right to choose an appointed lawyer.** People who *hire* a lawyer have that right, but courts have said the same right does not exist for people with an appointed lawyer. Instead, judges in Tennessee decide which lawyers to appoint to cases in their courts. Still, you **can ask** the judge to appoint the lawyer you want. While asking does not guarantee the judge will do that, the judge may grant your request.

**If you choose to send a request to the court about replacing your appointed lawyer,** keep a copy of it for yourself, and mail the original to the Criminal Court Clerk’s Office, 408 Second Ave. North, Suite 2120, Nashville, TN 37201. You may also want to send a copy to your appointed lawyer. You can also ask your lawyer to request a hearing for the motion.

**If you use this packet to send a request to the court, CJI also invites you to send a copy of your request to us.** (You do not have to do this, we just hope you will). We want to learn how people are using this packet, and what is happening in the courts when they do. Also, we may be able to help you with your request after it is filed, if you want that. We will make that decision on a case-by-case basis, and there is no guarantee someone will be available to help you with your request for replacement counsel. If you choose to use this packet, you must be prepared to go forward on your own. If we do agree to help you with your request for replacement counsel, our services for that will be free of charge.

If you have questions about how to use this packet, or suggestions for how to make it easier to use, please write to Choosing Justice Initiative (**mark the envelope as “Legal Mail”**) at:

Choosing Justice Initiative  
1623 Haynes Meade Circle  
Nashville, TN 37207

## ATTORNEY COMMUNICATION LOG

<b>From (Name)</b>	<b>Type of Contact (Visit, Phone Call, Letter, Video Conf.)</b>	<b>To (Name)</b>	<b>Date</b>	<b>General Description</b>
Example: Your Name	Letter	Your Attorney's Name	3-21-20	Asking you to visit me at the jail to discuss a bond reduction. NO RESPONSE.
Example: Your Name	Phone call	Your Attorney's Name	4-10-20	Called your office to follow up on my letter. Left message. NO RESPONSE.
Example: Lawyer's name	Visit	Your Name	5-15-20	You came to see me for about 15 minutes. You told me about investigator you hired, and gave me some discovery, but did not answer my questions about bail reduction.



## Legal Resources

### Caselaw

*State v. Gilmore*, 823 S.W.2d 566, 568-69 (Tenn. Crim. App. 1991): “When an accused seeks to substitute counsel, the accused has the burden of establishing to the trial judge’s satisfaction that (a) the representation being furnished by counsel is ineffective, inadequate, and falls below the range of competency expected of defense counsel in criminal prosecutions, (b) the accused and appointed counsel have become embroiled in an irreconcilable conflict, or (c) there has been a complete breakdown in communications between them.”

*Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975): The standard for evaluating an attorney’s competence in criminal representation is “whether the advice given, or the services rendered by the attorney, are within the range of competence demanded of attorneys in criminal cases. . . . Trial courts and defense counsel should look to and be guided by the American Bar Association’s Standards relating to the Administration of Criminal Justice in general, and specifically to those portions of those Standards which relate to the Defense Function.”

**Excerpts from the American Bar Association Standards for Criminal Justice, The Defense Function (4<sup>th</sup> ed. 2017)** (full standards available online at: [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/))

#### Standard 4-3.1: Establishing and Maintaining an Effective Client Relationship

- (a) Immediately upon appointment or retention, defense counsel should work to establish a relationship of trust and confidence with each client. Defense counsel should explain, at an appropriate time, the necessity for frank and honest discussion of all facts known to the client in order to provide an effective defense. Defense counsel should explain that the attorney-client privilege protects the confidentiality of communications with counsel except in exceptional and well-defined circumstances, and explain what the client can do to help preserve confidentiality.
- (b) At an early stage, counsel should discuss with the client the objectives of the representation and through what stages of a criminal matter the defense counsel will continue to represent the accused. An engagement letter as described in Standard 4-3.5 should also be provided.
- (c) Counsel should consider whether the client appears to have a mental impairment or other disability that could adversely affect the representation. Even if a client appears to have such a condition, this does not diminish defense counsel’s obligations to the client, including maintaining a normal attorney-client relationship in so far as possible. In such an instance, defense counsel should also consider whether a mental examination or other protective measures are in the client’s best interest.

(d) In communicating with a client, defense counsel should use language and means that the client is able to understand, which may require special attention when the client is a minor, elderly, or suffering from a mental impairment or other disability.

(e) Defense counsel should ensure that space is available and adequate for confidential client consultations.

(f) Defense counsel should actively work to maintain an effective and regular relationship with all clients. The obligation to maintain an effective client relationship is not diminished by the fact that the client is in custody.

#### Standard 4-3.2: Seeking Detained Client's Release From Custody, or Reduction in Custodial Conditions

(a) In every case where the client is detained, defense counsel should discuss with the client, as promptly as possible, the client's custodial or release status and determine whether release, a change in release conditions, or less restrictive custodial conditions, should be sought. Counsel should be aware of applicable statutes and rules, and all alternatives less restrictive than full institutional detention. Counsel should investigate community and family resources that might be available to assist in implementing such alternatives.

(b) Counsel should investigate the factual predicate that has been advanced to support detention and custodial conditions, and not assume its accuracy.

(c) Once counsel has sufficient command of the facts, counsel should approach the prosecutor to see if agreement to release or a change in release or custodial conditions can be negotiated and submitted for approval by the court.

(d) If the prosecutor does not agree, counsel should submit to the court a statement of facts, legal argument, and proposed conditions if necessary, to support the client's release or a reduction in release or custodial conditions.

(e) If a court orders release, counsel should fully explain all conditions of release to the client, as well as the consequences of their violation. Counsel should assist the client and others acting for the client in properly implementing the release conditions.

(f) If counsel is unable to secure the client's release, counsel should, after discussion with the client and with due regard to any relevant confidentiality concerns, alert the court and institutional personnel to any special medical, psychiatric, religious, dietary, or security needs of the client while in government custody, and request that the court order the appropriate officials to take steps to meet such special needs.

(g) Counsel should reevaluate the client's eligibility for release, or for reduced release or custodial conditions, at all significant stages of a criminal matter and when there is any relevant change in facts or circumstances. Counsel should request reconsideration of detention or modification of conditions whenever it is in the client's best interests.

### Standard 4-3.3: Interviewing the Client

(a) In the initial meeting with a client, defense counsel should begin the process of establishing an effective attorney-client relationship. This includes assuring the client of confidentiality, establishing trust, explaining the posture of the matter, discussing fees if applicable, and inquiring about the client's objectives for the representation. Counsel may also discuss available evidentiary materials with the client, seek information from the client as to the facts and other potential sources of information, and ask what the client's immediate objectives and needs are and how to fulfill them.

(b) Counsel should interview the client as many times as necessary for effective representation, which in all but the most simple and routine cases will mean more than once. Defense counsel should make every reasonable effort to meet in person with the client. Consultation with the client regarding available options, immediately necessary decisions, and next steps, should be a part of every meeting.

(c) As early as practicable in the representation, defense counsel should also discuss:

(i) and share with the client evidentiary materials relevant to the matter (consistent with the terms of any applicable protective order), and determine in depth the client's view of the facts and other relevant facts known to the client;

(ii) the likely length and course of the pending proceedings;

(iii) potential sources of helpful information, evidence, and investigation;

(iv) the client's wishes regarding, and the likelihood of and steps necessary to gain, release or reduction of supervisory conditions;

(v) likely legal options such as motions, trial, and potential negotiated dispositions;

(vi) the range of potential outcomes and alternatives, and if convicted, possible punishments;

(vii) if appropriate, the possibility and potential costs and benefits of a negotiated disposition, including one that might include cooperation with the government; and

(viii) relevant collateral consequences resulting from the current situation as well as from possible resolutions of the matter.

(d) When asking the client for information and discussing possible options and strategies with the client, defense counsel should not seek to induce the client to make factual responses that are not true. Defense counsel should encourage candid disclosure by the client to counsel and not seek to maintain a calculated ignorance.

#### Standard 4-3.7: Prompt and Thorough Actions to Protect the Client

- (a) Many important rights of a criminal client can be protected and preserved only by prompt legal action. Defense counsel should inform the client of his or her rights in the criminal process at the earliest opportunity, and timely plan and take necessary actions to vindicate such rights within the scope of the representation.
- (b) Defense counsel should promptly seek to obtain and review all information relevant to the criminal matter, including but not limited to requesting materials from the prosecution. Defense counsel should, when relevant, take prompt steps to ensure that the government's physical evidence is preserved at least until the defense can examine or evaluate it.
- (c) Defense counsel should work diligently to develop, in consultation with the client, an investigative and legal defense strategy, including a theory of the case. As the matter progresses, counsel should refine or alter the theory of the case as necessary, and similarly adjust the investigative or defense strategy.
- (d) Not all defense actions need to be taken immediately. If counsel has evidence of innocence, mitigation, or other favorable information, defense counsel should discuss with the client and decide whether, going to the prosecution with such evidence is in the client's best interest, and if so, when and how..
- (e) Defense counsel should consider whether an opportunity to benefit from cooperation with the prosecution will be lost if not pursued quickly, and if so, promptly discuss with the client and decide whether such cooperation is in the client's interest. Counsel should timely act in accordance with such decisions.
- (f) For each matter, defense counsel should consider what procedural and investigative steps to take and motions to file, and not simply follow rote procedures learned from prior matters. Defense counsel should not be deterred from sensible action merely because counsel has not previously seen a tactic used, or because such action might incur criticism or disfavor. Before acting, defense counsel should discuss novel or unfamiliar matters or issues with colleagues or other experienced counsel, employing safeguards to protect confidentiality and avoid conflicts of interest.
- (g) Whenever defense counsel is confronted with specialized factual or legal issues with which counsel is unfamiliar, counsel should, in addition to researching and learning about the issue personally, consider engaging or consulting with an expert in the specialized area.
- (h) Defense counsel should always consider interlocutory appeals or other collateral proceedings as one option in response to any materially adverse ruling.

#### Standard 4-3.9: Duty to Keep Client Informed and Advised About the Representation

- (a) Defense counsel should keep the client reasonably and currently informed about developments in and the progress of the lawyer's services, including developments in pretrial investigation,

discovery, disposition negotiations, and preparing a defense. Information should be sufficiently detailed so that the client can meaningfully participate in the representation.

(b) Defense counsel should promptly comply with the client's reasonable requests for information about the matter and for copies of or access to relevant documents, unless the client's access to such information is restricted by law or court order. Counsel should challenge such restrictions on the client's access to information unless, after consultation with the client, there is good reason not to do so.

#### Standard 4-4.1: Duty to Investigate and to Engage Investigators

(a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.

(b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.

(c) Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

(d) Defense counsel should determine whether the client's interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation.

(e) If the client lacks sufficient resources to pay for necessary investigation, counsel should seek resources from the court, the government, or donors. Application to the court should be made *ex parte* if appropriate to protect the client's confidentiality. Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a regular basis. If adequate investigative funding is not provided, counsel may advise the court that the lack of resources for investigation may render legal representation ineffective.

### Standard 4-6.1: Duty to Explore Disposition Without Trial

(a) Defense counsel should be open, at every stage of a criminal matter and after consultation with the client, to discussions with the prosecutor concerning disposition of charges by guilty plea or other negotiated disposition. Counsel should be knowledgeable about possible dispositions that are alternatives to trial or imprisonment, including diversion from the criminal process.

(b) In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest.

#### **Excerpts from Tennessee Supreme Court Rule 8, Rules of Professional Conduct**

(Rule and Commentary available online at <https://www.tncourts.gov/rules/supreme-court/8>)

**Rule 1.1: Competence.** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

**Rule 1.3: Diligence.** A lawyer shall act with reasonable diligence and promptness in representing a client.

#### **Rule 1.4: Communication.**

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

SAMPLE  
Legal Mail: Letter to Attorney

Date:

[Your Lawyer's Name]  
[Mailing Address     ]  
[City, State, Zip Code ]

Reason for Letter: Your representation of me in Case # \_\_\_\_\_

Dear Attorney \_\_\_\_\_,

You were appointed to represent me on a criminal case in Davidson County because I cannot afford to hire a lawyer. **I am concerned that I am not receiving the level of representation that I am entitled to under the law.** This letter is to ask you to help me with my case. I \_\_\_ am \_\_\_ am not currently in jail.

**Communications**

Since you were appointed, you have visited with me \_\_\_ time(s). We have talked \_\_\_ time(s) on the phone. You have sent me \_\_\_ letter(s). I have tried to contact you to ask you to work on my case and tell me about what is happening with my case, and you have not done so. In total, we have had the following communications:

<b>From (Name)</b>	<b>Type of Contact</b>	<b>To (Name)</b>	<b>Date</b>	<b>General Description</b>

SAMPLE  
Legal Mail: Letter to Attorney


I do not feel that you have kept me reasonably informed of the status of my case. These are the things/questions I want to discuss with you about my case:

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Please contact me by phone or in person within two weeks of the date of this letter to discuss these issues in my case.

**Other Specific Legal Concerns**

I also have concerns about:

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**Conclusion**

I would like to be able to work with you, my court-appointed lawyer, on my case. I have questions about my case, and there are things I want you to do for me. If you are not able to communicate with me or to advocate for me, or do not want to do so, please move to withdraw from my case so I can request another appointed lawyer.

Thank you,

\_\_\_\_\_  
Your Signature  
Your Printed Name:





**BOARD OF PROFESSIONAL RESPONSIBILITY**

of the

**SUPREME COURT OF TENNESSEE**

10 Cadillac Drive Suite 220

Brentwood, TN 37027

FAX No: 615-367-2480

EMAIL: [complaints@tbpr.org](mailto:complaints@tbpr.org)

**Complaint/Assistance Form**

**Please check ONE of the following:**

I would like to file a formal complaint:  **OR** I would rather file an informal request for assistance:

Your Name: Mr.  Mrs.  Ms.  Miss  \_\_\_\_\_

Your Home Address: \_\_\_\_\_  
City State Zip

Email \_\_\_\_\_ Check box if incarcerated:  Inmate ID#: \_\_\_\_\_

Your Home Phone: \_\_\_\_\_ Your Work Phone: \_\_\_\_\_ Your Cell Phone: \_\_\_\_\_

Your Employer: \_\_\_\_\_

Your Work Address: \_\_\_\_\_  
City State Zip

Where do you prefer to receive correspondence? Home address  Work Address

Lawyer's Name: \_\_\_\_\_ Lawyer's Phone: \_\_\_\_\_

Lawyer's Address: \_\_\_\_\_  
City State Zip

**(Fill out a separate form for each lawyer you are complaining about. Do not include the name of the law firm.)**

The above lawyer is: My attorney: \_\_\_\_\_ Opposing attorney: \_\_\_\_\_ Other: \_\_\_\_\_

Date of first contact with Lawyer: \_\_\_\_\_ Date of last contact with Lawyer: \_\_\_\_\_

Is your case: Criminal  Civil  Case# \_\_\_\_\_ County: \_\_\_\_\_

If your case is in a Federal District, please check one of the following districts: Eastern  Middle  Western

**Please check the case type:**

Bankruptcy \_\_\_\_\_ Domestic (Family) \_\_\_\_\_ General Civil \_\_\_\_\_ Personal Injury \_\_\_\_\_ Workers Comp \_\_\_\_\_ Estate \_\_\_\_\_

Social Security \_\_\_\_\_ Real Estate \_\_\_\_\_ Other (please describe): \_\_\_\_\_

Criminal (if this is a Criminal case, please list the charge[s]): \_\_\_\_\_

Stage of the Criminal Case:

Trial or Pre-Trial \_\_\_\_\_ Direct Appeal \_\_\_\_\_ Post-Conviction \_\_\_\_\_ Post-Conviction Appeal \_\_\_\_\_ Habeas Corpus \_\_\_\_\_

Violation of Probation/Parole \_\_\_\_\_ Other: \_\_\_\_\_

**CLEARLY DESCRIBE YOUR CONCERNS AND ATTACH SUPPORTING DOCUMENTS:** \_\_\_\_\_

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If more space is needed, please attach extra pages. Please do not write on the back of this form.

**In the event our office is unable to reach you, please provide the name and address of an alternate contact person:**

\_\_\_\_\_

\_\_\_\_\_

**NOTE:** The filing of this complaint does not create an attorney-client relationship and the Board will not provide you any legal advice. The Board does not intervene in any on-going legal matter. The Board cannot require a lawyer to do, or not do, anything until a finding of misconduct is made. Filing a complaint with the Board will not preserve your legal rights and remedies. You should pursue independent legal advice and counsel concerning your legal matters. You may have limited time (statute of limitations) to file a legal malpractice lawsuit.

The information given in this complaint is true to the best of my knowledge and belief. I am aware that the lawyer may be notified of my complaint.

YOUR SIGNATURE: \_\_\_\_\_ Date: \_\_\_\_\_

**FORWARD TO:** Board of Professional Responsibility  
10 Cadillac Drive Suite 220  
Brentwood, TN 37027  
**FAX NO:** 615-367-2480  
**EMAIL:** [complaints@tbpr.org](mailto:complaints@tbpr.org)

**OFFICE USE ONLY**

Log:                    /   /

DC:                    Action:

Case Type:

IN THE \_\_\_\_\_ COURT FOR DAVIDSON COUNTY, TENNESSEE  
DIVISION \_\_\_\_

STATE OF TENNESSEE ]  
VS. ] Case No. \_\_\_\_\_  
\_\_\_\_\_] ]  
(Defendant's Name)

**PRO SE MOTION TO APPOINT NEW LAWYER**

The defendant in this case, \_\_\_\_\_, on my own behalf, moves this Court to remove attorney \_\_\_\_\_ as my appointed counsel, and to appoint a new lawyer to represent me. In support of this Motion, I rely on the statements below, which are made in good faith. **I request a hearing on this Motion as soon as possible, and I want to be represented by an attorney at that hearing, if I can find one to represent me.**

**FACTS**

1. This Court appointed \_\_\_\_\_ to represent me in this case. I cannot afford to hire a lawyer.
2. My next court date is set for \_\_\_\_\_.
3. I believe my lawyer is violating my constitutional right to effective assistance of counsel, which is guaranteed to me by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 9 of the Tennessee Constitution, because (mark all that apply):

- my lawyer rarely, or never, visits me at the jail
- my lawyer rarely, or never, answers my phone calls
- my lawyer rarely, or never, responds to my letters
- my lawyer rarely, or never, sends me written letters

- my lawyer has not given me copies of documents I have requested
- my lawyer has not reviewed the State's discovery response with me
- my lawyer has not let me listen to or watch video/audio recordings in my case
- my lawyer has done little or no investigation into the facts of my case
- my lawyer has not explained the charges against me
- my lawyer has not discussed defense strategies with me
- my lawyer has not explained the sentence I could receive
- my lawyer has not filed a motion to reduce bond that I requested
- my lawyer has not filed other motions that I requested
- my lawyer has not done other things I asked my lawyer to do
- my lawyer has done things I told my lawyer not to do
- my lawyer has threatened me, or been abusive/disrespectful to me
- my lawyer has done other things to cause me not to trust my lawyer.

4. In support of these statements, I want to tell the Court what my lawyer has or has not done in my case. I do not want to do that with the prosecutor there, because my statements about my case could be used against me. I would like the Court to conduct a hearing where I can present proof of my claims without the prosecutor there.

5. I have told my lawyer (or tried to tell my lawyer) about these problems, and I have tried to work with my lawyer to fix these problems by (mark all that apply):

- talking with my lawyer in person
- calling my lawyer on the phone
- asking friends, family members, or others to talk with my lawyer for me
- writing to the Board of Professional Responsibility once

- writing to the Board of Professional Responsibility more than once
- asking my lawyer to file a motion to get me a new lawyer
- asking my lawyer to let me talk directly to the judge about a new lawyer

6. Nothing I have done has fixed the problems with my lawyer. As a result, I am now asking that a new lawyer be appointed because (mark all that apply):

my lawyer's performance is ineffective, inadequate, and below the standards expected of defense counsel in criminal cases

my lawyer and I have a conflict that cannot be fixed

there is a complete breakdown in communication between my lawyer and me.

7. I do not want to represent myself in this case, and I do not want to waive my constitutional right to counsel.

8. I am not asking for a new lawyer because I want to drag out my case or delay my trial. I am asking for a new lawyer because good cause exists to appoint me a new lawyer, one who will communicate with me, and work for me by doing the basic tasks required of a lawyer.

9. I  have  have not identified a lawyer I would like to represent me in this case. The lawyer's name is \_\_\_\_\_. If this lawyer is willing and available to represent me, I request that the Court appoint this lawyer to represent me.

10. A lawyer \_\_\_\_\_ did \_\_\_\_\_ did not assist me in completing this form. If a lawyer did assist me, that lawyer's name is \_\_\_\_\_.

### LAW

The Sixth and Fourteenth Amendments to the United States Constitution, and Article 1, § 9 of the Tennessee Constitution, guarantee an indigent criminal defendant the right to assistance of counsel. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *State v. Carruthers*, 35

S.W.3d 516, 546 (Tenn. 2000). As a matter of equal protection of the law, the State of Tennessee is required to provide indigent criminal defendants with the basic tools of an adequate defense or appeal, when those tools are “available for a price to other” defendants. *See Britt v. North Carolina*, 404 U.S. 226, 227 (1971) (citing *Griffin v. Illinois*, 351 U.S. 12 (1956)). “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive[,] for it affects his ability to assert any other rights he may have.” *United States v. Cronin*, 466 U.S. 648, 654 (1984) (quoting Walter Schaefer’s “Federalism and State Criminal Procedure,” 70 Harv.L.Rev. 1, 8 (1956)).

The Sixth and Fourteenth Amendments and the Tennessee Constitution require more than mere appointment of a member of the bar – they protect the right to *effective* assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975); *see also Powell v. Alabama*, 287 U.S. 45, 58-61 (1932) (holding that counsel's "appearance was rather pro forma than zealous and active [and] defendants were not accorded the right of counsel in any substantial sense"). “The Constitution’s guarantee of assistance of counsel cannot be satisfied by mere formal appointment.” *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (footnote omitted).

Denial of the right to counsel can be actual or constructive. *Cronin*, 466 U.S. at 654. Actual denial of counsel occurs when no lawyer is appointed. Constructive denial of counsel occurs when a lawyer “entirely fails to subject the prosecution’s case to meaningful adversarial testing.” *Id.* at 659. Whenever either happens, “there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable...” *Id.* Because a denial of counsel renders the process presumptively unreliable, a defendant who suffers that fate is not required to prove actual prejudice to obtain relief. *Id.*; *see also United*

*States v. Gonzalez-Lopez*, 548 U.S. 140, 148, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2016) (wrongful deprivation of the right to counsel is “structural” error that so “affec[ts] the framework within which the trial proceeds,” courts may not ask whether the error harmed the defendant) (internal quotation marks omitted).

Pre-trial denial of counsel claims are different than post-trial ineffective assistance of counsel claims, and as such, they are not analyzed by the standards established in *Strickland v. Washington*, 466 U.S. 668 (1984). See *Kuren v. Luzerne Cnty.*, 146 A.3d 715, 743-747 (Pa. 2016) (holding that harm from a violation of the right to counsel, in the form of actual or constructive denial of counsel, is not limited to the post-conviction context, and rejecting *Strickland* as the proper standard to analyze pre-trial constructive denial of counsel claims); see also *Hurrell-Harring v. State*, 930 N.E.2d 217, 224 (N.Y. 2010) (holding that these “allegations state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*.”); *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988) (holding that the Sixth Amendment protects rights that do not affect the outcome of a trial, and deficiencies that do not meet the “ineffectiveness” standard may still violate a defendant’s rights under the Sixth Amendment); *Missouri Pub. Defenders Comm’n v. Waters*, 370 S.W.3d 592, 607 (Mo. 2012) (holding Sixth Amendment right to counsel requires more than just a “pro forma” appointment whereby the defendant has counsel in name only).

When faced with pre-trial denial of counsel claims, courts have analyzed them under the principles first stated in *Gideon* and expounded upon thereafter: “[t]he essence of th[e] right to counsel]. . . is the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial.” *Michigan v. Harvey*, 494 U.S. 344, 348 (1990) (emphasis added and citations omitted). “Actual representation assumes a

certain basic representational relationship.” *Hurrell-Harring*, 930 N.E.2d at 224 (emphasis added). This includes the attorney’s availability to engage in meaningful attorney-client contact to learn from and advise the client, the attorney’s ability to investigate the allegations and the client’s circumstances that may inform strategy, and the attorney’s ability to advocate for the client either through plea negotiation, trial, or post-trial. When these traditional markers of representation are absent, there is serious concern that the assigned counsel is merely a lawyer in name only.

**When an accused in Tennessee seeks to substitute counsel, the accused has the burden of establishing to the trial judge’s satisfaction at least one of the following: (a) that counsel’s representation is ineffective, inadequate, and falls below the range of competency expected of defense counsel in criminal prosecutions; (b) that the accused and counsel have become embroiled in an irreconcilable conflict; or (c) that there has been a complete breakdown in communications between them.** *State v. Gilmore*, 823 S.W.2d 566, 568-69 (Tenn. Crim. App. 1991). The standard for evaluating whether a defendant’s right to effective assistance of counsel has been violated is whether “the advice given, or the services rendered by the attorney, are within the range of competence demanded of attorneys in criminal cases.” *Baxter*, 523 S.W.2d at 936.

The Tennessee Supreme Court has held that in making this assessment, trial courts should look to the American Bar Association’s Standards for Criminal Justice, The Defense Function (4th ed. 2015). *See id.* (citing to the original version of those Standards, which are now in their 4<sup>th</sup> edition). Those standards include the duty to establish and maintain an effective client relationship (Standard 4-3.1), the duty to seek a detained client’s release from custody (Standard 4-3.2), and the duty to investigate a case (Standard 4-4.1). Tennessee Supreme



Court Rule 8, Rules of Professional Conduct, is also relevant to this analysis, as it establishes an attorney's ethical obligations in representing clients. Particularly relevant in this context are the duties of Competence (Rule 1.1); Diligence (Rule 1.3); Communication (Rule 1.4); and Conflict of Interest: Current Clients (Rule 1.7). Although the Board of Professional Responsibility governs attorney conduct, it does not have the power or authority to appoint substitute counsel to represent me in this case.

### **REQUEST FOR RELIEF**

Based on the facts and law in this Motion, I believe my constitutional right to counsel is being violated in this case, because my lawyer's representation is "ineffective, inadequate, and falls below the range of competency expected of defense counsel in criminal prosecutions," and/or because my lawyer and I have an irreconcilable conflict, and/or because there has been a complete breakdown in communications between me and my lawyer. My right to equal protection of the law is being violated, because the State is denying me access to the most important tool I need for a fair trial and my defense – an effective lawyer. Because that tool is available to persons who can pay for it, and because it is necessary to fundamental fairness, the State must provide the same for those who cannot afford to pay for it. Failing to do so violates equal protection.

The right to counsel means nothing if I have to wait until I am convicted of a crime to assert it. Without a hearing on this motion, I have no way of meeting the legal burden put on me to prove that I am entitled to a different lawyer who will provide me with effective representation. Based on this motion, I ask this Court to grant me a hearing on this request, and to appoint me a new attorney who will provide me with effective representation. If I can find a

lawyer to represent me on this Motion, I also request to be represented by a lawyer other than my appointed lawyer at that hearing.

\_\_\_\_\_  
(Defendant's signature)

**Defendant's Name:**

**Defendant's Address:**

### **CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of this Motion has been delivered to the District Attorney General for the State of Tennessee, 222 2<sup>nd</sup> Avenue North, Nashville, TN 37201, on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
**Defendant's signature**