

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Committee Substitute

for

Senate Bill 103

SENATOR TRUMP, *original sponsor*

[Originating in the Committee on the Judiciary;

Reported on January 23, 2019]

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; providing for payment of contracts;
10 authorizing agency to reduce or reject vouchers or requests for payment; requiring panel
11 attorneys to maintain time-keeping records to enable the attorney to determine time
12 expended on a daily basis; authorizing Governor by executive order to borrow funds from
13 the Revenue Shortfall Reserve Fund to pay appointed counsel; establishing repayment
14 requirements; requiring Secretary of Administration's clarification that borrowing is
15 necessary; expiring authorization to borrow on January 1, 2021; setting record-keeping
16 standards; requiring prompt processing and payment of vouchers; increasing the rates of
17 compensation for panel attorneys; authorizing payment for in-court paralegal services with
18 prior approval of the circuit court and subject to agency rule regarding maximum
19 reimbursement; authorizing the executive director to promulgate emergency rules; and
20 setting an effective date.

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 §29-21-7 of this code. This center shall
11 undertake directly, or by grant or contract, to serve as a clearinghouse for information; to provide
12 training and technical assistance related to the delivery of legal representation; and to engage in
13 research, except that broad general, legal, or policy research unrelated to direct representation
14 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
30 include, 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 or the representation of respondent parents in abuse and
47 neglect proceedings, to provide legal representation to eligible clients, the execution of the
48 contract is authorized and is exempt from the provisions of, and procedures adopted pursuant to,
49 §5A-3-1 et seq. of this code. The payment of the contract amount is authorized from the funds
50 appropriated for the payment of appointed counsel fees.

51 (g) The agency may reduce or reject vouchers or requests for payment submitted pursuant
52 to §29-21-13a of this code found not to be in compliance with the provisions of this article, subject
53 to the limitations set forth herein.

54 (h) The executive director may promulgate emergency rules pursuant to §29A-3-15 of this
55 code to effectuate the provisions of this article as amended during the 2019 regular session of
56 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, 2021.

§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 in a
3 form that will enable the attorney to determine for any day the periods of time expended in tenths
4 of an hour on behalf of any eligible client and the total time expended in tenths of an hour on that
5 day on behalf of all eligible clients: *Provided, That in no event may panel attorneys be required*
6 to maintain or submit the actual start and finish times of work performed.

7 (b) Upon completion of each case, exclusive of appeal, panel attorneys shall submit to ~~the~~
8 ~~appointing court~~ Public Defender Services a voucher for services. Public Defender Services shall
9 electronically acknowledge the submission of a voucher. 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~~ business days after the last date of service shall be
14 rejected unless, for good cause, the appointing court authorizes in writing an extension. *Provided,*
15 ~~That claims where the last date of service occurred prior to July 1, 2008, shall be rejected unless~~
16 ~~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~~
19 ~~voucher to the agency with an order approving payment of the claimed amount or of a lesser sum~~
20 ~~the court considers appropriate.~~ A voucher found to be correct shall be processed and payment
21 promptly directed within 45 business days of submission of the voucher.

22 (d)(1) If Public Defender Services rejects a voucher, the attorney submitting the voucher
23 shall be notified electronically of the rejection and provided detailed reasons for the rejection
24 within 30 business days of submission of the voucher. The attorney may resubmit the voucher
25 accompanied by copies of his or her records supporting the voucher and certification from the
26 appointing court that the services or expenses were performed or incurred, and were reasonable

27 and necessary, within 15 business days of receipt of notification. The executive director shall
28 make a final agency decision regarding the rejection of the voucher within 15 business days of
29 receipt of the submitted records and certification. Under no circumstances may the executive
30 director have the authority or require any panel attorney to submit privileged client information;

31 (2) If the final agency decision is to reject the voucher, Public Defender Services shall
32 request review of the final agency decision by motion to the appointing court filed within 15
33 business days of notice of the final agency decision. After a hearing providing the attorney and
34 Public Defender Services an opportunity to be heard, the appointing court shall have final
35 authority to resolve the issue of payment and to order all remedies available under the West
36 Virginia Rules of Civil Procedure.

37 (e) If Public Defender Services reduces the amount of compensation claimed or
38 reimbursement requested, the attorney submitting the voucher shall be notified electronically of
39 the reduction and detailed reasons for the reduction within 30 business days of the submission of
40 the voucher. The attorney may:

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

43 (2) Disagree with the reduction and request payment of the reduced amount while
44 preserving the ability to contest the reduction;

45 (3) An attorney proceeding pursuant to this subsection shall inform Public Defender
46 Services of his or her decision by electronic means within 15 business days of receipt of the notice
47 of reduction. If there is no communication from the attorney within 15 business days of receipt of
48 the notice of reduction, then the reduction is deemed to be accepted by the attorney;

49 (4) The attorney may submit records and certification from the appointing court that the
50 services or expenses reflected in the amount reduced were performed or incurred and were
51 reasonable and necessary. The executive director shall then make a final agency decision
52 regarding the reduction within 15 business days of receipt of the submitted records and

53 certification. Under no circumstances may the executive director have the authority to require
54 any panel attorney to submit privileged client information;

55 (5) If the attorney disagrees with the final agency decision, and the attorney and the
56 executive director cannot reach an agreement regarding the reduction within 15 business days of
57 the receipt of the notice of the final agency decision, Public Defender Services shall request
58 review of the final agency decision by motion to the appointing court filed within 15 business days
59 of notice of the final agency decision. After a hearing providing the attorney and Public Defender
60 Services an opportunity to be heard, the appointing court shall have final authority to resolve the
61 issue of payment, and to order all remedies available under the West Virginia Rules of Civil
62 Procedure;

63 (6) If there is no communication from Public Defender Services within 30 business days
64 of the submission of the voucher, the voucher is deemed to have been approved for payment
65 without reduction.

66 (f) Notwithstanding any provisions of this code to the contrary, the executive director may
67 employ in-house counsel to represent Public Defender Services in hearings held pursuant to this
68 article.

69 (g) Except for the emergency rule-making provision set forth in §29-21-6(h) of this code,
70 the provisions of the amendments to this article enacted during the 2019 regular session of the
71 Legislature shall be effective July 1, 2019.

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

75 ~~(e)~~ (i) Notwithstanding any other provision of this section to the contrary, a panel attorney
76 may be compensated for services rendered and reimbursed for expenses incurred prior to the
77 completion of the case where: (1) More than six months have expired since the commencement
78 of the panel attorney's representation in the case; and (2) no prior payment of attorney fees has

79 been made to the panel attorney by Public Defender Services during the case. The executive
80 director, in his or her discretion, may authorize periodic payments where ongoing representation
81 extends beyond six months in duration. The amounts of any fees or expenses paid to the panel
82 attorney on an interim basis, when combined with any amounts paid to the panel attorney at the
83 conclusion of the case, shall not exceed the limitations on fees and expenses imposed by this
84 section.

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

89 (1) For attorney's work performed out of court, compensation shall be at the rate of \$45
90 \$60 per hour. ~~and For paralegal's work performed out of court for the attorney, compensation~~
91 ~~shall be at the rate of the paralegal's regular compensation on an hourly basis or, if salaried, at~~
92 ~~the hourly rate of compensation which would produce the paralegal's current salary, but in no~~
93 ~~event shall the compensation exceed \$20 per hour. Out-of-court work includes, but is not limited~~
94 ~~to, travel, interviews of clients or witnesses, preparation of pleadings and prehearing or pretrial~~
95 ~~research~~

96 Out-of-court work includes, but is not limited to, travel, interviews of clients or witnesses,
97 preparation of pleadings, and prehearing or pretrial research;

98 (2) For attorney's work performed in court, compensation shall be at the rate of \$65 \$80
99 per hour. ~~No compensation for paralegal's work performed in court shall be allowed. In-court work~~
100 ~~includes, but is not limited to, all time spent awaiting hearing or trial before a judge, magistrate,~~
101 ~~special master or other judicial officer~~

102 In-court work includes, but is not limited to, all time spent awaiting hearing or trial before
103 a judge, magistrate, special master, or other judicial officer;

104 (3) Compensation for legal services performed for a panel attorney by a paralegal out-of-
105 court is to be calculated using a rate of \$20 per hour and no such compensation is to be paid for
106 in-court services performed for a panel attorney by a paralegal absent prior approval of the circuit
107 court before whom the panel attorney is appearing and subject to maximum reimbursement
108 amounts set by agency rule:

109 ~~(3)~~ (4) The maximum amount of compensation for out-of-court and in-court work under
110 this subsection is as follows: For proceedings of any kind involving felonies for which a penalty of
111 life imprisonment may be imposed, the amount as the court may approve; for all other eligible
112 proceedings, \$3,000 unless the court, for good cause shown, approves payment of a larger sum.

113 ~~(e)~~ (k) Actual and necessary expenses incurred in providing legal representation for
114 proceedings of any kind involving felonies for which a penalty of life imprisonment may be
115 imposed, including, but not limited to, expenses for travel, transcripts, salaried or contracted
116 investigative services, and expert witnesses, shall be reimbursed in an amount as the court may
117 approve. For all other eligible proceedings, actual and necessary expenses incurred in providing
118 legal representation, including, but not limited to, expenses for travel, transcripts, salaried or
119 contracted investigative services and expert witnesses, shall be reimbursed to a maximum of
120 \$1,500 unless the court, for good cause shown, approves reimbursement of a larger sum.

121 (l) Expense vouchers shall specifically set forth the nature, amount, and purpose of
122 expenses incurred and shall provide receipts, invoices, or other documentation required by the
123 executive director and the State Auditor as follows:

124 ~~(1)(A)~~ Reimbursement of expenses for production of transcripts of proceedings reported
125 by a court reporter is limited to the cost per original page and per copy page as set forth in §51-
126 7-4 of this code;

127 ~~(2)(B)(i)~~ There ~~shall~~ may be no reimbursement of expenses for or production of a transcript
128 of a preliminary hearing before a magistrate or juvenile referee, or of a magistrate court trial,

129 where ~~such~~ the hearing or trial has also been recorded electronically in accordance with the
130 provisions of §50-5-8 of this code or court rule;

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

135 (4) ~~(iii)~~ Except for the appearance fees provided in this ~~paragraph~~ subsection, there ~~shall~~
136 may be no reimbursement for hourly court reporters' fees or fees for other time expended by the
137 court reporter, either at the proceeding or traveling to or from the proceeding;

138 (5) ~~(C)~~ Reimbursement of the cost of transcription of tapes electronically recorded during
139 preliminary hearings or magistrate court trials is limited to \$1 per page;

140 (6) ~~(2)~~ Reimbursement for any travel expense incurred in an eligible proceeding is limited
141 to the rates for the reimbursement of travel expenses established by rules promulgated by the
142 Governor pursuant to the provisions of §12-8-11 of this code and administered by the Secretary
143 of the Department of Administration pursuant to the provisions of §5A-3-48 of this code.

144 (7) ~~(3)~~ Reimbursement for investigative services is limited to a rate of \$30 per hour for
145 work performed by an investigator.

146 ~~(f)~~ (m) For purposes of compensation under this section, an appeal from magistrate court
147 to circuit court, an appeal from a final order of the circuit court, or a proceeding seeking an
148 extraordinary remedy made to the Supreme Court of Appeals shall be considered a separate
149 case.

150 ~~(g)~~ (n) Vouchers submitted under this section shall specifically set forth the nature of the
151 service rendered, the stage of proceeding or type of hearing involved, the date and place the
152 service was rendered, and the amount of time expended in each instance. All time claimed on the
153 vouchers shall be itemized to the nearest tenth of an hour. If the charge against the eligible client
154 for which services were rendered is one of several charges involving multiple warrants or

155 indictments, the voucher shall indicate the fact and sufficiently identify the several charges so as
156 to enable ~~the court~~ Public Defender Services to avoid a duplication of compensation for services
157 rendered. The executive director shall refuse to requisition payment for any voucher which is not
158 in conformity with the recordkeeping, compensation, or other provisions of this article or the
159 voucher guidelines established issued pursuant to ~~§29-21-13a(a) of this code~~ this article and in
160 such circumstance shall return the voucher to the court or to the service provider for further review
161 or correction.

162 ~~(h)~~ (o) Vouchers submitted under this section ~~after July 1, 2008~~ shall be reimbursed within
163 90 days of receipt. Reimbursements after 90 days shall bear interest from the 91st day at the
164 legal rate in effect for the calendar year in which payment is due.

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