

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

Senate Bill 546

**FISCAL
NOTE**

BY SENATORS HALL, PALUMBO, TRUMP AND PLYMALE

[Introduced February 8, 2016;

Referred to the Committee on the Judiciary; and then to
the Committee on Finance.]

1 A BILL to amend and reenact §29-21-2, §29-21-6, §29-21-8, §29-21-9 and §29-21-13a of the
 2 Code of West Virginia, 1931, as amended, all relating generally to Public Defender
 3 Services; transferring authority to review, approve, reduce or reject panel attorney
 4 vouchers from circuit courts to Public Defender Services; providing for resubmission of
 5 vouchers previously reduced or rejected; authorizing the Executive Director of Public
 6 Defender Services, with approval of the Indigent Defense Commission, to establish
 7 conflict public defender corporations and establishing criteria therefor; authorizing the
 8 Executive Director of Public Defender Services to contract for legal services or specialized
 9 legal services in any circuit; revising order of preference for the appointment of attorneys;
 10 and requiring panel attorneys to maintain time-keeping records on a daily basis.

Be it enacted by the Legislature of West Virginia:

1 That §29-21-2, §29-21-6, §29-21-8, §29-21-9 and §29-21-13a of the Code of West
 2 Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 21. PUBLIC DEFENDER SERVICES.

§29-21-2. Definitions.

1 As used in this article, the following words and phrases are hereby defined:

2 (1) "Conflict public defender corporation": A public defender corporation that is created
 3 and operated to provide legal representation to eligible clients who cannot be represented by an
 4 existing public defender corporation. A conflict public defender corporation is to be considered a
 5 public defender corporation for all purposes under this article except with respect to the manner
 6 and order in which cases are to be appointed to the conflict public defender corporation.

7 ~~(4)~~ (2) "Eligible client": Any person who meets the requirements established by this article
 8 to receive publicly funded legal representation in an eligible proceeding as defined herein;

9 ~~(2)~~ (3) "Eligible proceeding": Criminal charges which may result in incarceration; juvenile
 10 proceedings; proceedings to revoke parole or probation if the revocation may result in
 11 incarceration; contempt of court; child abuse and neglect proceedings which may result in a

12 termination of parental rights; mental hygiene commitment proceedings; extradition proceedings;
13 proceedings which are ancillary to an eligible proceeding, including, but not limited to,
14 proceedings to enhance sentences brought pursuant to sections eighteen and nineteen, article
15 eleven, chapter sixty-one of this code, forfeiture proceedings brought pursuant to article seven,
16 chapter sixty-a of this code, and proceedings brought to obtain extraordinary remedies; and
17 appeals from or post-conviction challenges to the final judgment in an eligible proceeding. Legal
18 representation provided pursuant to the provisions of this article is limited to the court system of
19 the State of West Virginia, but does not include representation in municipal courts unless the
20 accused is at risk of incarceration;

21 ~~(3)~~ (4) "Legal representation": The provision of any legal services or legal assistance as
22 counsel or guardian ad litem consistent with the purposes and provisions of this article;

23 ~~(4)~~ (5) "Private practice of law": The provision of legal representation by a public defender
24 or assistant public defender to a client who is not entitled to receive legal representation under
25 the provisions of this article, but does not include, among other activities, teaching;

26 ~~(5)~~ (6) "Public defender": The staff attorney employed on a full-time basis by a public
27 defender corporation who, in addition to providing direct representation to eligible clients, has
28 administrative responsibility for the operation of the public defender corporation. The public
29 defender may be a part-time employee if the board of directors of the public defender corporation
30 finds efficient operation of the corporation does not require a full-time attorney and the executive
31 director approves such part-time employment;

32 ~~(6)~~ (7) "Assistant public defender": A staff attorney providing direct representation to
33 eligible clients whose salary and status as a full-time or part-time employee are fixed by the board
34 of directors of the public defender corporation;

35 ~~(7)~~ (8) "Public defender corporation": A corporation created under section eight of this
36 article for the sole purpose of providing legal representation to eligible clients; and

37 ~~(8)~~ (9) "Public defender office": An office operated by a public defender corporation to

38 provide legal representation under the provisions of this article.

§29-21-6. Powers, duties and limitations.

1 (a) Consistent with the provisions of this article, the agency is authorized to make grants
2 to and contracts with public defender corporations and with individuals, partnerships, firms,
3 corporations and nonprofit organizations for the purpose of providing legal representation under
4 this article and may make any other grants and contracts that are necessary to carry out the
5 purposes and provisions of this article.

6 (b) The agency is authorized to accept, and employ or dispose of in furtherance of the
7 purposes of this article, any money or property, real, personal or mixed, tangible or intangible,
8 received by gift, devise, bequest or otherwise.

9 (c) The agency shall establish and the executive director or his or her designee shall
10 operate a criminal law research center as provided in section seven of this article. This center
11 shall undertake directly, or by grant or contract, to serve as a clearinghouse for information; to
12 provide training and technical assistance related to the delivery of legal representation; and to
13 engage in research, except that broad general, legal or policy research unrelated to direct
14 representation of eligible clients may not be undertaken.

15 (d) The agency shall establish and the executive director or his or her designee shall
16 operate an accounting and auditing division to require and monitor the compliance with this article
17 by public defender corporations and other persons or entities receiving funding or compensation
18 from the agency. The accounting and auditing division shall review all plans and proposals for
19 grants and contracts and shall make a recommendation of approval or disapproval to the
20 executive director. The accounting and auditing division shall prepare, or cause to be prepared,
21 reports concerning the evaluation, inspection or monitoring of public defender corporations and
22 other grantees, contractors, persons or entities receiving financial assistance under this article
23 and shall further carry out the agency's responsibilities for records and reports as set forth in
24 section eighteen of this article. The accounting and auditing division shall require each public

25 defender corporation to submit financial statements monthly and to report monthly on the billable
26 and nonbillable time of its professional employees, including time used in administration of the
27 respective offices, so as to compare the time to similar time expended in nonpublic law offices for
28 similar activities. The accounting and auditing division shall provide to the executive director
29 assistance in the fiscal administration of all of the agency's divisions. This assistance shall include,
30 but not be limited to, budget preparation and statistical analysis. The agency may reduce or reject
31 vouchers or requests for payment submitted pursuant to section thirteen-a of this article found not
32 to be in compliance with the provisions of this article.

33 (e) The agency shall establish and the executive director or his or her designee shall
34 operate an appellate advocacy division for the purpose of prosecuting litigation on behalf of
35 eligible clients in the Supreme Court of Appeals. The executive director or his or her designee
36 shall be the director of the appellate advocacy division. The appellate advocacy division shall
37 represent eligible clients upon appointment by the circuit courts or by the Supreme Court of
38 Appeals. The division may, however, refuse the appointments due to a conflict of interest or if the
39 executive director has determined the existing caseload cannot be increased without jeopardizing
40 the appellate division's ability to provide effective representation. In order to effectively and
41 efficiently use the resources of the appellate division, the executive director may restrict the
42 provision of appellate representation to certain types of cases. The executive director may select
43 and employ staff attorneys to perform the duties prescribed by this subsection. The appellate
44 division shall maintain records of representation of eligible clients for record purposes only.

§29-21-8. Public defender corporations; establishment thereof.

1 (a) (1) In each judicial circuit of the state, there is hereby created a public defender
2 corporation of the circuit: *Provided*, That the executive director, with the approval of the Indigent
3 Defense Commission, may authorize the creation, merger or dissolution of a public defender
4 corporation in a judicial circuit where the creation, merger or dissolution of such a public defender
5 corporation would improve the quality of legal representation, assure the prudent and resourceful

6 expenditure of state funds and further the purposes of this article: *Provided, however,* That prior
7 to the creation, merger or dissolution of a public defender corporation in accordance with this
8 subsection, the commission shall provide a report to the Legislature pursuant to subsection (g),
9 section three-b of this article for approval of the creation, merger, or dissolution of any public
10 defender corporation.

11 (2) The purpose of these public defender corporations is to provide legal representation in
12 the respective circuits in accordance with the provisions of this article. A public defender
13 corporation may employ full-time attorneys and employ part-time attorneys in whatever
14 combination that the public defender corporation deems most cost effective.

15 (b) If the executive director, with the approval of the Indigent Defense Commission,
16 determines there is a need to activate, merge or dissolve a corporation in a judicial circuit of the
17 state, pursuant to subsection (a) of this section, the Indigent Defense Commission shall first
18 consult with and give substantial consideration to the recommendation of the judge of a single-
19 judge circuit or the chief judge of a multijudge circuit.

20 (c) If the executive director, with approval of the Indigent Defense Commission,
21 determines that the purposes of this article can be furthered by the creation of a conflict public
22 defender corporation in a judicial circuit to handle the cases in which an existing public defender
23 corporation within the judicial circuit or within an adjoining judicial circuit has a conflict, the creation
24 and operation of a conflict public defender corporation is authorized.

25 (d) If the executive director, with the approval of the Indigent Defense Commission
26 determines that the purposes of this article can be furthered by the execution of a contract with a
27 provider of legal services to provide legal representation to eligible clients rather than by payment
28 of hourly rates of compensation to panel attorneys, the execution of the contract is authorized and
29 is exempt from the provisions of, and procedures promulgated or issued pursuant to, article three,
30 chapter five-a of this code. The payment of the contract amount is authorized from the funds
31 appropriated for the payment of appointed counsel fees.

32 (e) If the executive director, with the approval of the Indigent Defense Commission,
33 determines that the purposes of this article can be furthered by the execution of a contract with a
34 provider of legal services in discrete or specialized areas of the law to provide legal representation
35 to eligible clients, the execution of the contract is authorized and is exempt from the provisions of,
36 and procedures adopted pursuant to, article three, chapter five-a of this code. The payment of
37 the contract amount is authorized from the funds appropriated for the payment of appointed
38 counsel fees.

§29-21-9. Panel attorneys.

1 (a) In each circuit of the state, the circuit court shall establish and maintain regional and
2 local panels of private attorneys-at-law who are available to serve as counsel for eligible clients.
3 An attorney-at-law may become a panel attorney and be enrolled on the regional or local panel,
4 or both, to serve as counsel for eligible clients by informing the court. An agreement to accept
5 cases generally or certain types of cases particularly may not prevent a panel attorney from
6 declining an appointment in a specific case.

7 (b) In all cases where an attorney-at-law is required to be appointed for an eligible client,
8 the appointment shall be made by the circuit judge: *Provided*, That in family court contempt cases,
9 the family court judge shall appoint an attorney-at-law when required, in the following order of
10 preference:

11 (1) In circuits where a public defender office is in operation, the judge shall appoint the
12 public defender office unless an appointment is not appropriate due to a conflict of interest or
13 unless the public defender corporation board of directors or the public defender, with the approval
14 of the board, has notified the court that the existing caseload cannot be increased without
15 jeopardizing the ability of defenders to provide effective representation;

16 (2) If the public defender office is not available for appointment, the court shall appoint ~~one~~
17 ~~or more panel attorneys from the local panel~~ the conflict public defender corporation if one has
18 been created;

19 (3) If neither the public defender office nor the conflict public defender corporation, if
 20 created, is available, the court shall appoint one or more panel attorneys from the local panel;

21 ~~(3)~~ (4) If there is no local panel attorney available, the judge shall appoint one or more
 22 panel attorneys from the regional panel;

23 ~~(4)~~ (5) If there is no regional panel attorney available, the judge may appoint a public
 24 defender office or a conflict public defender corporation from an adjoining circuit if ~~such~~ the public
 25 defender office or conflict public defender corporation agrees to the appointment;

26 ~~(5)~~ (6) If the adjoining public defender office or conflict public defender corporation does
 27 not accept the appointment, the judge may appoint a panel attorney from an adjoining circuit; or

28 ~~(6)~~ (7) If a panel attorney from an adjoining circuit is unavailable, the judge may appoint a
 29 panel attorney from any circuit.

30 (c) In any given case, the appointing judge may alter the order in which attorneys are
 31 appointed if the case requires particular knowledge or experience on the part of the attorney to
 32 be appointed: *Provided*, That any time a court, in appointing counsel pursuant to the provisions
 33 of this section, alters the order of appointment as set forth herein, the order of appointment shall
 34 contain the court's reasons for doing so.

§29-21-13a. Compensation and expenses for panel attorneys.

1 (a) All panel attorneys shall maintain detailed and accurate records of the time expended
 2 and expenses incurred on behalf of eligible clients, ~~and~~ which records are to be maintained
 3 contemporaneously with the performance of the legal services in a form which will enable the
 4 attorney to determine for any day the periods of time expended on behalf of any eligible client and
 5 the total time expended on that day on behalf of all eligible clients. Upon completion of each case,
 6 exclusive of appeal, panel attorneys shall submit to ~~the appointing court~~ Public Defender Services
 7 a voucher for services. Claims for fees and expense reimbursements shall be submitted to ~~the~~
 8 ~~appointing court~~ Public Defender Services on forms approved by the executive director. The
 9 executive director shall establish guidelines for the submission of vouchers and claims for fees

10 and expense reimbursements under this section. Claims submitted more than ninety calendar
11 days after the last date of service shall be rejected, unless for good cause, the appointing court
12 Public Defender Services authorizes in writing an extension. ~~Provided, That claims where the last~~
13 ~~date of service occurred prior to July 1, 2008, shall be rejected unless submitted prior to January~~
14 ~~1, 2009~~

15 ~~The appointing court~~ Public Defender Services shall review the voucher to determine if
16 the time and expense claims are reasonable, necessary and valid. ~~and shall forward the voucher~~
17 ~~to the agency with an order approving payment of the claimed amount or of a lesser sum the court~~
18 ~~considers appropriate~~ If Public Defender Services rejects a voucher or reduces the amount of
19 compensation claimed or reimbursement requested, the attorney submitting the voucher shall be
20 notified by electronic means of the rejection or the reduction. The attorney may resubmit the
21 voucher or may request payment of the amount by which the voucher was reduced by submitting
22 to Public Defender Services copies of the attorneys' records establishing that the services were
23 performed for the reported period of time, submitting certification from a judge of the appointing
24 circuit court or family court that the services or expenses were reasonable, valid and necessary,
25 and providing other information or records Public Defender Services requests. The executive
26 director shall then make a final determination regarding the payment of the requested amount.

27 (b) Notwithstanding any other provision of this section to the contrary, Public Defender
28 Services may pay by direct bill, prior to the completion of the case, litigation expenses incurred
29 by attorneys appointed under this article.

30 (c) Notwithstanding any other provision of this section to the contrary, a panel attorney
31 may be compensated for services rendered and reimbursed for expenses incurred prior to the
32 completion of the case where: (1) More than six months have expired since the commencement
33 of the panel attorney's representation in the case; and (2) no prior payment of attorney fees has
34 been made to the panel attorney by Public Defender Services during the case. The executive
35 director, in his or her discretion, may authorize periodic payments where ongoing representation

36 extends beyond six months in duration. The amounts of any fees or expenses paid to the panel
37 attorney on an interim basis, when combined with any amounts paid to the panel attorney at the
38 conclusion of the case, shall not exceed the limitations on fees and expenses imposed by this
39 section.

40 (d) In each case in which a panel attorney provides legal representation under this article,
41 and in each appeal after conviction in circuit court, the panel attorney shall be compensated at
42 the following rates for actual and necessary time expended for services performed and expenses
43 incurred subsequent to the effective date of this article:

44 (1) For attorney's work performed out of court, compensation shall be at the rate of \$45
45 per hour. For paralegal's work performed out of court for the attorney, compensation shall be at
46 the rate of the paralegal's regular compensation on an hourly basis or, if salaried, at the hourly
47 rate of compensation which would produce the paralegal's current salary, but in no event shall
48 the compensation exceed \$20 per hour. Out-of-court work includes, but is not limited to, travel,
49 interviews of clients or witnesses, preparation of pleadings and prehearing or pretrial research.

50 (2) For attorney's work performed in court, compensation shall be at the rate of \$65 per
51 hour. No compensation for paralegal's work performed in court shall be allowed. In-court work
52 includes, but is not limited to, all time spent awaiting hearing or trial before a judge, magistrate,
53 special master or other judicial officer.

54 (3) The maximum amount of compensation for out-of-court and in-court work under this
55 subsection is as follows: For proceedings of any kind involving felonies for which a penalty of life
56 imprisonment may be imposed, the amount ~~as the court may approve~~ that Public Defender
57 Services approves for all other eligible proceedings, \$3,000 unless the ~~court, for good cause~~
58 ~~shown~~ executive director, after consultation with the appointing court, approves payment of a
59 larger sum.

60 (e) Actual and necessary expenses incurred in providing legal representation for
61 proceedings of any kind involving felonies for which a penalty of life imprisonment may be

62 imposed, including, but not limited to, expenses for travel, transcripts, salaried or contracted
63 investigative services and expert witnesses, shall be reimbursed in an amount ~~as the court may~~
64 ~~approve~~ that Public Defender Services approves. For all other eligible proceedings, actual and
65 necessary expenses incurred in providing legal representation, including, but not limited to,
66 expenses for travel, transcripts, salaried or contracted investigative services and expert
67 witnesses, shall be reimbursed to a maximum of \$1,500 unless the ~~court, for good cause shown~~
68 executive director, after consultation with the appointing court, approves reimbursement of a
69 larger sum.

70 Expense vouchers shall specifically set forth the nature, amount and purpose of expenses
71 incurred and shall provide receipts, invoices or other documentation required by the executive
72 director and the State Auditor:

73 (1) (A) Reimbursement of expenses for production of transcripts of proceedings reported
74 by a court reporter is limited to the cost per original page and per copy page as set forth in section
75 four, article seven, chapter fifty-one of this code.

76 (B) (i) There ~~shall~~ may be no reimbursement of expenses for or production of a transcript
77 of a preliminary hearing before a magistrate or juvenile referee, or of a magistrate court trial,
78 where ~~such~~ the hearing or trial has also been recorded electronically in accordance with the
79 provisions of section eight, article five, chapter fifty of this code or court rule.

80 (ii) Reimbursement of the expense of an appearance fee for a court reporter who reports
81 a proceeding other than one described in subparagraph (i) of this paragraph is limited to \$25.
82 Where a transcript of a proceeding is produced, there ~~shall~~ may be no reimbursement for the
83 expense of any appearance fee.

84 (iii) Except for the appearance fees provided in this paragraph, there ~~shall~~ may be no
85 reimbursement for hourly court reporters' fees or fees for other time expended by the court
86 reporter, either at the proceeding or traveling to or from the proceeding.

87 (C) Reimbursement of the cost of transcription of tapes electronically recorded during

88 preliminary hearings or magistrate court trials is limited to \$1 per page.

89 (2) Reimbursement for any travel expense incurred in an eligible proceeding is limited to
90 the rates for the reimbursement of travel expenses established by rules promulgated by the
91 Governor pursuant to the provisions of section eleven, article eight, chapter twelve of this code
92 and administered by the Secretary of the Department of Administration pursuant to the provisions
93 of section forty-eight, article three, chapter five-a of this code.

94 (3) Reimbursement for investigative services is limited to a rate of \$30 per hour for work
95 performed by an investigator.

96 (f) For purposes of compensation under this section, an appeal from magistrate court to
97 circuit court, an appeal from a final order of the circuit court or a proceeding seeking an
98 extraordinary remedy made to the Supreme Court of Appeals shall be considered a separate
99 case.

100 (g) Vouchers submitted under this section shall specifically set forth the nature of the
101 service rendered, the stage of proceeding or type of hearing involved, the date and place the
102 service was rendered and the amount of time expended in each instance. All time claimed on the
103 vouchers shall be itemized to the nearest tenth of an hour. If the charge against the eligible client
104 for which services were rendered is one of several charges involving multiple warrants or
105 indictments, the voucher shall indicate the fact and sufficiently identify the several charges so as
106 to enable ~~the court~~ Public Defender Services to avoid a duplication of compensation for services
107 rendered. The executive director shall refuse to requisition payment for any voucher which is not
108 in conformity with the recordkeeping, compensation or other provisions of this article or the
109 voucher guidelines established issued pursuant to subsection (a) of this section and in such
110 circumstance shall return the voucher to the court or to the service provider for further review or
111 correction.

112 (h) Vouchers submitted under this section ~~after July 1, 2008,~~ shall be reimbursed within
113 ninety days of receipt. Reimbursements after ninety days shall bear interest from the ninety-first

- 114 day at the legal rate in effect for the calendar year in which payment is due.
- 115 (i) Vouchers submitted for fees and expenses involving child abuse and neglect cases
- 116 shall be processed for payment before processing vouchers submitted for all other cases.

NOTE: The purpose of this bill is to authorize Public Defender Services to approve vouchers of attorneys who represent indigent criminal defendants; to create conflict public defender corporations; to contract for legal services; and to require contemporaneous time records.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.