

# **WEST VIRGINIA LEGISLATURE**

**2017 REGULAR SESSION**

**Committee Substitute**

**for**

**Senate Bill 521**

BY SENATOR TRUMP

[Originating in the Committee on the Judiciary;

reported on March 20, 2017.]

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; and to amend said code by adding thereto a  
3 new section, designated §29-21-9a, all relating generally to Public Defender Services;  
4 transferring initial authority to review, approve, reduce or reject panel attorney vouchers  
5 from circuit courts to Public Defender Services; providing for resubmission of vouchers  
6 previously reduced or rejected; establishing protocol for handling of rejected or reduced  
7 vouchers; maintaining final authority over payment vouchers with the appointing courts;  
8 authorizing the Executive Director of Public Defender Services, with approval of the  
9 Indigent Defense Commission, to establish conflict public defender corporations and  
10 establishing criteria therefor; authorizing the Executive Director of Public Defender  
11 Services, with approval of the Indigent Defense Commission, to contract for legal services  
12 or specialized legal services in any circuit; authorizing Governor by executive order to  
13 borrow funds from the Revenue Shortfall Reserve Fund to pay appointed counsel and  
14 establishing repayment requirements; revising order of preference for the appointment of  
15 attorneys; 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; and that said code be amended by  
3 adding thereto a new section, designated §29-21-9a, 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  
30 include, but not be limited to, budget preparation and statistical analysis. The agency may reduce  
31 or reject vouchers or requests for payment submitted pursuant to section thirteen-a of this article  
32 found not 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 multi-judge circuit.

20           (c) If the executive director, with the approval of the Indigent Defense Commission and  
21 the Secretary of Administration, determines that the purposes of this article can be furthered and  
22 costs reduced by the creation of a conflict public defender corporation in the sixth or thirteenth  
23 judicial circuits, or both the creation and operation of a conflict public defender corporation is  
24 authorized; *Provided*, That such conflict public defender corporation may only represent  
25 defendants in the judicial circuit of its creation or pursuant to the provisions of section nine of this

26 article.

27 (d) If the executive director, with the approval of the Indigent Defense Commission and  
28 the Secretary of Administration, determines that the purposes of this article can be furthered and  
29 costs reduced by the execution of a contract with a provider of legal services in discrete or  
30 specialized areas of the law other than criminal defense to provide legal representation to eligible  
31 clients, the execution of the contract is authorized and is exempt from the provisions of, and  
32 procedures adopted pursuant to, article three, chapter five-a of this code. Contracts based upon  
33 the provisions of this subsection shall comply with the American Bar Association's Standards for  
34 Criminal Justice, Providing Defense Services, Third Edition. The payment of the contract amount  
35 is authorized from the funds appropriated for the payment of appointed 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 a conflict public defender corporation, if created,  
20 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 pursuant to the provisions of subsection  
25 (c), section eight of this article from an adjoining circuit if such the public defender office or conflict  
26 public defender corporation agrees to the appointment;

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

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

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

**§29-21-9a. Borrowing authority from Revenue Shortfall Reserve Fund to pay appointed  
counsel fees; repayment requirements.**

1 (a) Notwithstanding any provision of this code to the contrary and subject to the provisions  
2 of this section, the Governor may, by executive order, after first notifying the presiding officers of  
3 both houses of the Legislature in writing, borrow funds from the Revenue Shortfall Reserve Fund  
4 created in section twenty, article two, chapter eleven-b of this code for deposit into the appropriate

5 special revenue account established for the payment of appointed counsel fees. The amount of  
6 funds borrowed and outstanding under this section may not exceed \$20 million at any one time,  
7 or the amount the Governor determines is necessary to adequately fund payment of appointed  
8 counsel fees.

9 (b) Notwithstanding the provisions of subsection (a) of this section, the Governor may not  
10 borrow funds from the Revenue Shortfall Reserve Fund pursuant to this section unless the  
11 Secretary of Administration first certifies that borrowing is necessary to pay for appointed counsel  
12 fees and the Governor certifies that a supplemental budget appropriation sufficient to repay the  
13 funds borrowed will be submitted to the legislature.

14 (c) Any funds borrowed pursuant to this section shall be used to pay for appointed counsel  
15 fees only.

16 (d) Any funds borrowed pursuant to this subsection shall be repaid during the fiscal year  
17 in which the funds are borrowed from a supplemental budget appropriation to Public Defender  
18 Services, without interest, and redeposited to the credit of the Revenue Shortfall Reserve Fund  
19 within one hundred eighty days of their withdrawal.

20 (e) No amounts may be borrowed pursuant to the provisions of this section after January  
21 1, 2020.

**§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 promulgated by the  
4 executive director be designed to enable the attorney to determine for any day the periods of time  
5 expended on behalf of any eligible client and the total time expended on that day on behalf of all  
6 eligible clients. Upon completion of each case, exclusive of appeal, panel attorneys shall submit  
7 to ~~the appointing court~~ Public Defender Services a voucher for services. Claims for fees and  
8 expense reimbursements shall be submitted to ~~the appointing court~~ Public Defender Services on

9 forms approved by the executive director. The executive director shall establish guidelines for the  
10 submission of vouchers and claims for fees and expense reimbursements under this section.  
11 Claims submitted more than ninety calendar days after the last date of service shall be rejected,  
12 unless ~~for good cause, the appointing court~~ Public Defender Services authorizes in writing an  
13 extension. ~~Provided, That claims where the last date of service occurred prior to July 1, 2008,~~  
14 ~~shall be rejected unless submitted prior to January 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~~ A voucher found to be correct shall be processed and payment promptly  
19 directed, and in no event shall payment of such voucher be directed more than sixty days after  
20 receipt of the voucher. If Public Defender Services rejects a voucher, the attorney submitting the  
21 voucher shall be promptly notified electronically of the rejection. The attorney may resubmit the  
22 voucher accompanied by copies of his or her records supporting the voucher and certification  
23 from the appointing court that the services or expenses were performed or incurred, and were  
24 reasonable and necessary. The executive director shall then make a final agency decision  
25 regarding the payment of the voucher. If the executive director declines to pay the voucher, the  
26 attorney may request review of the final agency decision by the appointing court by motion to the  
27 appointed court filed within thirty days of the final agency decision. After a hearing providing the  
28 attorney and Public Defender Services an opportunity to be heard, the appointing court shall have  
29 final authority to resolve the issue of payment.

30 If Public Defender Services reduces the amount of compensation claimed or  
31 reimbursement requested, the attorney submitting the voucher shall be notified electronically of  
32 the reduction and the reasons therefor. The attorney may:

33 1) Agree with the reduction and certify his or her agreement electronically to Public  
34 Defender Services which shall then proceed to process payment; or

35           2) Disagree with the reduction and request payment of the reduced amount while  
36 preserving the ability to contest the reduction.

37           An attorney proceeding pursuant to this paragraph shall inform Public Defender Services  
38 of a decision by electronic means within thirty days of receiving notice of the reduction. The  
39 attorney may submit records and certification from the appointing court that the services or  
40 expenses reflected in the amount reduced were performed or incurred and were reasonable and  
41 necessary. The executive director shall then make a final agency determination regarding the  
42 amount reduced within thirty days of receipt of the submitted records and certification. The  
43 attorney may request review of the final agency decision by the appointing court by motion to the  
44 appointing court filed within thirty days of notice of the final agency decision. After a hearing  
45 providing the attorney and Public Defender Services an opportunity to be heard, the appointing  
46 court shall have final authority to resolve the issue of payment.

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

50           (c) Notwithstanding any other provision of this section to the contrary, a panel attorney  
51 may be compensated for services rendered and reimbursed for expenses incurred prior to the  
52 completion of the case where: (1) More than six months have expired since the commencement  
53 of the panel attorney's representation in the case; and (2) no prior payment of attorney fees has  
54 been made to the panel attorney by Public Defender Services during the case. The executive  
55 director, in his or her discretion, may authorize periodic payments where ongoing representation  
56 extends beyond six months in duration. The amounts of any fees or expenses paid to the panel  
57 attorney on an interim basis, when combined with any amounts paid to the panel attorney at the  
58 conclusion of the case, shall not exceed the limitations on fees and expenses imposed by this  
59 section.

60           (d) In each case in which a panel attorney provides legal representation under this article,

61 and in each appeal after conviction in circuit court, the panel attorney shall be compensated at  
62 the following rates for actual and necessary time expended for services performed and expenses  
63 incurred subsequent to the effective date of this article:

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

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

74 (3) The maximum amount of compensation for out-of-court and in-court work under this  
75 subsection is as follows: For proceedings of any kind involving felonies for which a penalty of life  
76 imprisonment may be imposed, the amount as the court may approve; for all other eligible  
77 proceedings, \$3,000 unless the court, for good cause shown, approves payment of a larger sum.

78 (e) Actual and necessary expenses incurred in providing legal representation for  
79 proceedings of any kind involving felonies for which a penalty of life imprisonment may be  
80 imposed, including, but not limited to, expenses for travel, transcripts, salaried or contracted  
81 investigative services and expert witnesses, shall be reimbursed in an amount as the court may  
82 approve. For all other eligible proceedings, actual and necessary expenses incurred in providing  
83 legal representation, including, but not limited to, expenses for travel, transcripts, salaried or  
84 contracted investigative services and expert witnesses, shall be reimbursed to a maximum of  
85 \$1,500 unless the court, for good cause shown, approves reimbursement of a larger sum.

86 Expense vouchers shall specifically set forth the nature, amount and purpose of expenses

87 incurred and shall provide receipts, invoices or other documentation required by the executive  
88 director and the State Auditor:

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

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

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

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

103 (C) Reimbursement of the cost of transcription of tapes electronically recorded during  
104 preliminary hearings or magistrate court trials is limited to \$1.00 per page.

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

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

112 (f) For purposes of compensation under this section, an appeal from magistrate court to

113 circuit court, an appeal from a final order of the circuit court or a proceeding seeking an  
114 extraordinary remedy made to the Supreme Court of Appeals shall be considered a separate  
115 case.

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

128 (h) Vouchers submitted under this section ~~after July 1, 2008,~~ shall be reimbursed within  
129 ninety days of receipt. Reimbursements after ninety days shall bear interest from the ninety-first  
130 day at the legal rate in effect for the calendar year in which payment is due.

131 (i) Vouchers submitted for fees and expenses involving child abuse and neglect cases  
132 shall be processed for payment before processing vouchers submitted for all other cases.