

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

Senate Bill 467

FISCAL
NOTE

BY SENATOR TRUMP

[Introduced February 2, 2018; Referred
to the Committee on the Judiciary; and then to the
Committee on Finance]

1 A BILL to amend and reenact §29-21-6 and §29-21-13a of the Code of West Virginia, 1931, as
2 amended; and to amend said code by adding thereto a new section, designated §29-21-
3 9a, all relating generally to Public Defender Services; transferring initial authority to review,
4 approve, modify, or refuse panel attorney vouchers from circuit courts to Public Defender
5 Services; providing for resubmission or reconsideration of vouchers previously modified
6 or refused; establishing procedures for handling of modified or refused vouchers;
7 maintaining final authority over payment of vouchers with circuit courts; authorizing the
8 Executive Director of Public Defender Services, with approval of the Indigent Defense
9 Commission, to contract for noncriminal legal services; requiring panel attorneys to
10 maintain time-keeping records to enable the attorney to determine time expended on a
11 daily basis; authorizing Governor by executive order to borrow funds from the Revenue
12 Shortfall Reserve Fund to pay appointed counsel and establishing repayment
13 requirements; revising the rates of compensation for various types of cases; and
14 authorizing the executive director to promulgate emergency rules.

Be it enacted by the Legislature of West Virginia:

ARTICLE 21. PUBLIC DEFENDER SERVICES.

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

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

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

9 (c) The agency shall establish and the executive director or his or her designee shall

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

15 (d) The agency shall establish and the executive director or his or her designee shall
16 operate an accounting and auditing division to require and monitor the compliance with this article
17 by public defender corporations and other persons or entities receiving funding or compensation
18 from the agency. The accounting and auditing division shall review all plans and proposals for
19 grants and contracts and shall make a recommendation of approval or disapproval to the
20 executive director. The accounting and auditing division shall prepare, or cause to be prepared,
21 reports concerning the evaluation, inspection, or monitoring of public defender corporations and
22 other grantees, contractors, persons, or entities receiving financial assistance under this article
23 and shall further carry out the agency's responsibilities for records and reports as set forth in §29-
24 21-18 of this code. The accounting and auditing division shall require each public defender
25 corporation to submit financial statements monthly and to report monthly on the billable and
26 nonbillable time of its professional employees, including time used in administration of the
27 respective offices, so as to compare the time to similar time expended in nonpublic law offices for
28 similar activities. The accounting and auditing division shall provide to the executive director
29 assistance in the fiscal administration of all of the agency's divisions. This assistance shall include,
30 but not be limited to, budget preparation and statistical analysis.

31 (e) The agency shall establish and the executive director or his or her designee shall
32 operate an appellate advocacy division for the purpose of prosecuting litigation on behalf of
33 eligible clients in the Supreme Court of Appeals. The executive director or his or her designee
34 shall be the director of the appellate advocacy division. The appellate advocacy division shall
35 represent eligible clients upon appointment by the circuit courts or by the Supreme Court of

36 Appeals. The division may, however, refuse the appointments due to a conflict of interest or if the
37 executive director has determined the existing caseload cannot be increased without jeopardizing
38 the appellate division's ability to provide effective representation. In order to effectively and
39 efficiently use the resources of the appellate division, the executive director may restrict the
40 provision of appellate representation to certain types of cases. The executive director may select
41 and employ staff attorneys to perform the duties prescribed by this subsection. The appellate
42 division shall maintain records of representation of eligible clients for record purposes only.

43 (f) If the executive director, with the approval of the Indigent Defense Commission and
44 the Secretary of Administration, determines that the purposes of this article can be furthered and
45 costs reduced by the execution of a contract with a provider of legal services in specialized areas
46 of the law other than criminal defense to provide legal representation to eligible clients, the
47 execution of the contract is authorized and is exempt from the provisions of, and procedures
48 adopted pursuant to, §5A-3-1 et seq. of this code. The payment of the contract amount is
49 authorized from the funds appropriated for the payment of appointed counsel fees.

50 (g) The agency may modify or refuse vouchers or requests for payment submitted
51 pursuant to §29-21-13a of this code found not to be in compliance with the provisions of this
52 article.

53 (h) The executive director may promulgate emergency rules pursuant to the provisions of
54 §29A-3-15 of this code, to effectuate the provisions of this article as amended during the 2018
55 regular session of the Legislature.

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

1 (a) Notwithstanding any provision of this code to the contrary and subject to the provisions
2 of this section, the Governor may, by executive order, after first notifying the presiding officers of
3 both houses of the Legislature in writing, borrow funds from the Revenue Shortfall Reserve Fund
4 created in §11B-2-20 of this code for deposit into the appropriate special revenue account

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

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

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

15 (d) Any funds borrowed pursuant to this subsection shall be repaid during the fiscal year
 16 in which the funds are borrowed from a supplemental budget appropriation to Public Defender
 17 Services, without interest, and redeposited to the credit of the Revenue Shortfall Reserve Fund
 18 within 180 days of their withdrawal.

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

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

1 (a) All panel attorneys shall maintain detailed and accurate records of the time expended
 2 and expenses incurred on behalf of eligible clients, and which records are to be maintained
 3 contemporaneously with the performance of the legal services in a form that will enable the
 4 attorney to determine for any day the periods of time expended on behalf of any eligible client and
 5 the total time expended on that day on behalf of all eligible clients: *Provided, That in no event*
 6 may panel attorneys be required to maintain or submit the actual start and finish times of work
 7 performed.

8 (b) Upon completion of each case, exclusive of appeal, panel attorneys shall submit to ~~the~~
 9 ~~appointing court~~ Public Defender Services a voucher for services. Claims for fees and expense

10 reimbursements shall be submitted to ~~the appointing court~~ Public Defender Services on forms
11 approved by the executive director. The executive director shall establish guidelines for the
12 submission of vouchers and claims for fees and expense reimbursements under this section.
13 Claims submitted more than 90 calendar days after the last date of service shall be rejected,
14 unless ~~for good cause, the appointing court~~ Public Defender Services authorizes ~~in writing~~ an
15 extension. ~~Provided, That claims where the last date of service occurred prior to July 1, 2008,~~
16 ~~shall be rejected unless submitted prior to January 1, 2009.~~

17 (c) The appointing court Public Defender Services shall review the voucher to determine
18 if the time and expense claims are reasonable, necessary and valid. ~~and shall forward the voucher~~
19 ~~to the agency with an order approving payment of the claimed amount or of a lesser sum the court~~
20 ~~considers appropriate.~~

21 (1) A voucher found to be correct shall be processed and payment promptly directed.

22 (2) If Public Defender Services reduces or rejects a voucher, the attorney submitting the
23 voucher shall be notified electronically of such action within 60 days of receipt. The attorney may
24 resubmit the voucher accompanied by copies of his or her records supporting the voucher and
25 certification from the appointing court that the services or expenses were performed or incurred,
26 and were reasonable and necessary. The executive director shall then make a final agency
27 decision regarding the payment of the voucher.

28 (3) If the executive director declines to pay the voucher, the attorney may request review
29 of the final agency decision by the appointing court by motion to the appointed court filed within
30 30 days of the final agency decision. After a hearing providing the attorney and Public Defender
31 Services an opportunity to be heard, the appointing court shall have final authority to resolve the
32 issue of payment.

33 (d) If Public Defender Services reduces the amount of compensation claimed or
34 reimbursement requested, the attorney submitting the voucher shall be notified electronically of
35 the reduction and the reasons therefor. The attorney may:

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

38 (2) Disagree with the reduction and request payment of the reduced amount while
39 preserving the ability to contest the reduction.

40 (A) An attorney proceeding pursuant to subsection (d) of this section shall inform Public
41 Defender Services of his or her decision by electronic means within 30 days of receiving notice
42 of the reduction.

43 (B) The attorney may submit records and certification from the appointing court that the
44 services or expenses reflected in the amount reduced were performed or incurred and were
45 reasonable and necessary. The executive director shall then make a final agency determination
46 regarding the amount reduced within 30 days of receipt of the submitted records and certification.

47 (C) The attorney may request review of the final agency decision by the appointing court
48 by motion to the appointing court filed within 30 days of notice of the final agency decision. After
49 a hearing providing the attorney and Public Defender Services an opportunity to be heard, the
50 appointing court shall have final authority to resolve the issue of payment.

51 (e) Notwithstanding any provisions of this code to the contrary, the executive director may
52 employ in-house counsel to represent Public Defender Services in hearings held pursuant to this
53 article.

54 (f) The provisions of the amendments to this article enacted during the 2018 regular
55 session of the Legislature are effective July 1, 2018.

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

59 ~~(c)~~ (h) Notwithstanding any other provision of this section to the contrary, a panel attorney
60 may be compensated for services rendered and reimbursed for expenses incurred prior to the
61 completion of the case where: (1) More than six months have expired since the commencement

62 of the panel attorney's representation in the case; and (2) no prior payment of attorney fees has
63 been made to the panel attorney by Public Defender Services during the case. The executive
64 director, in his or her discretion, may authorize periodic payments where ongoing representation
65 extends beyond six months in duration. The amounts of any fees or expenses paid to the panel
66 attorney on an interim basis, when combined with any amounts paid to the panel attorney at the
67 conclusion of the case, shall not exceed the limitations on fees and expenses imposed by this
68 section.

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

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

79 (1) Compensation is to be calculated using a rate of \$45 per hour, without regard to
80 whether the work is performed in-court or out-of-court, for a panel attorney's work performed in
81 an eligible proceeding for which the maximum period of incarceration upon conviction on the most
82 serious offense is one year or less and in the following eligible proceedings: contempt of court
83 proceedings; mental hygiene commitment proceedings; forfeiture proceedings brought pursuant
84 to §61A-1-1 et seq. of this code; appeals from proceedings governed by this subsection; post-
85 conviction challenges to the final judgment in an eligible proceeding other than a direct appeal;
86 and proceedings in municipal court when the accused is at risk of incarceration.

87 ~~(2) For attorney's work performed in court, compensation shall be at the rate of \$65 per~~

88 ~~hour. No compensation for paralegal's work performed in court shall be allowed. In-court work~~
89 ~~includes, but is not limited to, all time spent awaiting hearing or trial before a judge, magistrate,~~
90 ~~special master or other judicial officer~~

91 (2) Compensation is to be calculated using a rate of \$50 per hour for work performed out-
92 of-court and \$70 for work performed in-court in an eligible proceeding in which the most serious
93 charge is a felony and in the following eligible proceedings: child abuse and neglect proceedings
94 which may result in a termination of parental rights; extradition proceedings; proceedings to
95 enhance sentences brought pursuant to §61-11-18 and §61-11-19 of this code; proceedings
96 brought to obtain extraordinary remedies; and appeals from the final judgment in an eligible
97 proceeding governed by this subsection.

98 (3) Compensation for legal services performed for a panel attorney by a paralegal out-of-
99 court is to be calculated using a rate of \$20 per hour and no compensation is to be paid for in-
100 court services performed for a panel attorney by a paralegal.

101 ~~(3)~~ (4) The maximum amount of compensation for out-of-court and in-court work under
102 this subsection is as follows: For proceedings of any kind involving felonies for which a penalty of
103 life imprisonment may be imposed, the amount as the court may approve; for all other eligible
104 proceedings, \$3,000 unless the court, for good cause shown, approves payment of a larger sum.

105 ~~(e)~~ (j) Actual and necessary expenses incurred in providing legal representation for
106 proceedings of any kind involving felonies for which a penalty of life imprisonment may be
107 imposed, including, but not limited to, expenses for travel, transcripts, salaried or contracted
108 investigative services and expert witnesses, shall be reimbursed in an amount as the court may
109 approve. For all other eligible proceedings, actual and necessary expenses incurred in providing
110 legal representation, including, but not limited to, expenses for travel, transcripts, salaried or
111 contracted investigative services and expert witnesses, shall be reimbursed to a maximum of
112 \$1,500 unless the court, for good cause shown, approves reimbursement of a larger sum.

113 (k) Expense vouchers shall specifically set forth the nature, amount and purpose of

114 expenses incurred and shall provide receipts, invoices, or other documentation required by the
115 executive director and the State Auditor:

116 (1)(A) Reimbursement of expenses for production of transcripts of proceedings reported
117 by a court reporter is limited to the cost per original page and per copy page as set forth in §51-
118 7-4 of this code.

119 (2)(B)(i) There ~~shall~~ may be no reimbursement of expenses for or production of a
120 transcript of a preliminary hearing before a magistrate or juvenile referee, or of a magistrate court
121 trial, where ~~such~~ the hearing or trial has also been recorded electronically in accordance with the
122 provisions of §50-5-8 of this code or court rule.

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

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

130 (5)(C) Reimbursement of the cost of transcription of tapes electronically recorded during
131 preliminary hearings or magistrate court trials is limited to \$1 per page.

132 (6)(2) Reimbursement for any travel expense incurred in an eligible proceeding is limited
133 to the rates for the reimbursement of travel expenses established by rules promulgated by the
134 Governor pursuant to the provisions of §12-8-11 of this code and administered by the Secretary
135 of the Department of Administration pursuant to the provisions of §5A-3-48 of this code.

136 (7)(3) Reimbursement for investigative services is limited to a rate of \$30 per hour for
137 work performed by an investigator.

138 (f)(l) For purposes of compensation under this section, an appeal from magistrate court
139 to circuit court, an appeal from a final order of the circuit court or a proceeding seeking an

140 extraordinary remedy made to the Supreme Court of Appeals shall be considered a separate
141 case.

142 ~~(g)~~ (m) Vouchers submitted under this section shall specifically set forth the nature of the
143 service rendered, the stage of proceeding or type of hearing involved, the date and place the
144 service was rendered and the amount of time expended in each instance. All time claimed on the
145 vouchers shall be itemized to the nearest 10th of an hour. If the charge against the eligible client
146 for which services were rendered is one of several charges involving multiple warrants or
147 indictments, the voucher shall indicate the fact and sufficiently identify the several charges so as
148 to enable ~~the court~~ Public Defender Services to avoid a duplication of compensation for services
149 rendered. The executive director shall refuse to requisition payment for any voucher which is not
150 in conformity with the recordkeeping, compensation or other provisions of this article or the
151 voucher guidelines established issued pursuant to subsection (a) of this section and in such
152 circumstance shall return the voucher to the court or to the service provider for further review or
153 correction.

154 ~~(h)~~ (n) Vouchers submitted under this section ~~after July 1, 2008~~ shall be reimbursed within
155 90 days of receipt. Reimbursements after 90 days shall bear interest from the 91st day at the
156 legal rate in effect for the calendar year in which payment is due.

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

NOTE: The purpose of this bill is to transfer initial authority to review, approve, modify, or refuse panel attorney vouchers from circuit courts to Public Defender Services; to provide for resubmission or reconsideration of vouchers previously modified or refused; to establish procedures for handling of modified or refused vouchers; to maintain final authority over payment of vouchers with circuit courts; to authorize the executive director of Public Defender Services, with approval of the Indigent Defense Commission, to contract for noncriminal legal services; to require panel attorneys to maintain time-keeping records to enable the attorney to determine time expended on a daily basis; to authorize the Governor by executive order to borrow funds from the Revenue Shortfall Reserve Fund to pay appointed counsel and establish repayment requirements; to revise the rates of compensation for various types of cases; and to authorizing the executive director to promulgate emergency rules.

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