

January 2023
PE 22-09-659

PERFORMANCE REVIEW PUBLIC DEFENDER SERVICES

AUDIT OVERVIEW

The Public Defender Services Is Required by Law to Monitor and Evaluate both the Efficiency and Quality of the Indigent Defense Legal System, but the Agency's Ability to Evaluate Quality Is Limited by the Structure of the Indigent Defense System

Because Cost Data for PDCs and Panel Attorneys Are Too Dissimilar for Accurate Comparison, the PDS Should Review Whether There Are Other Advantages to PDCs



JOINT COMMITTEE ON GOVERNMENT OPERATIONS

Senate

Mark Maynard, Chair
Chandler Swope
Dave Sypolt
Glenn Jeffries
Richard D. Lindsay II

House of Delegates

Unassigned
Unassigned
Unassigned
Unassigned
Unassigned

Agency/ Citizen Members

Vacant
Vacant
Vacant
Vacant
Vacant

JOINT COMMITTEE ON GOVERNMENT ORGANIZATION

Senate

Mark Maynard, Chair
Chandler Swope, Vice-Chair
Mike Maroney
Patrick Martin
Eric Nelson
Randy Smith
David Stover
Dave Sypolt
Jack Woodrum
Owens Brown
Mike Caputo
Glenn Jeffries
Richard D. Lindsay II
Mike Woelfel

House of Delegates

Brandon Steele, Chair
Geoff Foster, Vice-Chair
Phillip W. Diserio, Minority Chair
Jim Barach, Minority Vice-Chair
Trenton Barnhart
Josh Booth
Jarred Cannon
Roger Conley
Roy Cooper
Kathie Hess Crouse
Mark Dean
Don Forsht
Danny Hamrick
Josh Holstein

Shannon Kimes
Carl Martin
Margitta Mazzocchi
Charlie Reynolds
Doug Smith
Terri Funk Sypolt
Evan Worrell
Barbara Evans Fleischauer
Evan Hansen
Doug Skaff
Kayla Young



WEST VIRGINIA OFFICE OF THE LEGISLATIVE AUDITOR

PERFORMANCE EVALUATION & RESEARCH DIVISION

Building 1, Room W-314
State Capitol Complex
Charleston, West Virginia 25305
(304) 347-4890

Aaron Allred
Legislative Auditor

John Sylvia
Director

Jill Mooney
Research Manager

Alexander Penny
Research Analyst

Keith Brown
Referencer

WEST VIRGINIA LEGISLATURE
Performance Evaluation and Research Division

1900 Kanawha Blvd. East
Building 1, Room W-314
Charleston, WV 25305-0610
(304) 347-4890



John Sylvia
Director

January 10, 2023

The Honorable Mark Maynard
West Virginia State Senate
Building 1, Room 217W
1900 Kanawha Boulevard, East
Charleston, WV 25305-0470

The Honorable Brandon Steele
West Virginia House of Delegates
Building 1, Room 213E
1900 Kanawha Boulevard, East
Charleston, WV 25305-0470

Dear Chairs:

Pursuant to the West Virginia Performance Review Act, we are transmitting a performance review of the Public Defender Services (PDS). The issues covered herein are *“The Public Defender Services Is Required by Law to Monitor and Evaluate both the Efficiency and Quality of the Indigent Defense Legal System, but the Agency’s Ability to Evaluate Quality Is Limited by the Structure of the Indigent Defense System”* and *“Because Cost Data for PDCs and Panel Attorneys Are Too Dissimilar for Accurate Comparison, the PDS Should Review Whether There Are Other Advantages to PDCs.”*

We transmitted a draft copy of the report to the PDS on December 14, 2022. We received the agency response on December 29, 2022. If you have any questions, please let me know.

Sincerely,


John Sylvia

CONTENTS

Executive Summary 7

Issue 1: The Public Defender Services Is Required by Law to Monitor and Evaluate both the Efficiency and Quality of the Indigent Defense Legal System, but the Agency’s Ability to Evaluate Is Limited by the Structure of the Indigent Defense System 11

Issue 2: Because Cost Data for PDCs and Panel Attorneys Are Too Dissimilar for Accurate Comparison, the PDS Should Review Whether There Are Other Advantages to PDCs 33

List of Tables

Table 1: Indigent Defense Delivery System Appropriations and Expenditures FY 2019 through FY 2022 12

Table 2: National Advisory Commission on Criminal Justice Standards for Annual Caseload Maximums by Case Type 22

Table 3: Maryland Public Defender Final Case Weighing Study Recommended Caseload Standards..... 23

Table 4: Indiana Public Defender Commission Standard on Qualifications for Attorneys by Case Type 26

Table 5: Indigent Defense Expenditures by Legal Representation Type FY 2019 through FY 2022 34

Table 6: Indigent Defense Average Cost Per Case By Legal Representation Type FY 2018 through FY 2021 34

Table 7: Indigent Defense Average Cost Per Hour By Legal Representation Type FY 2018 through FY 2021 35

Table 8: Average Hours Per Case Type Appointed Attorneys FY 2018 through FY 2021 38

List of Maps

Map 1: Judicial Circuits with and without Public Defender Corporations 13

List of Figures

Figure 1: Case Distribution by Case Type PDC Attorneys vs. Appointed Panel Attorneys FY 2021 37

List of Appendices

Appendix A: Transmittal Letter 45

Appendix B: Objectives, Scope and Methodology 47

Appendix C: Agency Response 49

EXECUTIVE SUMMARY

The Performance Evaluation and Research Division (PERD) within the Office of the Legislative Auditor conducted a performance review of the Public Defender Services (PDS) pursuant to West Virginia Code §4-10-8. The first objective of this audit was to determine if the Public Defender Services compiles data to adequately evaluate the efficiency and quality of legal representation provided to indigent persons as required by W. Va. Code §29-21-1 and §29-21-3. The second objective was to determine how the PDS uses data to monitor legal representation, and make recommendations to improve the overall performance of the indigent defense system.

Frequently Used Acronyms

PDS – Public Defender Services

IDC – Indigent Defense Commission

PDC – Public Defender Corporation

PERD – Performance Evaluation and Research Division

Report Highlights:

Issue 1: The Public Defender Services Is Required by Law to Monitor and Evaluate both the Efficiency and Quality of the Indigent Defense Legal System, but the Agency’s Ability to Evaluate Quality Is Limited by the Structure of the Indigent Defense System

- According to a legal opinion, the enabling statute of the PDS requires the agency to monitor and evaluate both the efficiency and quality of the indigent defense system.
- PERD finds that while the PDS compiles substantial data to evaluate the efficiency of the indigent defense system, it does not compile data to evaluate the quality of the system’s legal representation.
- According to the PDS, it does not collect data to evaluate the quality of the indigent defense system because it does not have the authority to do so.
- The PDS does not establish performance measures to conduct a qualitative review of indigent defense as required by law (W. Va. Code §29-21-3b(a)), and the Indigent Defense Commission has not annually evaluated the compensation and caseloads of public defenders and panel attorneys as required by law (W. Va. Code §29-21-3b(f)(3)).
- PERD finds that the structure of West Virginia’s indigent defense system limits the PDS from evaluating the quality of the indigent defense system.

Issue 2: Because Cost Data for PDCs and Panel Attorneys Are Too Dissimilar for Accurate Comparison, the PDS Should Review Whether There Are Other Advantages to PDCs

- The PDS often reports the cost differentials between panel attorneys and public defenders to conclude that PDCs are more cost-efficient than panel attorneys.
- PERD finds that the data used to compare costs between panel attorneys and PDCs are incomparable and should not be used to recommend a greater use of PDCs along the lines of greater efficiency.
- There are other shortcomings with PDS data for the purpose of measuring efficiency of the indigent defense system.
- The PDS should consider reviewing and measuring whether there are other advantages of PDCs that would warrant greater use of them.

PERD's Response to the Agency's Written Response

On Thursday, December 29, 2022, PERD received a written response to the report from the Public Defender Services executive director, which can be found in Appendix A. The agency generally agrees with the overall recommendations as they pertain in general to developing performance measures to determine the overall effectiveness of the state's indigent defense system, which in turn would reflect on the quality of legal representation. The PDS indicated that it "accepts PERD's overall perspective that the agency's mandate should be measuring the performance of the system in some manner other than for its efficiency." Other parts of the agency's written response are given below.

Agency Response:

The Executive Director of the Public Defender Services stated:

However, the agency's perspective is that, during the performance review, the discussion shifted from direct measurement of the quality of representation to the establishment of performance measures that would indicate quality representation was being afforded to indigent defendants or respondents. This evolution of the performance review resulted in a focus on caseloads of public defender corporations or private counsel.

While PDS disagrees that it is mandated to measure the quality of representation provided by an attorney, PDS agrees that performance measures should be developed to measure the effectiveness of the state's indigent defense system or systems which then ensures that, overall, quality representation is being provided.

The Executive Director added:

In summary, the agency believes that its statutory mandate is not to measure the quality of representation, but is to administer the indigent defense system, which it does by securing legislative appropriations and providing for the disbursements. The mandate extends to

developing, coordinating, and evaluating programs by which legal representation is provided. The agency has developed programs to enhance the legal representation of indigent defendants or respondents. Overall, the agency has as a mission the movement of the indigent defense system to “holistic defense.” This model of defense has as its purpose the identification of issues leading to the defendant’s intersection with the criminal justice system as well as the resolution of the legal issues arising out of involvement in the criminal justice system. These issues range from unemployment and housing insecurity to substance use disorders or unmet trauma.

PERD Response:

PERD acknowledges a “shift” occurred in the discussion related to evaluating the quality of legal representation. However, it should be stated that at no time during the planning or course of the audit did PERD have the understanding that measuring the quality of legal representation meant direct measurement at the individual attorney level. PERD apparently was not clear in communicating the audit objectives in our initial entrance conference with the PDS. PERD fully understood that directly measuring the quality of legal representation at the attorney level would be subjective, impractical, and unproductive. From the start, PERD intended to evaluate how the PDS was collecting and evaluating data on the efficiency and quality of the indigent defense system as a whole and included the terms “system” and “overall” in the performance review objectives.

Moreover, PERD’s understanding of the concept of the quality of representation comes from the indigent defense standards adopted by the IDC and issued by the PDS, the standards developed by the American Bar Association, and standards from other states. From these sources and statute, we concluded that data could and should be collected on caseloads, compensation, years of experience, qualifications, and continuing education for attorneys. This list is not exhaustive and PERD acknowledges that the PDS and the IDC may find other meaningful ways to measure the quality of representation. PERD also recognizes the limitations to collecting data, especially from panel attorneys, within the current structure of the indigent defense system and tried to address independence from the judiciary and political forces as well.

PERD further recognizes that the programs the PDS has developed and the shift towards a holistic defense enhance the quality of legal representation; however, PERD reaffirms its understanding that the references to quality in statute refer primarily to the system level and main providers of legal representation. PERD asserts that panel attorneys and public defender corporations represent the primary programs by which legal representation is provided to indigent defendants, and an evaluation of the system should include quality in addition to costs.

Agency Response:

“The agency acknowledges PERD’s findings that the average cost per case as calculated for the public defender corporations does not permit meaningful comparisons with panel attorneys because it is not case specific. ... Accordingly, the agency will no longer calculate ‘savings’ generated by cases handled by public defender corporations.” The PDS agrees that other advantages of having PDCs should be highlighted, such as providing a “holistic” model for indigent defense, employing para-professionals to assist in the representation, and launching programs such as recovery coaches designed to improve the quality of representation.

Recommendations

1. *The Legislature should consider implementing changes to establish an attorney appointment system that is more independent of the judicial branch.*
2. *The Legislature should consider restructuring the indigent defense system to give the Public Defender Services greater authority over and access to data that are needed from appointed attorneys to evaluate the quality of indigent legal representation.*
3. *If the indigent defense system is to remain as currently structured, the Legislature should consider requiring a periodic study to gather data to evaluate the quality of indigent legal representation through either the Public Defender Services or an independent entity. Cooperation from every level of the indigent defense system should be mandated to facilitate the data gathering process.*
4. *The Public Defender Services should establish performance measures for the qualitative review of indigent defense as required by West Virginia Code 29-21-3b(a).*
5. *The Public Defender Services should collect sufficient and appropriate data that are representative of the quality of legal representation within the indigent defense delivery system.*
6. *The Public Defender Services should assist and collaborate with the Indigent Defense Commission in achieving the statutory mandate (W. Va. Code §29-21-3b(f)(3)) of annually evaluating the compensation and caseloads of public defenders and appointed panel attorneys.*
7. *The Public Defender Services should consider establishing numerical caseload maximums for types and complexities of cases to guide PDCs and panel attorneys as to what is an excessive caseload.*
8. *The Public Defender Services should consider specifying the number of years of experience and qualifications an attorney should have for certain types and complexities of cases.*
9. *The PDS should continue to gather data related to the costs and efficiency of the indigent defense systems. However, the current use of the data to illustrate lower costs for PDCs should not serve to inform recommendations.*
10. *The PDS should review whether there are other advantages of PDCs in terms of the programs that could be provided, and the resources public defenders would have that many panel attorneys may not have. Appropriate data should be collected that would demonstrate the advantages of PDCs in improving the quality of the indigent defense system.*
11. *The PDS should consider improving its efficiency data by determining the number of hours per case type for public defenders.*
12. *The PDS should collect and use data on the quality of legal representation to improve the indigent defense delivery system as led by the data assessment.*

ISSUE 1

The Public Defender Services Is Required by Law to Monitor and Evaluate both the Efficiency and Quality of the Indigent Defense Legal System, but the Agency’s Ability to Evaluate Quality Is Limited by the Structure of the Indigent Defense System

Issue Summary

The Performance Evaluation and Research Division (PERD) sought to determine if the Public Defender Services (PDS) compiles data to evaluate the efficiency and quality of legal representation provided to indigent persons as required by W. Va. Code §29-21-1, and §29-21-3. PERD found that the PDS collects data to evaluate the efficiency of legal representation, but it does not collect data that are representative of the quality of the indigent defense delivery system (indigent defense). The PDS contends that it does not have the statutory responsibility or authority to collect data on the quality of legal representation, and that objective criteria do not exist to evaluate the quality of legal representation. However, a legal opinion from the Legislative Services Division of the Office of the Legislative Auditor, opines that the PDS has the responsibility and authority to collect data on the efficiency and quality of indigent defense in order to monitor, evaluate, and make recommendations to improve the indigent defense system as required by law. Furthermore, the Indigent Defense Commission (IDC), which was created to assist the PDS, is required to annually evaluate the caseload of public defenders and appointed panel attorneys as required by W. Va. Code 29-21-3b(f)(3). Caseload evaluations are critical in monitoring and evaluating the quality of legal representation. The legislative auditor concludes that the PDS does not know if the indigent defense system provides quality legal representation. Moreover, while **the PDS should collect appropriate data that are representative of the quality of legal representation, this is limited under the current structure of the indigent defense system.**

The PDS does not collect data that are representative of the quality of the indigent defense delivery system.

The legislative auditor concludes that the PDS does not know if the indigent defense system provides quality legal representation.

West Virginia’s Indigent Defense Delivery System Consists of Public Defender Corporations and Appointed Panel Attorneys

The PDS funds indigent defense legal representation through Public Defender Corporations (PDCs) and appointed panel attorneys. Indigent persons are those who meet certain income guidelines and cannot afford legal representation. Table 1 shows PDS general revenue appropriations and expenditures for fiscal years 2019 through 2022 for indigent defense.

Table 1
Indigent Defense Delivery System
Appropriations and Expenditures*
FY 2019 through FY 2022

Fiscal Year	Original Appropriations	Supplemental Appropriations	Total Appropriations	Expenditures
2019	\$29,930,114	\$15,298,000	\$45,228,114	\$42,845,263
2020	\$32,436,550	\$19,792,998	\$52,229,548	\$44,975,397
2021	\$32,229,548	\$20,000,000	\$52,229,548	\$40,147,567
2022	\$33,879,548	\$19,800,000	\$53,679,548	\$44,633,406

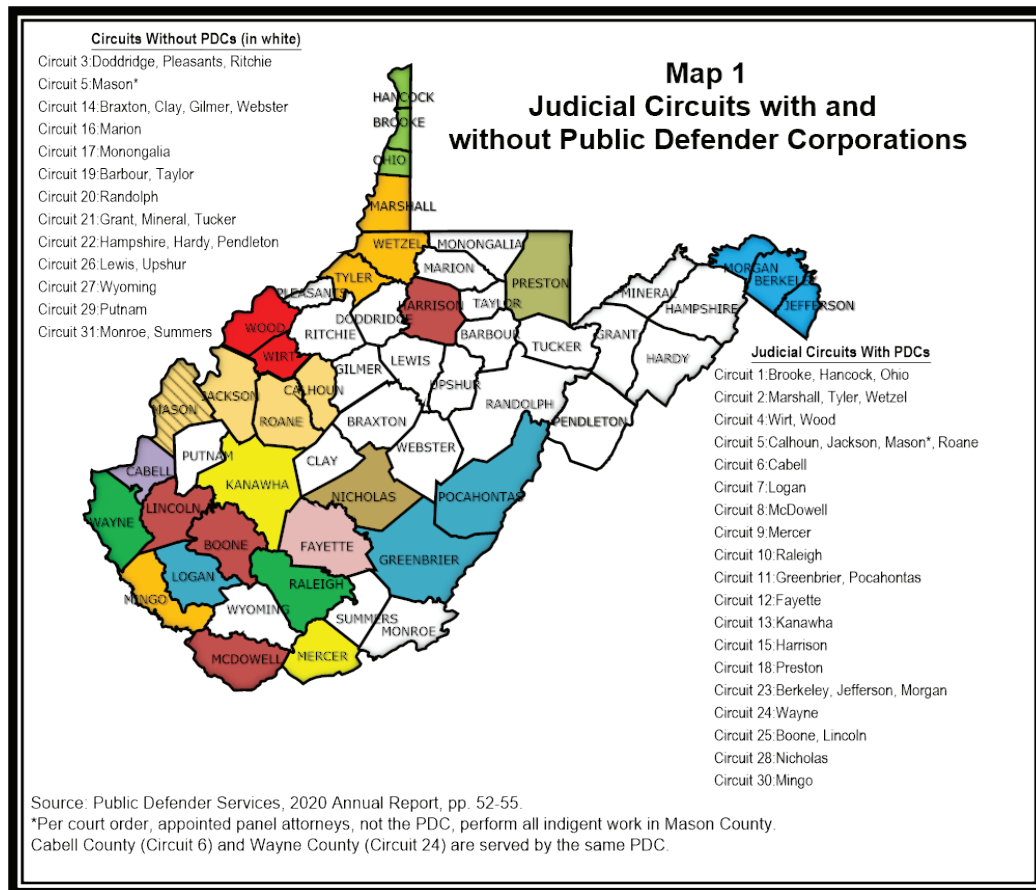
Source: Our Advanced Solution with Integrated Systems (OASIS), report (WV-FIN-BC-030).

**Figures do not include appropriations and expenditures for the administrative agency Public Defenders Services.*

There are 18 PDCs present in 19 of the 31 circuit courts in the state (see Map 1). PDCs are nonprofit corporations dedicated to indigent defense that receive legislative appropriations through the PDS. There are approximately 130 public defenders employed by these PDC's. Seventy (70) percent of West Virginia's population live in the 30 counties that comprise the 19 circuits with a PDC.¹ In the dozen circuits that do not have operational public defender corporations, the circuit or family law court judges appoint private practice legal counsel (panel attorneys) for indigent defendants. Even in circuits that have public defenders, a judge may need to appoint panel attorneys either because a PDC has a conflict of interest in a case, or the PDC caseload would become excessive. In fiscal year 2022, 546 panel attorneys requested payment for indigent legal representation.

PDCs are nonprofit corporations dedicated to indigent defense that receive legislative appropriations through the PDS. In the dozen circuits that do not have operational public defender corporations, the circuit or family law court judges appoint private practice legal counsel (panel attorneys) for indigent defendants.

¹ *Per a circuit court order, appointed panel attorneys, not the PDC, perform all indigent work in Mason County so we did not include it or its population in this percentage or county count. The 19th PDC in Monongalia County is activated but was not operational until Fall 2022. When operational, this will increase the percent of West Virginia's population living in a county with a PDC to 76 percent.*



The PDS Compiles Substantial Efficiency Data on PDCs and Panel Attorneys

The PDS publishes an annual report with statistical data summarizing the yearly work of PDCs and panel attorneys. With respect to the PDCs, this includes:

- the number of cases closed,
- the number of cases and case types per each judicial circuit,
- the total amount of monies dispersed to PDCs,
- a breakdown of total dollar amounts per judicial circuit,
- the average cost per closed case,
- the total number of in and out-of-court hours worked by judicial circuit, and
- the number of hours spent on administrative tasks.

For panel attorneys, the PDS reports:

- the total number of reimbursement claims paid to appointed panel attorneys,

- the case type of the claim,
- the type of the claim and if it is supplemental or direct,
- the names or firm name of panel attorneys paid,
- the total number of in and out-of-court hours worked by judicial circuit and county,
- the travel time and expenses of each panel attorney, and
- the amounts paid to each panel attorney.

The PDS further breaks down the monies paid to panel attorneys into three categories: attorney fees, attorney expenses, and direct expenses by circuit as well as each county within a circuit. As it does for the PDCs, the agency also reports statistics on the number of claims and case types such as misdemeanors, felonies, mental hygiene, and juvenile cases for each judicial circuit. The PDS also reports total costs per case type with a breakdown of those costs per judicial circuit and the counties within each judicial circuit.

These data compiled by the PDS are essentially output data. These data are important and useful because they can be used to measure the efficiency of the indigent defense system. The agency calculates the overall average hourly costs, average cost per case type, and average cost per claim submitted.

These data compiled by the PDS are essentially output data. These data are important and useful because they can be used to measure the efficiency of the indigent defense system.

The PDS Does Not Collect Data to Evaluate the Quality of Legal Representation Because It Claims It Does Not Have the Duty or Authority to Do So

Although the PDS compiles data that can be used to evaluate and monitor the costs of the indigent defense system, the legislative auditor finds that the agency does not compile data it needs to evaluate the quality of legal representation. The PDS interprets its statutory duty to be administering, coordinating, developing, evaluating, and improving programs. The statutory term “programs” is considered by the PDS as distinct from the indigent defense system itself. As such, the agency sees its responsibility as evaluating programs but not evaluating the quality of the indigent defense system. This assertion is represented in the following statement by the agency:

Technically, the Governing Statute does not charge PDS with evaluating the “quality of representation” provided to eligible clients. Instead, the provisions to which PERD makes reference states that the “agency shall administer, coordinate and evaluation programs by which the state provides legal representation to indigent persons.” W. Va. Code §29-21-3 [italics added]. Consistently, the

PDS sees its responsibility as evaluating programs but not evaluating the quality of the indigent defense system.

statute also provides that the “agency shall have as its principal purpose the development and improvement of programs by which the state provides legal representation to indigent person.” W. Va. Code §29-21-4

The programs the PDS refers to include initiatives and projects such as the (1) Indigent Defense Standards; (2) Overbilling; (3) DATA-WAY; (4) Jury Instructions/Motions Manuals/Attorney Assistance; (5) Recovery Coaches; (6) Social worker Initiative; (7) Juvenile Law; (8) Continuing Legal Education Programs; (9) SWIFT Defense; (10) Parental Navigation; (11) the Habeas Corpus Division; and (12) the Monongalia Public Defender Corporation. While important and beneficial to improving indigent defense in West Virginia, these projects do not operate at the same scale as the panel attorney and PDC defense. Most are ancillary and do not involve providing direct, legal representation as provided by panel attorneys and PDCs.

In a separate written response, the executive director stated “Nonetheless, evaluating the ‘quality of representation’ is not entirely missing from the delivery systems. It is simply not within the province of this agency.”

PDS’ executive director stated “Nonetheless, evaluating the ‘quality of representation’ is not entirely missing from the delivery systems. It is simply not within the province of this agency.”

It Is the Opinion of Legislative Services that the PDS Has a Statutory Duty to Evaluate the Quality of Legal Representation within the Indigent Defense System

According to a legal opinion from the Legislative Services Division, the PDS has a statutory duty to monitor the quality of legal representation clients receive. The legal opinion states that the Legislature purposefully included the word “quality” four times in key places of Chapter 29 of West Virginia Code. For example, in W. Va. Code §29-21-1 “quality legal assistance” is mentioned twice.

The Legislature finds and declares that in certain proceedings the state is required to provide high quality legal assistance to indigent persons . . . the availability of quality legal assistance reaffirms the faith of our citizens in our government of laws. [emphasis added]

The Legislative Services legal opinion states that the Legislature purposefully included the word “quality” four times in key places of Chapter 29 of West Virginia Code.

A reference to quality is mentioned a third time in W. Va. Code §29-21-3b(2).

Three lawyers, one from each congressional district, who have significant experience in the defense of criminal cases or have demonstrated a strong commitment to quality representation of indigent defendants. [emphasis added]

And finally, quality is stated a fourth time in W. Va. Code §29-21-8(a)(1).

The executive director, with the approval of the Indigent Defense Commission, may authorize the creation, merger or dissolution of a public defender corporation in a judicial circuit where the creation, merger or dissolution of such a public defender corporation would improve the quality of legal representation.

This code citation suggests that the executive director would need indicators of the current quality of legal representation in a judicial circuit to know how the quality would be improved.

The legal opinion further suggests that the PDS has a duty to not just collect data and identify legal representation issues but to rectify issues as well. According to the legal opinion:

If the PDS identifies poor quality legal representation within its organization, its duty would be to rectify those issues and improve the quality of the representation it is providing. Simply identifying issues related to quality within the PDS and not resolving those issues would make no sense. Accordingly, because there is a duty to identify issues with quality, there is also a duty to make corrections that could improve the quality of service.

Furthermore, the legal opinion reiterates the PDS responsibility to evaluate the quality of legal representation by stating:

It is natural that if PDS is tasked with recommending improvements, some of those improvements would be to the quality of service being given by the PDS. Again, this is a natural extension of what the office should be doing, as outlined in statute.

As the legal opinion concludes, the PDS has a duty to recommend actions, such as creating a PDC, to improve both the efficiency of services rendered and the quality of legal representation provided. **However, how can the executive director authorize and seek approval for additional PDCs if he has not considered or measured the quality of legal representation and how it would be improved as stipulated in W. Va. Code §29-21-8(a)(1)?** The only way of evaluating and measuring the efficiency and quality of legal representation is to gather sufficient and appropriate data.

The PDS's executive director wrote in the following statement that the agency does not have the authority by which it can evaluate appointed panel attorneys.

The legal opinion further suggests that the PDS has a duty to not just collect data and identify legal representation issues but to rectify issues as well.

The only way of evaluating and measuring the efficiency and quality of legal representation is to gather sufficient and appropriate data.

The attorneys to be appointed to cases and the assessment of the attorneys' skills and experience is solely within the province of the circuit court judge. PDS has no input into this process.

According to the PDS, circuit court judges have discretion over panel attorney appointment, thus indirectly assessing quality. The PDS's executive director also states that "with panel attorneys, the statute gives the agency no authority by which it could, 'administer' or 'coordinate' their use. By statute, the respective circuit court judges have the exclusive province."

With respect to the PDCs, the PDS asserts that data on the quality of representation would fall under the authority of each public defender corporation since it was related to employee issues. The PDS states the following:

The corporations are governed by a board of directors. While the agency has some influence through funding contracts, it certainly has no authority to administer and coordinate the activities within a public defender corporation.

The PDS indicates that PDCs must perform personnel evaluations of the attorneys they employ using PDS developed performance evaluation guides and metrics. However, the PDS states that it does not review the evaluations as that is the PDC's domain. However, Legislative Services' legal opinion states that since the PDS has a statutory duty to monitor and evaluate the quality of legal representation under W. Va. Code §29-21-3, **"The PDS also has the statutory authority to collect any available data that are representative of the quality of legal representation provided by the delivery systems."**

The PDS Does Not Establish Performance Measures to Conduct a Qualitative Review of Indigent Defense as Required by Law

According to the PDS executive director, even if it is responsible for evaluating the quality of legal representation, it would be unable to do so because of a lack of objective criteria. The executive director explained the PDS' stance.

PDS acknowledges that it is not currently collecting data that would permit the effective evaluation of the quality of representation. The 'quality' of representation is subjective and, indeed, ephemeral. Outcomes are certainly not reflective of the quality or representation.

Legislative Services' legal opinion states "The PDS also has the statutory authority to collect any available data that are representative of the quality of legal representation provided by the delivery systems."

According to the PDS executive director, even if it is responsible for evaluating the quality of legal representation, it would be unable to do so because of a lack of objective criteria.

In another written response, the agency stated the following:

Even if semantics suggest the delivery systems also constitute programs, the reality is that Public Defender Services cannot evaluate the quality of representation in any particular case by any particular lawyer. No objective criteria exist that could be applied to a case to determine the quality of representation. The only way to do so would be the review of each individual file. But even this review would be mostly subjective with one attorney substituting his or her judgment for another. And as explained, you cannot measure representation by results because so many factors go into the resolution of a matter.

However, despite the PDS's claims that it is not responsible to evaluate the quality of legal representation and that no objective criteria exist to do so, statutory language indicates that the Legislature envisioned the PDS establishing performance measures for a qualitative review of indigent defense. When the Legislature established the Indigent Defense Commission (IDC) by West Virginia Code §29-21-3b, the IDC was to assist the PDS regarding its responsibilities. The IDC enabling statute (W. Va. Code §29-21-3b(a)) states the following:

*There is hereby established the Indigent Defense Commission to provide assistance to Public Defender Services with regard to the general policies and procedures of the agency, including, but not limited to, the opening, closing or merging of public defender offices throughout the state and **the establishment of performance measures for the qualitative review of indigent defense.** [emphasis added]*

This code citation lists responsibilities of the PDS, including its general policies and procedures, opening, closing, or merging of public defender offices throughout the state **and the establishment of performance measures for the qualitative review of indigent defense.** The IDC was created to assist the PDS in its responsibilities, and a qualitative review of indigent defense involves, by definition, the review of quality legal representation. **However, PERD finds that the PDS has not established performance measures for the qualitative review of indigent defense.**

Statutory language indicates that the Legislature envisioned the PDS establishing performance measures for a qualitative review of indigent defense.

The IDC was created to assist the PDS in its responsibilities, and a qualitative review of indigent defense involves, by definition, the review of quality legal representation.

The IDC Has Not Annually Evaluated the Compensation and Caseloads of Public Defenders and Panel Attorneys as Required by Law

Part of the PDS’s qualitative review of indigent defense would logically involve the statutory requirement that the IDC “evaluate, on an annual basis, the compensation and caseloads of public defenders and appointed panel attorneys” (W. Va. Code §29-21-3b(f)(3)). **Caseload data are essential elements of quality legal representation.** By law, the IDC is required to meet a minimum of four times a year (W. Va. §29-21-3b(c)); however, according to the PDS executive director, who is the chair of the IDC by statute, the IDC has only met once or twice a year and no meetings were held in 2021. **Moreover, the executive director indicated that an annual evaluation of compensation and caseloads of public defenders and panel attorneys has not been conducted by the IDC.**

In May 2017, the IDC adopted and the PDS issued standards, or “best practices,” adapted from national standards developed by the American Bar Association for attorneys who represent indigent clients. These standards, according to the document, were provided to PDCs and panel attorneys throughout the state. One standard speaks to the workload of attorneys as follows:

Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client’s interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations. A defense counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced and should work to ensure competent representation in counsel’s existing matters. Defense counsel within a supervisory structure should notify supervisors when counsel’s workload is approaching or exceeds appropriate levels.

This standard is important towards achieving quality legal representation, but the PDS does not know if this standard is complied with by PDCs or panel attorneys. Moreover, the PDS has not established numerical caseload maximums to guide attorneys as to what is an excessive caseload by levels or by types and complexities of cases.

In addition to caseload data, qualifications are also an important element of quality legal representation. The IDC standards (1.11(a) and 2.1) state:

Part of the PDS’s qualitative review of indigent defense would logically involve the statutory requirement that the IDC “evaluate, on an annual basis, the compensation and caseloads of public defenders and appointed panel attorneys.”

The PDS has not established numerical caseload maximums to guide attorneys as to what is an excessive caseload by levels or by types and complexities of cases.

Strong professional qualifications and performance should be the basis for selection and retention for public defenders or assistant public defenders. . . . The government has an obligation to provide, and fully fund, services of qualified defense counsel for indigent criminal defendants. . . . The statutory scheme establishes public defender corporations in each judicial circuit of the state, subject to activation, and complements the public defender corporations by a panel of attorneys maintained by the judges of the circuit court on a local or regional basis. For this reason, lawyers generally are relieved of the obligation to accept appointments without regard to the lawyers' qualifications or experience in criminal matters.

There are no specifics as to the number of years' experience or qualifications that an attorney should have for certain types and complexities of cases.

Again, the PDS does not know if this standard is complied with by PDCs, judges, or panel attorneys, and there are no specifics as to the number of years' experience or qualifications that an attorney should have for certain types and complexities of cases.

Continuing education is also important as a measure of qualifications. The IDC standards (1.11(c)) states that "A public defender corporation should promote continuing professional development." However, the PDS does not compile this type of data on PDCs or panel attorneys.

Contrary to the PDS assertion that there are no objective criteria for monitoring and evaluating quality legal representation, the legislative auditor determines that at a minimum, caseload data, attorney qualifications, continuing education, and case types can and should be compiled. The IDC is required by law to evaluate each year the compensation and caseloads of public defenders and appointed panel attorneys. Other data should be considered as well such as defendant demographics, and case events (client interviews, court appearances, etc.).

Contrary to the PDS assertion that there are no objective criteria for monitoring and evaluating quality legal representation, the legislative auditor determines that at a minimum, caseload data, attorney qualifications, continuing education, and case types can and should be compiled.

As stated in the Legislative Services' legal opinion, the PDS has a statutory duty to collect any available data that are representative or proxies of the quality of legal representation. Therefore, the **PDS should collect data that are adequate to represent the quality of legal representation provided in the indigent defense delivery system.**

National Legal Organizations and Other States Have Set Standards with Objective Criteria to Evaluate the Quality of Legal Representation

Indigent defense standards developed by national legal organizations as well as the indigent defense commissions and the

public defender offices in other states, facilitate data collection on the quality of representation. Standards relevant to data collection on quality include those on quantified caseload limits, attorney experience and qualifications for appointment, and attorney independence from the judiciary. These standards provide additional criteria to the previously mentioned standards developed by the IDC and the PDS. While the PDS has broad indigent defense standards, more specific and/or numerical standards are available that the PDS should consider.

The nature of standards often means they are considered best practices, but not necessarily requirements. The West Virginia IDC states, “the standards are aspirational or describe ‘best practices’ and are not intended to serve as the basis for the imposition of professional discipline.” The degree to which indigent defense standards are enforced varies from state to state. Some states like Indiana and Ohio require the standards be met for reimbursement. The Idaho Legislature has required its public defense commission to make regular recommendations for enforcement mechanisms to uphold standards. Regardless of whether states strictly enforce standards, the American Bar Association, and the National Legal Aid & Defender Association suggest that standards have a significant impact on improving the quality and the efficiency of representation and that more detailed standards are more successful. Moreover, revised standards can help the PDS collect data on the quality of representation.

National Legal Organizations Recognize Monitoring Attorney Caseloads as a Standard by which to Evaluate the Quality of Representation

Attorney caseload limits have long been a feature of the indigent defense system. Excessive caseloads suggest that public defenders or panel attorneys may be unable to provide high quality representation. The U.S. Department of Justice funded the National Advisory Commission on Criminal Justice Standards and Goals that developed standards in 1973 that have remained as a guideline for establishing caseload limits. The federal commission’s standards, illustrated in Table 2, suggest a starting point, but more advanced methods that incorporate local complexities and case weighting such as the Delphi Method should be considered. The Delphi Method brings together a thorough panel of experts that collaborate on multi-round surveys to arrive at recommended case weights and caseload limits. Indigent defense authorities in Texas, New Mexico, North Carolina, and Missouri have used the Delphi method to assess their caseloads and Texas has adopted the findings of the assessment to inform their standards.

While the PDS has broad indigent defense standards, more specific and/or numerical standards are available that the PDS should consider.

Regardless of whether states strictly enforce standards, the American Bar Association, and the National Legal Aid & Defender Association suggest that standards have a significant impact on improving the quality and the efficiency of representation and that more detailed standards are more successful.

Table 2
National Advisory Commission on
Criminal Justice Standards for
Annual Caseload Maximums by Case Type

Case Type	Caseload
Felonies	150
Misdemeanors	400
Juvenile Court	200
Mental Health Act	200
Appeals	25

Source: National Advisory Commission on Criminal Justice Standards and Goals.

While the contracts between the PDCs and PDS require the PDCs to regularly review the workload of their individual attorneys and the total workload of the office, the PDS does not require the PDCs to report this information to the agency.

Although the IDC and the PDS have established standards calling for manageable workloads, **the PDS does not know if panel attorneys have manageable or excessive caseloads.** The PDS does not know the number of cases panel attorneys may have in their private practices or in the indigent system. And while the contracts between the PDCs and PDS require the PDCs to regularly review the workload of their individual attorneys and the total workload of the office, the PDS does not require the PDCs to report this information to the agency. Thus, the PDS reports the total number of cases completed by each PDC during each fiscal year but not the number of cases individual PDC attorney completed. Moreover, the PDS does not compile the average number of cases individual PDC attorneys are assigned at any given time during the fiscal year. Collecting these data would allow the PDS to have information necessary to assess whether caseloads are manageable or excessive.

Other states have established numerical caseload limits for panel attorneys and public defenders. Additionally, some states further require that data on caseloads be collected for reimbursement and other monitoring practices. The National Legal Aid & Defender Association concluded in its report, *Impact of Indigent Defense Standards*, that states that have numerical limits on caseloads generally had lower caseloads per type of case than states that did not have numerical caseload limits.

Some states require that data on caseloads be collected for reimbursement and other monitoring practices.

Indigent Defense Standards for Caseload Limits and Data Collection in Neighboring and Other States

Maryland, Ohio, Indiana, Washington, and Texas have set numerical standards for caseloads that act as a benchmark. These

caseload-limit standards recognize some, or all, of the following variables: case type and complexity, the prevalence of mixed caseloads, attorney qualifications, attorney resources, and the population of the judicial circuit. States have different systems for indigent defense provision, and they have developed caseload standards accordingly. The specific standards are not necessarily transferrable to indigent defense in West Virginia, but nonetheless show that quantitative standards for caseloads are possible and can serve as a source of data on the quality of representation provided.

The Office of the Maryland Public Defender (Maryland Public Defender) has developed caseload standards specifically for its public defenders. Unlike West Virginia, Maryland does not use panel attorneys extensively. Every circuit or district has a public defender office and panel attorneys are appointed when there are conflicts of interest. The Maryland Public Defender caseload standards vary by the three case categories of felonies, misdemeanors, and juvenile court. Furthermore, the population (rural, suburban, or urban) of the circuit/district is factored in calculating caseload standards. Table 3 shows the final recommendations for the caseload standards that were adopted by the Maryland Public Defender.

While all circuits have not met the standards since they were enacted in 2015, the Maryland Public Defender’s data suggest that improvements to caseload statistics are possible. Prior to calendar year 2021 and the COVID-19 pandemic in which the Maryland Public Defender saw a decline in the number of circuit court caseload limits met, the state had made progress. In 2015, 33 percent of public defender offices had met the caseload standards for circuit court cases. By 2019 and 2020, over 75 percent of the public defender offices met the threshold for these cases. Misdemeanors at the district level include traffic violations, and other minor proceedings not necessarily applicable to the PDS. Nonetheless, caseload limits have been established for different types of proceedings.

Caseload-limit standards recognize some, or all, of the following variables: case type and complexity, the prevalence of mixed caseloads, attorney qualifications, attorney resources, and the population of the judicial circuit.

Table 3			
Maryland Public Defender Final Case Weighting Study			
Recommended Caseload Standards			
Location	Rural	Suburban	Urban
Circuit Court/ Felony	191	140	156
District Court/ Misdemeanor	630	705	728
Juvenile Court	271	238	182

Source: Maryland Office of the Public Defender Key Goals, Objectives, and Performance Measures.

Specific standards show that quantitative standards for caseloads are possible and can serve as a source of data on the quality of representation provided.

The Ohio Public Defender requires that public defenders and appointed panel attorneys adhere to the limits set by the National Advisory Commission on Criminal Justice Standards and Goals. County public defender offices are required to submit a monthly operating expense and caseload report for reimbursement.

The Indiana Public Defender Commission (Indiana PDC) has set standards for caseloads that require attorneys and public defender offices weigh the case complexities and the number of support staff available. The Indiana PDC has set maximums at not more than 150 felony cases and 400 misdemeanor cases. However, the Indiana PDC also considers the presence of support staff. Without adequate support staff, the Indiana PDC suggests not more than 120 felonies and 300 misdemeanors. The Indiana PDC suggests that adequate support staff is equal to .75 support staff for each full-time attorney at the trial level. This includes one secretary/paralegal for every four full-time attorneys, one paralegal/investigator for every four attorneys, and one other litigation support employee for every four attorneys. Like Ohio, reimbursement is dependent on adherence to the standards.

Washington State has set caseload limits at 150 felonies per attorney per year; or 300 misdemeanor cases; or 250 juvenile offender cases; or 80 Juvenile Dependency; or 250 civil commitment cases. Additional limits have been established for death penalty trials and appeals to an appellate court. The standards further require that cases be weighted accordingly dependent upon the severity of charges, their complexity, and the attorney's total caseload composition.

The Washington State standards are applicable for public defenders and private panel attorneys. One of its standards further incorporates private practice cases when it states "private attorneys who provide public defense representation shall set limits on the amount of privately retained work which can be accepted. These limits shall be based on the percentage of a full-time caseload which the public defense cases represent."

The Texas Indigent Defense Commission utilized the Delphi panel method to calculate the number of cases per type attorneys should handle per year. The guidelines final recommendations suggest caseloads should not exceed 236 Class B Misdemeanors, 216 Class A Misdemeanors, 174 state felonies, 144 third degree felonies, 105 second degree felonies, or 77 first degree felonies. The state further retains a data repository that publicly displays the number of indigent defense cases attorneys are handling.

The Indiana Public Defender Commission (Indiana PDC) has set standards for caseloads that require attorneys and public defender offices weigh the case complexities and the number of support staff available.

The Indiana PDC has set maximums at not more than 150 felony cases and 400 misdemeanor cases. However, the Indiana PDC also considers the presence of support staff. Without adequate support staff, the Indiana PDC suggests not more than 120 felonies and 300 misdemeanors.

Indigent Defense Standards for the Appointment of Attorneys in Other States

Standards set by indigent defense authorities in Indiana and the state of Washington recognize the need to have specific requirements for the experience and skills necessary to represent clients in certain proceedings. However, the PDS asserts in the following statement that it does not have the authority to set criteria for the appointment of panel attorneys:

PDS has no role in the appointment of counsel and in the development of criteria for appointments. Every circuit court judge maintains his or her own list of attorneys to be appointed and no formal criteria exists for what attorney to appoint to what case. [emphasis added].

The PDS should consider standards incorporating specific requirements for years of experience and skills necessary by case type.

The Indiana PDC has developed standards regarding the qualifications for appointment of trial counsel that consider individual case difficulties and complexities. Different standards for the necessary experience of attorneys exist for murder trials, felonies, juvenile delinquency cases, and children-in-need of services cases. For example, Table 4 shows that to be eligible to represent a client in a murder case, the attorney must have three years of criminal litigation experience and prior experience as lead or co-counsel in three or more felony jury trials. Lower-level felonies require a minimum of one to two years of experience in criminal litigation and one to three cases of experience as lead or co-counsel depending on the severity of the charges.

Standards set by indigent defense authorities in Indiana and the state of Washington recognize the need to have specific requirements for the experience and skills necessary to represent clients in certain proceedings. However, the PDS asserts that it does not have the authority to set criteria for the appointment of panel attorneys.

Table 4
Indiana Public Defender Commission
Standard on Qualifications for Attorneys by Case Type

Charge	Experience in Years	Prior experience as Lead or co-counsel (Number of Cases)
Murder	3	3+
Level 1 - 4 Felony	2	1+
Level 5 Felony	1	3+
Children-In-Need of Services/ Termination of Parental Rights	1*	1+

Source: Indiana Standards for Indigent Defense
**Prior to appointment, attorneys must have at least six hours of training in CHINS/TPR*

The Washington State Supreme Court's *Standards for Indigent Defense* include standards regarding the necessary experience and qualifications needed to handle different case types. The standard requires a baseline of professional qualifications applicable to all cases. Attorneys must meet the minimum requirements to practice, be familiar with relevant statutes and caselaw, and adhere to the rules of professional conduct. Attorneys must be knowledgeable of the consequences of conviction, mental health issues, and take seven hours of continuing legal education relevant to their indigent defense practice yearly. Like Indiana, Washington requires attorneys have a prerequisite number of years of experience and past trials. For example, to be eligible to represent a client in a class A felony, the attorney must have two years of experience as a public defender and have served as counsel or co-counsel in three class A felonies.

Appointed counsel attorneys in Washington must sign a certification of compliance with the standards for indigent defense. Attorneys must certify they meet the basic qualifications, have access to adequate office space, have access to investigators, comply with caseload standards, and will not accept appointment in a case as lead counsel unless they meet the qualifications for that case. The certification also requires the panel attorneys to give an estimate of the percentage of their total practice time devoted to indigent defense.

Appointed counsel attorneys in Washington must sign a certification of compliance with the standards for indigent defense. Attorneys must certify they meet the basic qualifications, have access to adequate office space, have access to investigators, comply with caseload standards, and will not accept appointment in a case as lead counsel unless they meet the qualifications for that case.

Indigent Defense Standards Also Address Independence from Judicial and Political Influence

West Virginia’s indigent defense system has mechanisms for independence from judicial and political influence, specifically in situations where the public defender corporation counsel is representing an indigent client. However, given the limitations of the PDCs, judges still have authority in the selection of panel attorneys for a significant number of cases that come before it. Although both judicial officers and attorneys have very clear ethical obligations regarding their conduct, the appointment of attorneys by judges is still subject to scrutiny and criticism due to potential appearance of favoritism. The independence of appointed attorneys is emphasized as an important element of quality legal representation. The American Bar Association (ABA) writes:

The ABA endorses complete independence of the defense function, in which the judiciary is neither involved in the selection of counsel nor in their supervision. This call for independence applies to public defender programs, as well as to indigent defense programs that furnish private assigned counsel and legal representation through contracts.²

Indiana, Michigan, and Maryland have created standards and/or structured their indigent defense system in such a way as to preserve the independence of counsel and promote impartial representation. Appointments made outside of the judiciary present an opportunity for data collection, heightened review, and greater transparency.

In Maryland, the Office of Public Defender directly appoints panel attorneys from rosters of attorneys that district public defender or division chiefs at the district level offices of the Office of the Public Defender compile. The Maryland Public Defender retains rosters of eligible attorneys while judges have a limited role in the appointment process.

In 2020, the Michigan Indigent Defense Commission (Michigan IDC) approved its *Minimum Standards for Indigent Criminal Defense Services*. Standard five includes ensuring that indigent criminal defense services are independent of the judiciary. The standard notes “The selection of lawyers and the payment for their services shall not be made by the judiciary or employees reporting to the judiciary.” Each county is required to supply a plan to the Michigan IDC on how they will comply with the standards.

Judges still have authority in the selection of panel attorneys for a significant number of cases that come before it. Although both judicial officers and attorneys have very clear ethical obligations regarding their conduct, the appointment of attorneys by judges is still subject to scrutiny and criticism due to potential appearance of favoritism.

Appointments made outside of the judiciary present an opportunity for data collection, heightened review, and greater transparency.

² American Bar Association, *Eight Guidelines of Public Defense Related to Excessive Workloads* (August 2009), 6.

In Indiana, panel attorneys are appointed by county level public defender boards comprised of a diverse set of stakeholders. The purpose of the boards is to guarantee professional independence of the defense function and the integrity of the lawyer-client relationship.

Therefore, the Legislative Auditor finds that the Legislature should implement changes to establish an attorney appointment system that is more independent of the judicial branch.

The Structure of West Virginia’s Indigent Defense System Limits the PDS from Evaluating the Quality of the Indigent Defense System

The PDS has noted that circuit court judges have the sole discretion to appoint panel attorneys and it does not have any input concerning these attorneys. As panel attorneys are reliant on the circuit court judge to be appointed, this may place perceived influence on the panel attorney to perform in a manner to satisfy the circuit court judge making the appointment. This also creates a barrier to the PDS collecting the necessary data that are representative of quality legal defense. The PDS also identified additional costs and a lack of cooperation from appointed attorneys as other barriers to evaluating the quality of legal representation. With respect to panel attorneys, the PDS does not know a panel attorney has been appointed to a case by a judge until after legal representation has begun and the appointed attorney submits a claim for payment. It is at this point of receiving claims that the PDS can collect data related to the case and appointed attorneys. The PDS states that collecting more information would require updated computer programming and the agency has prioritized other projects over reprogramming. The agency added that panel attorneys would resist supplying more information if the PDS did not compensate them for the additional time it takes to provide it. According to the PDS, the additional cost to pay panel attorneys to give more information would cost millions of dollars. Furthermore, the agency anticipates that panel attorneys will become hostile to the PDS if it asks for more information. The executive director stated “PDS knows that most panel attorneys would react adversely to this strain on their already constricted time and would half-heartedly prepare reports, rendering them meaningless.”

The IDC is required by law to gather compensation and caseload data each year from both public defenders and appointed panel attorneys. These data are critical towards assessing quality legal representation; however, gathering such data from panel attorneys is not without difficulties and limitations. The current voucher system requires panel attorneys to submit the following information:

- name of appointed attorney,

The PDS also identified additional costs and a lack of cooperation from appointed attorneys as other barriers to evaluating the quality of legal representation.

The PDS does not know a panel attorney has been appointed to a case by a judge until after legal representation has begun and the appointed attorney submits a claim for payment.

The agency anticipates that panel attorneys will become hostile to the PDS if it asks for more information.

- date of appointment,
- disposition date,
- date and time of legal services,
- case type, and
- specific criminal charge.

The list is not exhaustive; however, some of these data can factor into evaluating quality legal representation, particularly case type and specific criminal charges. Nevertheless, caseload data cannot be sufficiently obtained from the voucher system. The PDS does not know the number of cases appointed attorneys have until they submit claims, and even then, panel attorneys may have other cases for which they have not yet submitted claims. Moreover, appointed attorneys may have cases in their private practices that the PDS knows nothing about. Requiring data on years of experience and continuing education would require cooperation from panel attorneys.

With respect to PDCs, the agency collects data through a software system it licenses that has timekeeping and case management functions. The PDS assigns the PDCs software access. The PDS requires PDCs to use the timekeeping function and the disbursement of funds is contingent upon the PDCs submission of data. As such the PDS collects data on the total number of cases completed and the total disbursements. However, the PDS does not mandate the way PDCs are to use the case management function to administer and manage cases. As a result, PDCs vary in the extent to which they use this case management function. Additionally, the PDS states the software was consolidated with another, PC Law, and license fees that were \$50,310 in fiscal year 2020 are projected to be approximately \$228,500 in fiscal year 2023. Nevertheless, the current case management system has data fields that are relevant towards evaluating the quality of legal representation. In particular, fields are available to enter case data (charges, circuit, etc.); case events and management (client interviews, court appearances, attorney To-Do section, etc.); case dispositions and sentences; and the prevalence of continuous, vertical representation by one attorney. However, the timekeeping and case management functions of the PDCs do not contain fields related to caseload, attorney qualifications, or continuing education.

There is no evidence that the PDS knows if PDCs assign cases based on caseload and experience. If PDCs are taking these factors into account, the process is likely subjective because the PDS has not associated numerical caseload maximums and years of experience with the types and complexities of cases to guide the assignment of cases. Following the examples of other states would provide more objectivity and uniformity in assigning cases to achieve quality legal representation.

Caseload data cannot be sufficiently obtained from the voucher system. The PDS does not know the number of cases appointed attorneys have until they submit claims, and even then, panel attorneys may have other cases for which they have not yet submitted claims.

Nevertheless, the current case management system has data fields that are relevant towards evaluating the quality of legal representation.

Conclusion

In the January 1999 performance audit of the PDS, PERD concluded “The State office of Public Defender Services lacks management information to monitor the quality, compliance, and improvement of legal representation.” In this current performance audit of the PDS, PERD comes to the same conclusion. The PDS is required by law to monitor, evaluate, and make recommendations for improvements of the efficiency and quality of indigent legal representation. This mandate can only be accomplished by gathering appropriate information that is representative of efficiency and quality. PERD finds that the PDS collects data that are useful for measuring efficiency of indigent defense, but it does not collect sufficient data to evaluate and monitor the quality of indigent legal representation. This does not mean that the indigent defense system does not provide quality legal representation; it only means that the PDS does not know if the indigent defense system is providing quality legal representation.

However, the legislative auditor finds that while the Legislature mandated that the PDS monitor and evaluate the quality of legal representation within the indigent defense system, **the PDS is limited in doing so because of the structure of the State’s indigent defense system.** An indigent defense system that significantly relies on judges appointing attorneys, in and of itself, infringes on quality legal representation, according to well established standards for indigent defense. Moreover, when attorneys are appointed by judges, gathering data from such attorneys to evaluate quality representation is impeded because the PDS has limited jurisdiction over them.

In 2008, the Legislature established the Indigent Defense Commission to assist the PDS in “the establishment of performance measures for the qualitative review of indigent defense.” Establishing these performance measures is an important responsibility of the PDS. Also, the IDC has an important responsibility to annually evaluate the compensation and caseloads of public defenders and appointed panel attorneys. However, the IDC has not conducted annual evaluations of compensation and caseloads of public defenders and panel attorneys, and the structure of the indigent defense system impedes these statutory responsibilities from being carried out. Other data are needed to evaluate quality such as attorney qualifications, continuing education, and standards that associate years of experience and caseloads with the types and complexities of cases. Given the Legislature’s intent to have the quality of legal representation within the indigent defense system evaluated, consideration should be given to enhance the PDS’s ability to carry out this responsibility. Therefore, the legislative auditor makes the following recommendations.

In the January 1999 performance audit of the PDS, PERD concluded “The State office of Public Defender Services lacks management information to monitor the quality, compliance, and improvement of legal representation.” In this current performance audit of the PDS, PERD comes to the same conclusion.

Given the Legislature’s intent to have the quality of legal representation within the indigent defense system evaluated, consideration should be given to enhance the PDS’s ability to carry out this responsibility.

Recommendations

1. *The Legislature should consider implementing changes to establish an attorney appointment system that is more independent of the judicial branch.*
2. *The Legislature should consider restructuring the indigent defense system to give the Public Defender Services greater authority over and access to data that are needed from appointed attorneys to evaluate the quality of indigent legal representation.*
3. *If the indigent defense system is to remain as currently structured, the Legislature should consider requiring a periodic study to gather data to evaluate the quality of indigent legal representation through either the Public Defender Services or an independent entity. Cooperation from every level of the indigent defense system should be mandated to facilitate the data gathering process.*
4. *The Public Defender Services should establish performance measures for the qualitative review of indigent defense as required by West Virginia Code 29-21-3b(a).*
5. *The Public Defender Services should collect sufficient and appropriate data that are representative of the quality of legal representation within the indigent defense delivery system.*
6. *The Public Defender Services should assist and collaborate with the Indigent Defense Commission in achieving the statutory mandate (W. Va. Code §29-21-3b(f)(3)) of annually evaluating the compensation and caseloads of public defenders and appointed panel attorneys.*
7. *The Public Defender Services should consider establishing numerical caseload maximums for types and complexities of cases to guide PDCs and panel attorneys as to what is an excessive caseload.*
8. *The Public Defender Services should consider specifying the number of years of experience and qualifications an attorney should have for certain types and complexities of cases.*

Because Cost Data for PDCs and Panel Attorneys Are Too Dissimilar for Accurate Comparison, the PDS Should

ISSUE 2

Review Whether There Are Other Advantages to PDCs

Issue Summary

As Issue 1 indicates, the PDS compiles data that can be used to measure the efficiency of the indigent defense system but not its quality. The PDS gathers an extensive amount of efficiency data that are useful for the Legislature and stakeholders to understand the costs of the indigent defense system, and to be able to identify fraud, waste, and abuse in the reimbursement process for legal services. The PDS has also used efficiency data to make cost comparisons between appointed panel attorneys and public defenders. The analyses, as reported in the PDS annual reports, often show that panel attorneys are more costly than public defenders. This conclusion has been used as a measure of efficiency of the indigent defense system and to recommend that all judicial circuits in West Virginia have an operational PDC. However, PERD finds, and the PDS agrees, that these efficiency measures for PDCs and panel attorneys are incomparable. Therefore, improvements are needed in measuring the efficiency of the indigent defense system and the measures, as currently calculated, should not be used to promote a greater use of PDCs throughout the state. Instead, the PDS should consider reviewing whether there are other advantages in establishing PDCs.

PERD finds, and the PDS agrees, that these efficiency measures for PDCs and panel attorneys are incomparable.

The PDS Gathers a Substantial Amount of Data that Can Be Used to Measure the Efficiency of the Indigent Defense System

The PDS compiles and calculates data that represent total expenditures, average cost per case, and the average cost per hour for panel attorneys and PDC attorneys. Using the PDS's cost comparison calculation method from fiscal year 2019 through 2022, on average PDCs annually cost \$2,303,271 less than panel attorneys (Table 5). The combined total cost for appointed attorneys and public defenders is over \$43 million.

Table 5			
Indigent Defense			
Expenditures by Legal Representation Type			
FY 2019 through FY 2022			
FY	Panel Attorneys	PDCs	Totals
2019	\$23,894,894	\$18,950,369	\$42,845,263
2020	\$25,676,729	\$19,298,669	\$44,975,397
2021	\$19,476,609	\$20,670,958	\$40,147,567
2022	\$21,859,128	\$22,774,278	\$44,633,406
Avg.	\$22,726,840	\$20,423,568	\$43,150,408

*Source: OASIS, report WV-FIN-BC-030.
Actual cost outlay. In its annual reports, the PDS includes incurred expenses as well as actual costs for panel attorneys for purposes of cost comparisons.*

The PDS also calculates the average cost per case for PDCs as being less than the average cost per case for appointed panel attorneys. Total panel attorney voucher payments and total PDC disbursements are divided by the number of claims and the number of cases. Table 6 shows the PDS's calculations for the average cost per case from fiscal years 2018 through 2021.

Table 6		
Indigent Defense		
Average Cost Per Case		
By Legal Representation Type		
FY 2018 through FY 2021		
FY	Appointed Panel Attorneys	PDCs
2018	\$796	\$541
2019	\$772	\$531
2020	\$860	\$615
2021	\$1,016	\$618

Source: PDS annual reports and information provided by the PDS.

In addition, the PDS also calculates the cost per hour of PDCs and panel attorneys. Total voucher payments and disbursements are divided by the total hours logged. Table 7 shows the PDS’s calculations for the average cost per hour from fiscal years 2018 through 2021. The data suggest panel attorneys have a lower hourly cost than PDCs.

Table 7 Indigent Defense Average Cost Per Hour By Legal Representation Type FY 2018 through FY 2021		
FY	Appointed Panel Attorneys	PDCs
2018	\$53	\$92
2019	\$52	\$99
2020	\$58	\$112
2021	\$64	\$108

Source: PDS annual reports and information provided by the PDS.

The PDS expressed that its evaluation of the delivery of indigent defense focuses on the financial aspect.

The PDS Often Reports the Cost Differentials Between Panel Attorneys and Public Defenders to Conclude that PDCs Are More Efficient than Panel Attorneys

According to the agency, “Inevitably, this [cost comparison] leads to the conclusion that public defender corporations are the more efficient means of delivering legal services and the state would benefit from completing the system.” The PDS expressed that its evaluation of the delivery of indigent defense focuses on the financial aspect. The executive director wrote:

Again, the agency does evaluate the delivery system and tries to make improvements. However, the evaluation is primarily economic, not result-oriented. The economic evaluation is used to compare delivery of legal services by panel attorneys with the delivery of legal services by public defender corporations.

The PDS uses the calculations to make recommendations to the Legislature for the expansion of PDCs.

The PDS uses the calculations to demonstrate PDC cost-savings and makes recommendations to the Legislature for the expansion of PDCs. The PDS has used the calculations and comparisons to estimate potential PDC cost savings in the Operating Detail Budgets from fiscal years 2018 through 2023. In the sections for goals and performance measures, the agency listed the goal of activating more PDCs from 2018 through 2021. The 2018 through 2023 documents contain estimated

cost avoidances that would come from PDCs based on the cost per case differential between panel attorneys and public defenders. The fiscal year 2023 estimate contained in the Operating Detail Budget for fiscal year 2022 is \$6.4 million in savings.

In the PDS's fiscal year 2023 Improvement Package Request, the PDS commented that an increase in funding to the Monongalia County PDC was necessary and would lead to eventual cost savings. The PDS calculated the savings using the cost-per-case differential between panel attorneys and public defenders. Under the anticipated cost savings section, the PDS wrote:

The 2019 Annual Report calculates that the cost per case for public defender corporations is \$531.79 and the cost per case for Appointed Counsel is \$772.84. This is a difference of \$241.09. If, comparable to the First Judicial Circuit's experience, the new public defender corporation handles 1,746 cases, then the savings would be \$420,873.30. This savings may not be realized immediately because history demonstrates that the number of cases closed in a judicial circuit increases after the corporation operates and thus the annual expense does not reflect, immediately, the savings. This demonstrates an efficiency in the system by resolving cases more quickly. Eventually, the system reaches an equilibrium that benefits the criminal justice process in a judicial circuit.

The IDC has also used the data and cost per case calculations to support recommendations in the past. The IDC's first recommendation in the 2009 Report to the Legislature is to activate four new PDCs and it was partially based on cost-efficiencies. The report cites PDS's statistics within the 2005 through 2008 annual reports as support that the PDCs are less costly.

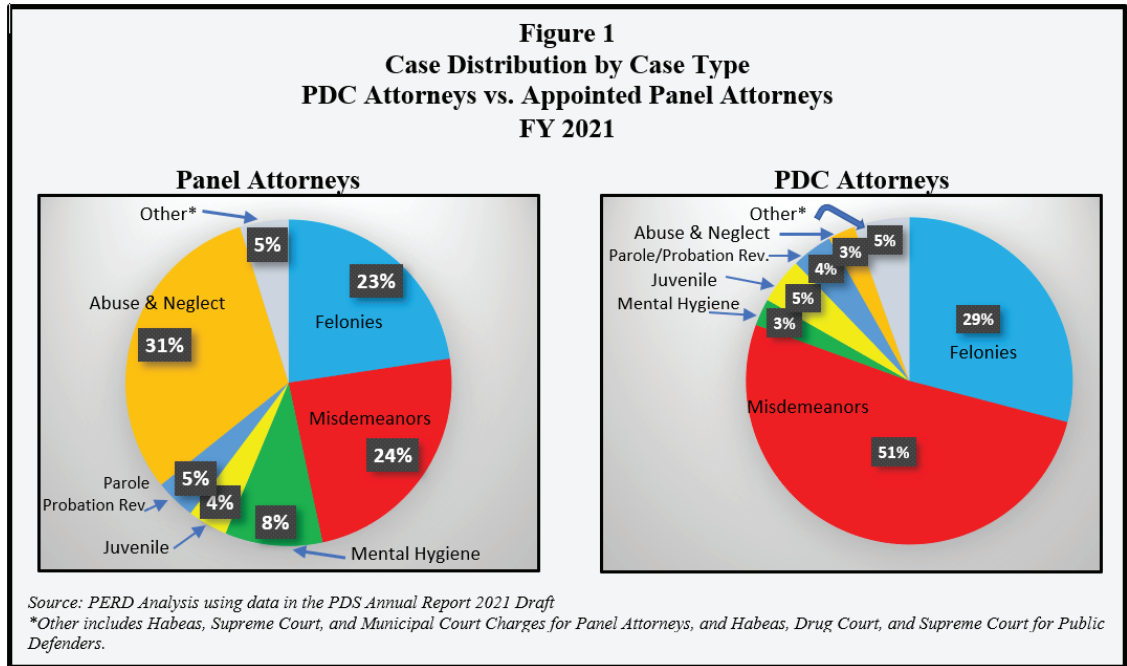
The PDS's Cost Calculations for Panel Attorneys and PDCs Are Incomparable

The PDS annual reports provide extensive quantitative data, and they make frequent comparisons in costs between panel attorneys and public defenders with the intent to show lower costs by public defenders. PERD finds that the statistics are useful towards measures of cost and internal control, but it is misleading and inappropriate to use the data for comparisons between appointed panel attorneys and public defenders. Figure 1 below shows the compositions of case types for FY 2021 for appointed attorneys and public defenders as reported by the PDS. The striking feature between the two compositions is that PDCs handle more than twice the percentage of misdemeanors than appointed attorneys, and the PDC caseload includes only 3 percent abuse and neglect cases while

The PDS annual reports make frequent comparisons in costs between panel attorneys and public defenders with the intent to show lower costs by public defenders. PERD finds that the statistics are useful towards measures of cost and internal control, but it is misleading and inappropriate to use the data for comparisons between appointed panel attorneys and public defenders.

The striking feature between the two compositions is that PDCs handle more than twice the percentage of misdemeanors than appointed attorneys, and the PDC caseload includes only 3 percent of abuse and neglect cases while appointed attorneys deal with 31 percent.

appointed attorneys deal with 31 percent. The other case types are not significantly different between the two attorney groups. The FY 2021 compositions for each attorney group are typical for fiscal years 2018-2020.



The disparity between the two attorney groups in terms of misdemeanors and abuse and neglect cases is significant because the number of hours to manage these cases are substantially different. The PDS does not compile data for the number of hours per case type for PDCs, but it provides these data for appointed attorneys. Table 8 shows that the average number of hours for misdemeanors is around 6, while the average hours per abuse and neglect cases tends to be around 25. Abuse & neglect proceedings concern the safety and well-being of a child in potential instances of abuse. These cases involve lengthy processes with numerous hearings. After a petition is filed, there may be a preliminary hearing, an adjudicatory hearing, a disposition hearing, and a permanency hearing. Moreover, there are opportunities for pre-adjudicatory hearings and post-adjudicatory or dispositional hearings to institute improvement periods by which the court grants respondents a period to improve the circumstances of the child. Ultimately, term/abuse and neglect proceedings are maintained on the circuit court’s docket until permanent placement of the child has been achieved and they can take years to resolve.

The disparity between the two attorney groups in terms of misdemeanors and abuse and neglect cases is significant because the number of hours to manage these cases are substantially different.

Since appointed attorneys have a lower percentage of misdemeanors and a higher percentage of abuse and neglect cases, they are expected to have higher costs than PDCs because they have more cases that require a greater number of hours. This is revealed when one looks at the total average number of hours for all cases in the lower section of Table 9. It shows that appointed attorneys tend to average overall 15 hours per case, while PDCs average between 5 and 6 hours per case. The differential in average total hours is nearly three times the number of hours between the two attorney groups. The PDS executive director acknowledged to PERD that the calculations of costs for PDCs and panel attorneys are incomparable. **The legislative auditor concludes that the data used by the PDS to compare cost efficiency between panel attorneys and public defenders are incomparable for this purpose.** The data are insufficient because they do not measure costs per case type for PDCs. A more accurate comparison between appointed attorneys and public defenders would include comparing each case type for the two attorney groups.

Since appointed attorneys have a lower percentage of misdemeanors and a higher percentage of abuse and neglect cases, they are expected to have higher costs than PDCs because they have more cases that require a greater number of hours.

The PDS executive director acknowledged to PERD that the calculations of costs for PDCs and panel attorneys are incomparable.

Table 8
Average Hours Per Case Type
Appointed Attorneys
FY 2018 through FY 2021

Case Type	2018	2019	2020	2021
Felony	17.86	17.23	16.86	17.00
Misdemeanors	6.88	6.35	6.25	6.49
Mental Hygiene	2.32	2.35	2.28	1.97
Juvenile	15.44	14.24	15.65	17.60
Parole/Probation Revocation	7.96	6.85	7.01	7.51
Term/Abuse & Neglect	25.51	23.54	24.78	26.34
Habeas	52.58	47.37	42.84	39.57
Supreme Court	37.38	35.97	30.10	29.09
Municipal Court Charges	5.62	6.11	6.27	5.60
Other	6.76	6.18	6.73	5.94
Average Hours Per Case for all Case Types				
Appointed Attorneys	15.02	14.62	14.70	15.67
PDCs (without admin. time)	5.90	5.41	5.50	5.68

Source: PERD calculations using Public Defender Services Annual Reports for select years.

There Are Other Shortcomings with PDS Data for the Purpose of Measuring Efficiency of the Indigent Defense System

The PDS uses different data points from panel attorneys and PDCs regarding services rendered, time expended, and payments made to inform their cost calculations. First, the PDS compares the number of panel attorney claims to the number of cases closed by PDCs. Second, PDS compares salaried PDC employees to panel attorneys whose claims are hourly/fee for service. Lastly, the PDS compares the total dollar amount for claims paid to panel attorneys to the total disbursements made to PDCs.

Panel attorney claims are not comparable to PDC cases. Claims and cases closed are not equivalent.

Panel attorney claims are not comparable to PDC cases. Claims and cases closed are not equivalent. Panel attorneys can submit different types of claims including regular claims, direct expense claims, and supplemental claims. Direct expense claims are for the reimbursement of expenses such as travel, medical expert witnesses or other experts, court reporters, investigative services, paralegal fees, and other. Supplemental claims include the multiple vouchers paid in one child abuse and neglect proceeding. In contrast, the PDS reports the number of cases closed by PDCs. PDC expenses such as those for expert witnesses are not delineated in the PDS's annual report.

Furthermore, panel attorneys can make multiple claims for the same case. Panel attorneys may submit a claim after six months since the commencement of a case or at "critical stages." While representing clients in potentially lengthy term/abuse and neglect proceedings, panel attorneys can typically submit a voucher every 90 days. The PDS explained the reason multiple claims are paid for the same case and noted:

The use of 'critical stages' as indicators that a case is completed, even if the entire criminal process is not yet completed, is a reflection of this concern so that attorneys can be paid at intervals that are meaningful.

In addition, panel attorneys can submit claims for the same case in more than one year. The PDS adjusts its calculations in the effort to support a better comparison between claims and cases, but stated:

Admittedly, some vouchers may be received in different fiscal years causing the claims to reflect some uncompleted cases. However, this is countered by using closed cases reported by the public defender corporations when the services in a fiscal year may not have been totally attributable to the closed cases.

PDS compares salaried PDC employees to panel attorneys whose claims are hourly/fee for service. PDS compares the total dollar amount for claims paid to panel attorneys to the total disbursements made to PDCs.

It is not clear the extent to which closed cases reported by the PDCs

when services were provided in a different fiscal year match the claims of incomplete cases submitted by panel attorneys. Such a contrast could be misleading and does not allow a true comparison to take place, especially given the disproportionate number of term/abuse and neglect cases, which allow for more frequent claim submission, handled by panel attorneys.

The use and comparison of total time expended by panel attorneys paid incrementally and hourly through vouchers to salaried PDC employees and total hours are similarly incomparable. Panel attorneys record hours and increments spent on vouchers for payment. Since vouchers also include the case information, panel attorney vouchers provide data as to how hours are spent by case type. In comparison, PDCs record in-court hours, out-of-court hours, drug court hours, and administrative hours. PDC hours by case type are not recorded. The cost per hour comparison can only provide a broad overview based on total hours expended.

The PDS Should Review Whether There Are Other Advantages to PDCs

While the PDS has used the cost differentials between panel attorneys and public defenders as evidence to support the expansion of the PDC system, the PDS noted that the agency reports cost data because the Legislature wants this information. The PDS executive director acknowledged that comparing cost data between panel attorneys and public defenders to promote greater use of PDCs is problematic. However, he stated that he has attempted to emphasize that the primary reasons for completing the PDC system are the advantages of implementing programs that assist in the legal representation and providing public defenders with needed resources that many panel attorneys may not have such as adequate office space to meet with clients, support staff, structured education, and mentoring of young attorneys. These elements enhance the quality of indigent legal representation according to the PDS executive director.

PDCs present opportunities to implement programs, such as recovery coaches, the social worker initiative, and SWIFT Defense, that help clients navigate the various stages of the criminal justice system in a more holistic manner to ultimately reduce recidivism.

The PDS asserted:

At this time, it should be stated that the public defender corporations present a greater opportunity for PDS to advance quality representation. The public defender corporations represent an organized platform from which programs can be launched. Panel attorneys are discrete individuals, many of whom do not have support or staff.

The PDS executive director stated that he has attempted to emphasize that the primary reasons for completing the PDC system are the advantages of implementing programs that assist in the legal representation and providing public defenders with needed resources that many panel attorneys may not have such as adequate office space to meet with clients, support staff, structured education, and mentoring of young attorneys.

To bring panel attorneys together to coordinate programs is impossible. In funding contracts, PDS can mandate the public defenders' participation in programs and can influence the representation of clients toward a more holistic approach. Through monthly virtual meetings with the 18 public defenders and their office managers, PDS can coordinate efforts on a fairly statewide basis.

The recovery coach program has placed six coaches in the PDCs that assist clients with drug treatment needs. The program is designed to provide treatment at an early stage within the criminal justice system to reduce overdose deaths after individuals are no longer incarcerated. The PDS and the program have been recognized for their efforts by the National legal Aid and Defender Association, the American Bar Association, and the Rural Justice Collaborative.

The social worker initiative focuses on training social workers in mitigation work and making them available to provide their services to clients to achieve the best possible outcomes. The PDS website has a section dedicated to providing mitigation resources in which mitigation is defined as:

A complex, multi-pronged approach to preparing for sentencing for a defendant's crime with the goal of reducing or lessening the effects of aggravating factors. Mitigation is the story-telling part of representing the criminal defendant. Where the prosecution talks about the crime and the victim, mitigation talks about the story of the defendant as a person before the crime, after the crime, and in the future.

The SWIFT Defense pilot project is an extension of the social worker initiative. SWIFT, as an acronym, stands for the Social Worker Initiative for the Trauma Informed Defense of Women. The program places a social worker in selected PDCs to, "interview female clients for the purpose of identifying underlying and unaddressed trauma and other factors that might explain the involvement with the criminal justice system." The program seeks to address and mitigate high incarceration rates for women in West Virginia.

The legislative auditor acknowledges that establishing PDCs have the advantages of implementing programs that facilitate the improvement of the quality of legal representation; however, the programs are in their infancy and the PDS has been unable to collect significant data. The agency intends to collect more data as the programs mature. **Along with collecting data on compensation and caseloads, the PDS should continue to develop, implement, and collect data on PDC programs and analyze the data to inform recommendations on the delivery of indigent defense in West Virginia.**

The recovery coach program has placed six coaches in the PDCs that assist clients with drug treatment needs. The PDS and the program have been recognized for their efforts by the National legal Aid and Defender Association, the American Bar Association, and the Rural Justice Collaborative.

The Social Worker Initiative for the Trauma Informed Defense of Women program seeks to address and mitigate high incarceration rates for women in West Virginia.

Conclusion

The PDS collects an extensive amount of data that measure the efficiency of the indigent defense system. However, the agency often uses that data to compare the cost between panel attorneys and public defenders. The comparisons often conclude that PDCs are less costly and more efficient than panel attorneys and therefore supports the expansion of the PDC system. PERD's analysis finds that the data used by the PDS in making these comparisons are incomparable and therefore, is misleading when used to show greater value in using public defenders over panel attorneys. The statistics for total costs, cost per case and cost per hour calculated by the PDS do not account for the difference in composition of case between public defenders and panel attorneys. Given that panel attorneys generally have a significantly higher percentage of abuse and neglect cases that involve more hours, and a much lower percentage of misdemeanor cases, panel attorneys would be expected to have higher average costs than public defenders. Therefore, the PDS should consider reviewing whether there are advantages of PDCs along the lines of the programs that would be available, and the resources public defenders would have that panel attorneys may not have.

Moreover, cost and efficiency should not be the only criteria for evaluating indigent defense. The PDS has a statutory duty and the authority to collect data on both the efficiency and the quality of indigent defense legal representation. To recommend improvements for West Virginia's delivery of indigent defense, the PDS should continue to use data it is collecting, consider ways to evaluate costs and efficiency that recognize differences in case type, hours, etc., and evaluate additional data related to quality.

Recommendations

9. *The PDS should continue to gather data related to the costs and efficiency of the indigent defense systems. However, the current use of the data to illustrate lower costs for PDCs should not serve to inform recommendations.*
10. *The PDS should review whether there are other advantages of PDCs in terms of the programs that could be provided, and the resources public defenders would have that many panel attorneys may not have. Appropriate data should be collected that would demonstrate the advantages of PDCs in improving the quality of the indigent defense system.*

PERD's analysis finds that the data used by the PDS are incomparable and therefore, is misleading when used to show greater value in using public defenders over panel attorneys.

The PDS should consider reviewing whether there are advantages of PDCs along the lines of the programs that would be available, and the resources public defenders would have that panel attorneys may not have.

11. *The PDS should consider improving its efficiency data by determining the number of hours per case type for public defenders.*

12. *The PDS should collect and use data on the quality of legal representation to improve the indigent defense delivery system as led by the data assessment.*

Appendix A

Transmittal Letter

WEST VIRGINIA LEGISLATURE

Performance Evaluation and Research Division

1900 Kanawha Blvd. East
Building 1, Room W-314
Charleston, WV 25305-0610
(304) 347-4890



John Sylvia
Director

December 14, 2022

Dana F. Eddy, Executive Director
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311

Dear Mr. Eddy:

This is to transmit a draft copy of the performance review of the Public Defender Services. This report is tentatively scheduled to be presented during the January 8-10 interim meetings of the Joint Committee on Government Operations, and the Joint Committee on Government Organization. We will inform you of the exact time and location once the information becomes available. It is expected that a representative from your agency be present at the meeting to answer any questions committee members may have during or after the meeting.

We need to schedule an exit conference to discuss any concerns you may have with the report. We would like to have the meeting on Wednesday, December 21, 2022. Please notify us to schedule an exact time. In addition, we need your written response by noon on Thursday, December 29, 2022 in order for it to be included in the final report. If your agency intends to distribute additional material to committee members at the meeting, please contact the House Government Organization staff at 304-340-3192 by Thursday, January 5, 2023 to make arrangements.

We request that your personnel not disclose the report to anyone unaffiliated with your agency. However, the Legislative Auditor advises that you inform any non-state government entity of the content of this report if that entity is unfavorably described, and request that it not disclose the content of the report to anyone unaffiliated with its organization. Thank you for your cooperation.

Sincerely,
John Sylvia
John Sylvia

Enclosure

Appendix B

Objectives, Scope and Methodology

The Performance Evaluation and Research Division (PERD) within the Office of the Legislative Auditor conducted this performance review of the Public Defender Services (PDS) as part of the Agency Review of the Department of Administration, as required and authorized by the West Virginia Performance Review Act, Chapter 4, Article 10, of the *West Virginia Code*, as amended. The purpose of the PDS, as established in West Virginia Code §29-21, is to administer, coordinate, and evaluate programs by which the state provides legal representation to indigent persons, monitor the progress of various delivery systems, and recommend improvements to ensure high-quality legal representation is provided to indigent clients in an efficient manner.

Objectives

An objective of this review was to evaluate whether the PDS compiled data to adequately evaluate the efficiency and the quality of legal representation provided to indigent persons as required by W. Va. Code §29-21-1 and §29-21-3. An additional objective was to evaluate how the PDS uses data to assess and monitor legal representation and improve the overall performance of the indigent defense legal system as required by W. Va. Code §29-21-1 and §29-21-3.

Scope

The review focused on the efficiency and quality of indigent legal representation data collected by the PDS for FY 2018 through FY 2021. This encompasses the indigent legal representation provided by both Public Defender Corporations (PDC) and appointed counsel in both adult and juvenile cases, cases from all court levels (circuit, state supreme court, etc.), and all case types (felony, misdemeanor, term/abuse and neglect, mental hygiene, etc.). The review also included a review of the appointed counsel payment vouchers and the Time Matters case management software system data fields used by the PDCs as well as any recommendations PDS made to improve the performance of the indigent defense legal system. PERD solely reviewed PDS reported data and not any data collected, compiled, or reported by any other entities including the circuit courts, PDCs, or appointed counsel.

Methodology

PERD gathered and analyzed several sources of information and conducted audit procedures to assess the sufficiency and appropriateness of the information used as audit evidence. The following describe the information gathered and audit procedures.

The basic methodology outline for the audit objectives consists of confirming that the PDS is required to monitor and evaluate both the efficiency and quality of the legal representation within the indigent defense system, and if this is required by law, then the agency would need to collect certain data that would be used towards achieving these statutory duties. Therefore, PERD requested a legal opinion from the Legislative Services Division within the Office of the Legislative Auditor to determine if the PDS has the responsibilities to monitor and evaluate the efficiency and quality of the indigent defense system. Also, PERD interviewed the PDS executive director and staff to gain an understanding on how the agency interpreted its statutory mandates in comparison to the legal opinion. All verbal communication with the executive director and staff

were confirm in writing. The legal opinion confirmed that the PDS has the statutory duty to monitor and evaluate the efficiency and quality of the indigent defense system and make recommendations to improve the system. PERD determined that the evidence of the legal opinion and the confirmed discussions with the agency were sufficient and appropriate for determining the agency's statutory responsibilities.

Given the legal opinion, the PDS would need to gather certain data that would represent the efficiency and quality of the indigent defense system to accomplish these statutory duties. PERD interviewed the PDS executive director and staff to understand what types of data are collected, and how the data are used. All verbal communication with the executive director and staff were confirm in writing. Further testimonial evidence was gathered through letters and emails and confirmed in writing by the PDS executive director. Aside from testimonial evidence, PERD also obtained supporting and corroborating information from PDS annual reports, other publications including a report issued by PDS on standards for the indigent defense function in West Virginia, a report resulting from work of the West Virginia Indigent Defense Task force, a list of all the data fields included in the Time Matters case management software system, and a copy of the appointed counsel payment voucher template. The audit objectives concerned what data the agency attempted to collect, did they represent efficiency and quality of legal representation, and how were the data used in improving the indigent defense system. The audit team determined that testing the data for accuracy was not necessary because the context of the audit objectives was not about the accuracy of the data but on the fields of data the agency determined needed to be collected and how the agency used the data. PERD confirmed what data were gathered by the agency and how they were used through a review of its annual reports and by testimonial evidence from the agency. PERD also gathered information from independent, non-profit organizations such as the American Bar Association, and the PDS's counterparts in other states as supporting evidence of the types of data that can be used to evaluate the quality of legal representation, as well as certain best practices.

Some financial data presented in the report came from the West Virginia Our Advanced Solution with Integrated Systems (OASIS). These data were strictly used as background information as presented in Table 1 of the report. The Office of the Legislative Auditor reviews the statewide single audit and the Division of Highways financial audit annually with regards to any issues related to OASIS. The Legislative Auditor's staff requests and reviews on a quarterly basis any external or internal audit of OASIS. In addition, through its numerous audits, the Office of the Legislative Auditor continuously tests the OASIS financial information. At the start of each audit, PERD asks audited agencies if they have encountered any issues of accuracy with OASIS data. Based on these actions, along with the audit tests conducted on audited agencies, it is our professional judgement that the information in OASIS is reasonably accurate for auditing purposes under the 2018 Government Auditing Standards (Yellowbook). However, in no manner should this statement be construed as a statement that 100 percent of the information in OASIS is accurate.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix C Agency Response

STATE OF WEST VIRGINIA



MARK D. SCOTT
CABINET SECRETARY

**DEPARTMENT OF ADMINISTRATION
PUBLIC DEFENDER SERVICES**
ONE PLAYERS CLUB DRIVE, SUITE 301
CHARLESTON, WEST VIRGINIA 25311
Phone: (304) 558-3905 Fax: (304) 558-1098
www.pds.wv.gov

DANA F. EDDY
EXECUTIVE DIRECTOR

*"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."
Griffin v. Illinois, 351 U.S. 12 (1956)*

December 29, 2022

John Sylvia
Director
West Virginia Legislature
Performance Evaluation and
Research Division
1900 Kanawha Blvd., East
Building 1, Room W-314
Charleston, WV 25305-0610

**PERFORMANCE EVALUATION
DEC 29 2022
AND RESEARCH DIVISION**

Re: *Response to Performance Review*

Director Sylvia:

I submit the following as the response of Public Defender Services to the completed report of the Performance Evaluation and Research Division following its review of the agency's performance with respect to measuring the quality of the representation of indigent citizens facing the loss of liberty or the termination of parental rights.

Overview.

Public Defender Services ("PDS"), generally, and its management, specifically, commends you and your staff on the tremendous effort that the final report represents. Personally, I found the numerous conversations and exchanges to have been insightful. While I disagree with some fundamental assumptions made by the Performance Evaluation and Research Division ("PERD"), I do share the concerns that were expressed and do believe the agency can do more to measure whether the state's indigent defense system is effective. My intent is to continue to reflect upon these matters and, within the statutory strictures that exist, begin to devise solutions. Again, I commend you on the effort; I thank you for the attention that you paid to PDS' responses to the draft report; and I believe the exchange of ideas will benefit the constituency of both PDS and the

John Sylvia, Director
Performance Evaluation and
Research Division
December 29, 2022
Page 2

Legislature.

Perspective.

As originally presented to PDS, the performance review was to focus on the agency's efforts, or lack of effort, to generate data to measure the "quality of representation." PERD's perspective was that the agency was mandated to do this by statute.

From PDS' perspective, the agency's mandate is to focus on the administration of the proscribed structure of indigent defense in the State of West Virginia and on the improvement of this structure through programs or other efforts. The agency stated that, first, the "quality" of an attorney's representation is a subjective determination and could not be readily determined by objective measures, such as outcomes. The agency further stated that the legislative structure did not provide the agency with the tools necessary to even evaluate an indigent defense attorney's representation whether the attorney was a public defender, assistant public defender, or a private counsel taking court-appointments.

In response, PERD obtained a legal opinion that countered the agency's assertion regarding its statutory mandate.

However, the agency's perspective is that, during the performance review, the discussion shifted from direct measurement of the quality of representation to the establishment of performance measures that would indicate quality representation was being afforded to indigent defendants or respondents. This evolution of the performance review resulted in a focus on caseloads of public defender corporations or private counsel.

While PDS disagrees that it is mandated to measure the quality of representation provided by an attorney, PDS agrees that performance measures should be developed to measure the effectiveness of the state's indigent defense system or systems which then ensures that, overall, quality representation is being provided.

The Statutory Mandate.

The legal opinion provided to PERD highlights that in the "Legislative Findings; purpose" the following statement is found: "The legislature finds and declares that in certain proceedings the state is required to provide high quality legal assistance to indigent persons who would be otherwise unable to afford adequate legal counsel...." W. Va. Code §29-21-1 (1989). This is the mandate imposed upon the State of West Virginia through the Sixth and Fourteenth Amendments to the United States Constitution as set forth in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963). Indeed, this exact language was set forth in the legislative findings for the statute creating the predecessor to PDS, i.e., the "West Virginia public legal services council." W. Va. Code §29-

John Sylvia, Director
Performance Evaluation and
Research Division
December 29, 2022
Page 3

21-1 (1981).¹

Since 1977, the Legislature has fulfilled the *Gideon* constitutional mandate by a system of indigent defense that is both provincial and central. Specifically, the selection of counsel for appointments has always been with the local circuit courts, but the administration of the system has been centralized.

In 1977, the enactment of Article 11 of Chapter 51 of the West Virginia Code, W. Va. Code §§51-11-1, *et seq.*, entitled the Defense of Needy Persons, provided for appointment of counsel by the circuit courts, but provided that “it shall be the duty of the director of the administrative office of the supreme court of appeals to administer the program of legal representation of needy persons...” W. Va. Code §51-11-9 (1977)(repealed).

In 1981, with the enactment of Article 21 of Chapter 29 of the West Virginia Code, W. Va. Code §§29-21-1, *et seq.*, entitled Public Legal Services, the Legislature acknowledged the *Gideon* mandate, stating that “in certain proceedings the state is required to provide high quality legal assistance to indigent persons...” And, again, the Legislature maintained a system of indigent defense that was both provincial and central. The selection and appointment of counsel remained with the local circuit courts. The administration of the system was removed from the Supreme Court of Appeals by creating an executive entity known as the “West Virginia public legal services council.” W. Va. Code §29-21-3 (1981). Expressly, “the council shall have as its principal purpose the development of concepts for improving programs within the state for the legal representation of eligible clients.” W. Va. Code §29-21-5(a) (1981). Among other duties, the council “shall ... recommend improvements to the various systems utilized to provide legal representation to eligible clients ... [and] review the operations of alternative systems and compare and evaluate the performance and cost of the various alternative systems...” W. Va. Code §29-21-5 (1981). Notably, the duties did not include any express mandate that the “quality of representation” be directly measured. As stated, the council had no role in the composition of the public defender corporations or the appointment of counsel as this removed a provincial function.

Eight years later in the agency’s present governing statute, the Legislature repeated its findings word for word acknowledging, again, that the “state is required to provide high quality legal assistance.” W. Va. Code §29-21-1 (1989). And, similar to the language regarding the public legal services council, the Legislature established PDS, stating that “it shall administer, coordinate and evaluate programs by which the state provides legal representation to indigent persons, monitor the progress of various delivery systems and recommend improvements.” W. Va. Code §29-21-3 (heading is Establishment of public defender services) (1989). More directly, the Legislature declared “[t]he agency shall have as its principal purpose the development and

¹ This language is also included in the federal mandate for establishing legal services corporations that, in West Virginia, manifests as Legal Aid of West Virginia. 42 USCA §2996 (1974)(“The Congress finds and declares that ... there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel....”).

John Sylvia, Director
Performance Evaluation and
Research Division
December 29, 2022
Page 4

improvement of programs by which the state provides representation to indigent persons.” W. Va. Code §29-21-4 (heading is Purpose and duties of public defender services) (1989).

Essentially, the Legislature acknowledges that a system is needed by which legal services are provided to indigent defendants or respondents. The governing statute outlines the delivery system as a complement of (i) salaried public defenders and assistant public defenders and (ii) private counsel who take court appointments. But, consistently since 1977, the Legislature made the selection of such attorneys provincial. A public defender in a judicial circuit is chosen by a public defender corporation's board of directors which is composed of a resident of the circuit appointed by the governor to serve as the chair and additional members appointed by the local jurisdiction's county commission and bar association. W. Va. Code §29-21-15(a) (1989). The appointment of private counsel is made by the local circuit court judges from lists compiled and maintained by the circuit courts. W. Va. Code §29-21-9 (1989).

Accordingly, the quality of the representation provided by a public defender corporation is the province of the public defender and the board of directors, not this agency. W. Va. Code §29-21-15(c) (1989). The quality of the representation provided by private counsel is the province of the judge maintaining counsel on a list, not this agency.

As the statute provides, the agency administers the system by executing funding contracts with the public defender corporations for disbursement of the legislative appropriation for this purpose, W. Va. Code §29-21-13, and by processing the invoices of court-appointed counsel for payment by the Office of Auditor and the Office of Treasure from the legislative appropriation for this purpose, W. Va. Code §29-21-13a.

Simply, the Legislature determined that “high quality representation” was not to be measured by the state's executive agency but was to be assessed at the local jurisdictional levels.

The agency has recommended improvements to this process, some of which the Governor has approved and some of which have been adopted by the Legislature. One approved recommendation for improvement was the increase in the rates of compensation for private counsel taking court appointments that took effect on July 1, 2019.

PERD recognizes that the structure of PDS creates a barrier to any effort to measure the quality of representation. One notable barrier is that the governing statute provides what the attorney must include in the invoice submitted to PDS: “the nature of the service rendered, the stage of proceeding or type of hearing involved, the date and place the service was rendered, and the amount of time expended in each instance.” W. Va. Code §29-21-13a(n) (2019). The agency is not authorized to request other information and, when this has been attempted, the agency received substantial resistance especially when the time required to provide such information was

John Sylvia, Director
Performance Evaluation and
Research Division
December 29, 2022
Page 5

not to be compensated.²

With respect to public defender corporations, “[the agency] shall require each public defender corporation to submit financial statements monthly and to report monthly on the billable and nonbillable time of its professional employees, including time used in the administration of the respective offices, so as to compare the time to similar time expended in nonpublic law offices for similar activities.” W. Va. Code §29-21-6(d)(1989). Again, the agency is not alerted to the corporation’s appointment to a case and is authorized only to receive monthly reports of expended time.

So, as PERD recognizes, if the agency is to measure the quality of representation by an attorney, it cannot be done within this legislatively mandated structure.

But, again, this discussion relates to the initial understanding that the agency was being tasked with measuring the quality of representation.

If, instead, PERD’s recommendations relate to “performance measures” for the system which would indicate the overall quality of representation, then PDS concurs that it should do so when possible.

In summary, the agency believes that its statutory mandate is not to measure the quality of representation, but is to administer the indigent defense system, which it does by securing legislative appropriations and providing for the disbursements. The mandate extends to developing, coordinating and evaluating programs by which legal representation is provided. The agency has developed programs to enhance the legal representation of indigent defendants or respondents. Overall, the agency has as a mission the movement of the indigent defense system to “holistic defense.” This model of defense has as its purpose the identification of issues leading to the defendant’s intersection with the criminal justice system as well as the resolution of the legal issues arising out of involvement in the criminal justice system. These issues range from unemployment and housing insecurity to substance use disorders or unmet trauma.

And PDS accepts PERD’s overall perspective that the agency’s mandate should be measuring the performance of the system in some manner other than for its efficiency.

Caseloads.

PERD emphasizes “caseloads” as one performance measure that the agency is required to establish. PERD states, correctly, that a statutory duty of the Indigent Defense Commission is to

² Before 2019, attorneys were compensated for an hour for the “preparation of their vouchers.” When, in 2019, the rates of compensation were increased, the payment for completion of vouchers was stopped for several reasons. The cost to the state to compensate for the preparation of vouchers was calculated to be one to two million dollars.

John Sylvia, Director
 Performance Evaluation and
 Research Division
 December 29, 2022
 Page 6

“evaluate, on an annual basis, the compensation and caseloads of public defenders and appointed panel attorneys.” W. Va. Code §29-21-3b (1989).

By way of explanation, the Indigent Defense Commission was created in 2008 which is nine years after the agency was established. Its membership is diverse, both professionally and geographically. This design was intended to “demonstrate a collaborative approach to solving criminal justice problems.” W. Va. Code §29-21-3b(b)(2008). Overall, the Commission was “established ... to provide assistance to Public Defender Services with regard to the general policies and procedures of the agency, *including, but not limited to, the opening, closing or merging of public defender offices throughout the state and the establishment of performance measures for the qualitative review of indigent defense.*” W. Va. Code §29-21-3b(a)(2008). In a provision repealed as superfluous in 2019, the Commission was, by January 15, 2009, to “report to the Legislature its findings and recommendations on the feasibility and need for the creation of additional public defender corporations; the activity of public defender corporations; the formation of multicircuit or regional public defender corporations; or the dissolution of public defender corporations....” W. Va. Code §29-21-13a(g) (2008)[repealed]. The report was, in fact, issued.

Notably, the agency’s executive director is the chair of the Commission, emphasizing the consultative nature of the Commission. The members of the agency serve without compensation.

With respect to the requirement that the caseloads be evaluated on an annual basis, the Commission has not done so formally. Instead, the Commission hears reports from the agency on the number of claims paid to panel attorneys and the performance of the public defender corporations. The Commission hears presentations from the respective public defenders regarding their circuits and the performance of their corporation. But, admittedly, the Commission issues no formal evaluation.

In defense of the agency, the agency communicates consistently with the courts and the public defenders. When the courts have trouble finding attorneys, the agency assists. And, in fact, two new public defender corporations commenced operations when courts in those circuits had trouble assigning cases. When the public defender corporations have staffing issues, the agency assists in finding solutions.

In summary, the agency acknowledges the mandate to evaluate caseloads, but, in the current structure, the evaluation can only be done informally rather than through meaningful data analysis. PDS further acknowledges that it must be more formal in its presentations to the Commission and that a “written” evaluation should be issued by the Commission on an annual basis, even if it is to simply acknowledge that more data is needed.

Incomparable Data.

The agency attempted to compare the efficiencies of appointed counsel with public

John Sylvia, Director
Performance Evaluation and
Research Division
December 29, 2022
Page 7

defender corporations by using an “average cost per case.” The agency acknowledges PERD’s findings that the average cost per case as calculated for the public defender corporations does not permit meaningful comparisons with panel attorneys because it is not case specific. Case specific calculations are difficult for public defender corporations because it is impossible to allocate the expense of operation and salaries of staff to specific cases to make a meaningful calculation.

Accordingly, the agency will no longer calculate “savings” generated by cases handled by public defender corporations.

However, the agency generally states that the indigent defense system works more efficiently with public defender corporations that are supported by private counsel who take appointments when the public defender corporation has a conflict or excessive caseload. Moreover, the public defender corporations can more readily move to “holistic” models because, as funded, public defender corporations employ para-professionals to assist in the representation. Finally, the public defender corporations provide a platform for the launching of programs designed to generally improve the quality of representation. One example is the agency’s nationally recognized program of embedding recovery coaches in public defender corporations to ensure that treatment needs of clients are being immediately met, rather than awaiting formal resolution of proceedings that might recommend treatment.

Recommendations.

1. *The Legislature should consider restructuring the indigent defense system to give the Public Defender Services greater authority over and access to data that are needed from appointed attorneys to evaluate the quality of indigent legal representation.*

PDS would willingly engage in such a discussion, although, in part, a definition of “quality of representation” would need to be developed for the dialogue to be meaningful.

2. *If the indigent defense system is to remain as currently structured, the Legislature should consider requiring a periodic study to gather data to evaluate the quality of indigent legal representation through either the Public Defender Services or an independent entity. Cooperation from every level of the indigent defense system should be mandated to facilitate the data gathering process.*

PDS welcomes an independent review of the State’s indigent defense system. But, PDS continues to state that such review should focus on evaluation of the system such that the system should generally ensure legal representation that is effective. Evaluation of actual representation is purely subjective.

3. *The Public Defender Services should establish performance measures for the qualitative review of indigent defense as required by West Virginia Code §29-21-3b(a).*

John Sylvia, Director
Performance Evaluation and
Research Division
December 29, 2022
Page 8

Together with the Indigent Defense Commission, PDS will research and establish meaningful performance measures for the State of West Virginia's indigent defense system. When such measures are established, PDS will determine which measures can be actually determined within the scope of what data PDS can collect due to its lack of involvement in the appointment of counsel, generally, and oversight of the public defender corporation, directly. PDS may then determine what statutory revisions would be required and what funding would be necessitated to enable the collection of this data. For example, PDS' online voucher processing system collects much of the data that is used to measure efficiencies related to panel attorneys, but the information is collected only when a voucher is actually prepared, typically at the case's end, and the information is generally restricted to what the attorney can be required to input by force of statute. A statutory revision could require attorneys to effectively use the online voucher processing system as a case management system (without confidential information) which would permit collection of data. Attorneys would expect to be compensated and substantial programming changes would have to be made. The resulting expense is probably between one and a half and two million dollars annually for the compensation of counsel and the one-time expense of probably five hundred thousand dollars for the programming development.

4. *The Public Defender Services should collect sufficient and appropriate data that are representative of the quality of legal representation within the indigent defense delivery system.*

As previously stated, PDS agrees that performance measures can be created to measure the effectiveness of the indigent defense system, with some effort and some cost. However, PDS continues to assert that it has no authority to evaluate the quality of actual legal representation and that the evaluation of such quality would be inherently subjective. The world's best attorney will lose a criminal trial. Outcomes cannot be determinative measures of the quality of representation. Simply, no objective criteria exists to measure the quality of the actual representation. In contrast, the quality of the system could be measured, for example, in the length of time it took to assign counsel and to resolve the case. But, again, this is data that cannot be collected by PDS without statutory revisions and funding.

5. *The Public Defender Services should assist and collaborate with the Indigent Defense Commission in achieving the statutory mandate (W. Va. Code §29-21-3b(f)(3)) of annually evaluating the compensation and caseloads of public defenders and appointed attorneys.*

PDS will be more formal in its discussion of such matters with the Indigent Defense Commission and will issue a written memorialization of these discussions rather than reflect, generally, the discussion in the minutes. The caseloads of appointed counsel is data that is not collected and cannot be collected without statutory revision and funding.

John Sylvia, Director
Performance Evaluation and
Research Division
December 29, 2022
Page 9

However, PDS can continue to reference its voucher statistics and its discussions with judges to identify and propose solutions for caseload issues. The reports from public defender corporations will be reviewed to see what additional detail might be provided to review the individual attorneys' caseloads.

6. *The Public Defender Services should consider establishing numerical caseload maximums for types and complexities of cases to guide PDCs and panel attorneys as to what is an excessive caseload.*

PDS will consider this. The anticipation is that the American Bar Association will be issuing new guidelines. PDS will consider these, will discuss these with the Indigent Defense Commission, and will publish such guidelines for use by the public defender corporations' boards of directors and by the circuit courts that appoint attorneys. However, the guidelines can only be that – guidelines. PDS has no authority to mandate compliance and, for panel attorneys, cannot collect the data necessary to ensure compliance.

7. *The Public Defender Services should consider specifying the number of years of experience and qualifications an attorney should have for certain types and complexities of cases.*

PDS will consider this. As a caveat, circuit court judges often must resolve issues in *habeas corpus* cases regarding the ineffective assistance of counsel. If PDS does publish such specifications, these specifications will become evidence of ineffective assistance in such proceedings. Accordingly, PDS is compelled to consult with circuit court judges on this topic; otherwise, circuit court judges may push back substantially.

8. *The PDS should continue to gather data related to the costs and efficiency of the indigent defense systems. However, the current use of the data to illustrate lower costs for PDCs is inappropriate and should not serve to inform recommendations.*

PDS agrees to cease illustrating cost savings from public defender corporations by using an "average cost per case" as currently calculated. PDS used such calculations upon request by the budget office of some measure of fiscal benefit from funding public defender corporations. Without elaboration, public defender corporations generate an efficiency in a system enabling resolution of more matters more timely. The monetary benefit of this efficiency cannot be measured.

Moreover, my support for the operation of public defender corporations is that it permits movement to a holistic model of representation, whereby a team of professionals, not just attorneys, provide services to client to resolve unmet personal needs as well as the legal charges. These unmet needs are often the reason for the client's intersection with the criminal justice system.

John Sylvia, Director
 Performance Evaluation and
 Research Division
 December 29, 2022
 Page 10

9. *The PDS should consider emphasizing the advantages of PDCs in terms of the programs that could be provided, and the resources public defenders would have that many panel attorneys may not have. Appropriate data should be collected that would demonstrate the advantages of PDCs in improving the quality of the indigent defense system.*

PDS concurs with this recommendation.

10. *The PDS should consider improving its efficiency data by determining the number of hours per case type for public defenders.*

PDS intends to better quantify the hours spent by public defenders and assistant public defenders on discrete matters. This is to be extended to paralegals, investigators, and social workers involved in a particular matter. However, PDS can never fully measure the hours of general staff and the expenses of the corporation that relate to a particular matter.

PDS cannot accomplish this, however, until its issues with the currently mandated timekeeping system are resolved. Additional funding may be necessary to install a new system that enables PDS to collect this data more meaningfully, but the cost of migrating decades of matters to a new system is proving to be prohibitive. A new system is being piloted in the newest public defender corporation, but a solution for the migration of the old information still has to be resolved.

11. *The PDS should collect and use data on the quality of legal representation to improve the indigent defense delivery system as led by the data assessment.*

The quality of legal representation cannot be measured by data. It is a subjective process that requires the substitution of one person's judgment for another. Measurement of outcomes, for example, may be more reflective of judges' idiosyncrasies than it is an attorney's performance. Moreover, such evaluations can only be made by those who have control over the counsel. For appointed counsel, this would be the circuit court. For public defenders, this would be the Board of Directors for the public defender corporations. For assistant public defenders, this would be the public defender. The only manner in which PDS could begin to evaluate the quality of representation is by having a central office that administers the appointment of private counsel and by having a central office from which

John Sylvia, Director
Performance Evaluation and
Research Division
December 29, 2022
Page 11

public defenders would operate. In other words, the entire indigent defense system would have to be changed.

Respectfully submitted,



Dana F. Eddy
Executive Director
Public Defender Services



WEST VIRGINIA OFFICE OF THE LEGISLATIVE AUDITOR
PERFORMANCE EVALUATION & RESEARCH DIVISION

Building 1, Room W-314, State Capitol Complex, Charleston, West Virginia 25305

telephone: 1-304-347-4890 | www.legis.state.wv.us/Joint/PERD/perd.cfm | fax: 1-304-347-4939