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WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1983

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HOUSE BILL No. 1315

(By Mr. Stepoe.....)

— ● —

Passed March 11, 1983

In Effect July 1, 1983 ~~Passage~~



ENROLLED

H. B. 1315

(By MR. STEPTOE)

[Passed March 11, 1983; in effect July 1, 1983.]

AN ACT to amend and reenact sections two, seven, fifteen and seventeen, article twenty-one, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to further amend said article twenty-one by adding thereto three new sections, designated sections fourteen-a, fourteen-b and twenty-two, relating to public legal services generally; defining eligible proceedings; defining criminal charge; the powers and limitations of the West Virginia public legal services council; permitting the auditing and accounting division to require reports on nonbillable time; authorizing the auditing and accounting division to require increased itemization on vouchers; providing for the budget of the appellate division to be within the appropriations of the council or as provided by law; providing for supplemental grants; specifying that loans under this article are considered advancements only; limiting the use of funds; apportioning cost of representation; authorizing repayment of cost of representation; and prohibiting certain public defender corporations from being activated before the first day of April, one thousand nine hundred eighty-three.

Be it enacted by the Legislature of West Virginia:

That sections two, seven, fifteen and seventeen, article twenty-one, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted;

and that said article twenty-one be further amended by adding thereto three new sections, designated sections fourteen-a, fourteen-b and twenty-two, all to read as follows:

§29-21-2. Definitions.

1 As used in this article:

2 (1) "Council" or "legal services council" means the West
3 Virginia public legal services council established under this
4 article;

5 (2) "Eligible client" means any person who is the subject
6 of a serious criminal charge, has been convicted of such charge,
7 is a party in a juvenile court proceeding, or is the respondent
8 in a commitment proceeding, and who is to be afforded legal
9 representation under the provisions of this article;

10 (3) "Eligible proceeding" means any of the following pro-
11 ceedings or charges: Serious criminal charges, juvenile pro-
12 ceedings, contempts of court, child abuse and neglect proceed-
13 ings, mental hygiene commitment proceedings, paternity pro-
14 ceedings, or any post conviction, extraordinary remedy or other
15 appellate proceeding arising out of an eligible proceeding
16 or any other type of proceeding in which the West Virginia
17 state supreme court of appeals or the United States supreme
18 court has specifically held an indigent person is constitutionally
19 entitled to legal representation;

20 (4) "Legal representation" or "legal assistance" means the
21 provision of any legal services consistent with the purposes and
22 provisions of this article;

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23 ~~(5) "Outstanding practice of law"~~ means the provision of
24 legal assistance to a client who is not entitled to receive
25 legal assistance from the employer of the attorney rendering
26 assistance, but does not include, among other activities, teach-
27 ing, consulting, or performing evaluation;

28 (6) "Public defender" means the staff attorney employed
29 on a full-time basis by a public defender corporation who, in
30 addition to his direct representation of eligible clients, has ad-
31 ministrative responsibility for the operation of the public de-
32 fender corporation: *Provided*, That the public defender may

33 be a part-time employee if the board of directors of the public
34 defender corporation finds that there are extraordinary circum-
35 stances wherein efficient operation requires that no staff at-
36 torney should be employed on a full-time basis, and the council
37 approves such part-time employment;

38 (7) "Assistant public defender" means a staff attorney
39 hired by the public defender to provide direct representation
40 of eligible clients, and whose salary and status as a full-time or
41 part-time employee are fixed by the board of directors of the
42 public defender corporation;

43 (8) "Public defender corporation" or "public defender of-
44 fice" means a corporation created under section nine of this
45 article for the sole purpose of providing legal representation to
46 eligible clients; and

47 (9) "Serious criminal charge" means:

48 (a) A felony;

49 (b) A misdemeanor or offense, the penalty for which in-
50 volves the possibility of confinement or a fine of more than five
51 hundred dollars, or any other offense of a criminal nature
52 which, in the opinion of the court, because of the complexity
53 of the matter, or the youth, inexperience or mental capacity of
54 the accused or the probable substantial impact of an adverse
55 judgment or fine, or both, requires representation of the ac-
56 cused by an attorney;

57 (c) An act which, except for the age of the person involved,
58 would otherwise be a serious crime; and

59 (d) Any other charge, including revocation of probation or
60 parole, which involves the possibility of confinement in a jail
61 or penal institution.

ARTICLE 21. PUBLIC LEGAL SERVICES.

§29-21-7. Powers, duties and limitations of council.

1 (a) Consistent with the provisions of this article, the council
2 is authorized to make loans and grants to and contracts with
3 public defender corporations and with individuals, partnerships,
4 firms, corporations and nonprofit organizations, for the pur-
5 pose of providing legal representation to eligible clients under

6 this article, and to make such other loans, grants and contracts
7 as are necessary to carry out the purposes and provisions of
8 this article.

9 (b) The council is authorized to accept, and employ or
10 dispose of in furtherance of the purposes of this article, any
11 money or property, real, personal or mixed, tangible or intan-
12 gible, received by gift, devise, bequest or otherwise.

13 (c) The council shall establish and the executive director or
14 his designate shall operate a criminal law research center as
15 provided for in section eight of this article, and through such
16 center shall undertake directly, or by grant or contract, to
17 serve as a clearinghouse for information, to provide training
18 and technical assistance relating to the delivery of legal repre-
19 sentation, and to engage in research, except that broad general
20 legal or policy research unrelated to direct representation of
21 eligible clients may not be undertaken by grant or contract.

22 (d) The council shall establish and the executive director
23 or his designate shall operate an accounting and auditing divi-
24 sion to require and monitor the compliance of public defender
25 corporations and their employees with the provisions of this
26 article. This division shall receive all plans and proposals for
27 loans, grants and contracts, and all requisitions for payment,
28 and shall review the same. All such plans and proposals shall
29 be approved or disapproved by the division on the basis of con-
30 formity to the provisions of this article, and a recommenda-
31 tion shall then be made to the executive director and the coun-
32 cil. After review by the division, the executive director shall
33 draw requisitions on the state auditor for payment to public
34 defender corporations and others, upon proper application
35 under the provisions of this article. The division shall prepare,
36 or cause to be prepared, reports concerning the evaluation, in-
37 spection or monitoring of public defender corporations and
38 other grantees, contractors, or persons or entities receiving fi-
39 nancial assistance under this article, and shall further carry out
40 the council's responsibilities for records and reports as set
41 forth in section nineteen of this article.

42 Upon the request of the executive director, the accounting
43 and auditing division shall require each public defender cor-

44 poration to annually report on nonbillable time of its profes-
45 sional employees, including time utilized in administration of
46 the respective offices, so as to compare such time to similar
47 time expended in nonpublic law offices for like activities. Re-
48 sults of such studies shall be included by the council in the
49 annual report required in subsection (c), section nineteen of
50 this article.

51 Notwithstanding any provision of law to the contrary, upon
52 the request of the executive director, the accounting and audit-
53 ing division shall require vouchers for work thereafter per-
54 formed pursuant to the provisions of this article to be itemized
55 to some lesser fraction of an hour other than to the nearest
56 quarter-hour.

57 (e) The council shall establish and the executive director
58 or his designate shall operate an appellate advocacy division
59 for the purpose of prosecuting litigation on behalf of eligible
60 clients in the supreme court of appeals. The executive director
61 or a person designated by him shall be the director of the ap-
62 pellate advocacy division and shall represent eligible clients in
63 only those instances where the trial attorney or other local
64 counsel is unwilling or unable to serve as appellate counsel.
65 The executive director is empowered to select and employ staff
66 attorneys to perform the duties prescribed by this subsection,
67 the number of such staff attorneys being fixed by the council.
68 Within the appropriations to the council, the appellate division
69 shall have its own budget as determined to be appropriate by
70 the council or as provided by law and shall maintain vouchers
71 and records for representation of eligible clients, for record
72 purposes only.

§29-21-14a. Supplemental grants.

1 (a) A public defender corporation may make application
2 to the council for a supplemental grant at any time
3 during any fiscal year that it appears from actual experience
4 that the grants earned or to be earned by the corporation pur-
5 suant to section fourteen of this article less all credits against
6 loans, will be insufficient to permit operation of the public de-
7 fender corporation at the level deemed at the time of the appli-
8 cation to be sufficient to enable the corporation to provide the

9 services required of such corporation by law. The application
10 for such supplemental grant shall clearly identify (1) any pro-
11 posed change in the level of operations of the corporation from
12 that projected in the current program application, (2) the costs
13 or savings expected to result from such change, and (3) the
14 change, if any, in the earning of grants expected to be caused
15 by reason of such change. The supplemental grant application
16 shall also identify any anticipated deficit expected by reason of
17 any matter other than a change in the level of operations and
18 identify and evaluate the causes therefor.

19 (b) Upon receipt by the council of any application for a
20 supplemental grant, the executive director shall expeditiously
21 evaluate the application and report his findings and recom-
22 mendations to the council. He may require of the applicant
23 corporation such reasonable additional information as he may
24 deem appropriate. After consideration of the application, the
25 council may:

26 (1) Refuse such application,

27 (2) Reduce the rate at which grants earned are credited to
28 outstanding loans of the corporation, within the limits of avail-
29 able appropriations and the projected obligations of the council,

30 (3) Allow all or part of the supplemental grant, with or
31 without reduction of credits to loans,

32 (4) Make such recommendations to the corporation for re-
33 duction of costs or increased earnings as he may deem appro-
34 priate.

35 The auditor shall honor the requisition of the executive
36 director for such supplemental grants, from then current appro-
37 priations to the council, which shall be paid at such times and
38 in such installments as the executive director shall specify.

39 (c) The council shall include in the annual report required
40 in subsection (c), section nineteen of this article, a detailed re-
41 port of the supplemental grants made under this section and its
42 evaluation of the causes therefor.

43 (d) Supplemental grants shall be accumulated from year to
44 year. In the event all equipment and operational loans are

45 paid by a corporation, grants earned by the corporation shall
46 be credited against such supplemental grants at a rate specified
47 by the executive director not in excess of the rate for credit
48 against loans. The unpaid balances due on supplemental grants
49 shall be listed in the annual report required by subsection (c),
50 section nineteen of this article, together with the executive di-
51 rector's evaluation of the causes therefor.

§29-21-14b. Nature of loans.

1 Loans made under the provisions of this article are in the
2 nature of advancements, designed primarily to measure the ef-
3 ficiency, in economic terms, of publicly employed legal counsel.
4 Accordingly such advancements constitute expenditures of
5 the council in the fiscal year transferred to the public defender
6 corporation. There is not and shall not be any obligation im-
7 posed upon such corporations or their directors, either offici-
8 ally or individually, to actually repay such advancements. Such
9 advancements are to be reduced solely by the application of
10 credits on grants earned, as provided in this article.

§29-21-15. Limitation on use of funds; exceptions.

1 (a) Funds made available by the council to public defender
2 corporations under this article, either by loan, grant or con-
3 tract, shall be used to provide legal representation for persons
4 accused or convicted of serious criminal charges, except that
5 funds may be used for representation of indigent persons in the
6 following proceedings;

7 (1) Juvenile proceedings, including child neglect and abuse
8 proceedings;

9 (2) Mental hygiene proceedings;

10 (3) Habeas corpus actions brought for the purpose of chal-
11 lenging the validity of confinement arising out of proceedings
12 involving serious criminal charges, juvenile proceedings, or
13 mental hygiene proceedings or for which legal representation is
14 otherwise afforded by this article;

15 (4) Prohibition actions brought for the purpose of challeng-
16 ing the excessive exercise of authority in a criminal, juvenile,

17 or commitment proceeding for which legal representation is
18 afforded by this article;

19 (5) Mandamus actions brought for the purpose of com-
20 manding action applicable to proceedings covered by this
21 article;

22 (6) Extradition proceedings;

23 (7) Representation of persons who risk incrimination by
24 testifying as material witnesses in criminal proceedings; and

25 (8) Proceedings under article seven, chapter forty-eight of
26 this code in which the issue of paternity is to be determined.

27 (b) Funds received from another source other than the
28 council for the provision of legal representation shall not be
29 used by a public defender corporation for purposes prohibited
30 by this article.

**§29-21-17. Determination of maximum income levels; eligibility
guidelines; use of form affidavit; inquiry by court;
denial of services; repayment; limitation on remedies
against affiant.**

1 (a) The council shall establish, in consultation with the
2 commissioner of the department of finance and administration,
3 with the chief justice of the supreme court of appeals, and with
4 the judges of the several circuits, maximum annual income
5 levels for individuals eligible for legal representation under this
6 article. The council shall consider such factors as family size,
7 urban and rural differences, substantial cost-of-living variation
8 and the cost of available private representation.

9 (b) In addition to the maximum annual income level for
10 an area established under subsection (a) of this section, a cir-
11 cuit judge shall consider other relevant factors before deter-
12 mining whether a person is eligible to receive legal represen-
13 tation under the provisions of this article. Taking into account
14 all pertinent factors and being satisfied that no undue hard-
15 ship will be created, circuit judges may order that the total
16 cost of providing representation under this article shall be
17 apportioned between the state and the eligible client. A
18 person whose income exceeds the maximum annual income

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19 level for eligible clients may still receive all or part of the
20 necessary legal representation if the court finds the person's
21 circumstances require that eligibility be allowed on the basis
22 of one or more of the following factors:

23 (1) Current income prospects, taking into account seasonal
24 variations in income;

25 (2) Liquid net assets and other assets which may reason-
26 ably be available for the employment of private counsel;

27 (3) Fixed debts and obligations, including federal, state and
28 local taxes, and medical expenses;

29 (4) Child care, transportation, and other expenses necessary
30 for employment;

31 (5) Age or physical infirmity of resident family members;

32 (6) The cost of obtaining private legal representation with
33 respect to the particular matter in which assistance is sought;
34 and

35 (7) The consequences for the individual if legal assistance
36 is denied.

37 (c) The council shall adopt a simple form affidavit to be
38 completed by persons seeking legal representation, for use by
39 courts to determine eligibility. The information obtained shall
40 be preserved by the court for audit by the council. If there
41 is substantial reason to doubt the accuracy of information in
42 the affidavit, the circuit court shall make appropriate inquiry
43 upon the record to determine whether a person is an indigent
44 person entitled to all or any of the legal assistance sought and
45 may deny all or any part of such services to the affiant which
46 the court finds to be within the financial resources of the
47 affiant and may revoke any prior appointment of counsel which
48 the court determines to have been improvidently made. No
49 circuit court shall deny all or any part of the services requested
50 by the affiant unless the court shall determine upon the record
51 that such service or services, including counsel, are available
52 to the person seeking them and are within the financial re-
53 sources of such person. Upon the determination that appoint-
54 ment of counsel previously made should be revoked, or that

55 further provision of any other service should be denied, any
56 attorney previously appointed shall be entitled to compensa-
57 tion under the provisions of law applicable to such appoint-
58 ment for services already rendered and any other officer of
59 the court having previously rendered such services shall like-
60 wise be entitled to such compensation, if any, for services al-
61 ready rendered as law may provide.

62 (d) In the circumstances and manner set forth below, cir-
63 cuit judges may order repayment to the state of the costs of
64 representation provided under this article:

65 (1) In every case in which services are provided to an in-
66 digent person and an adverse judgment has been rendered
67 against such person, the court may require that person to
68 pay as costs the compensation of appointed counsel, the ex-
69 penses of the defense and such other fees and costs as author-
70 ized by statute.

71 (2) The court shall not order a person to pay costs unless
72 the person is able to pay without undue hardship. In deter-
73 mining the amount and method of repayment of costs, the
74 court shall take account of the financial resources of the per-
75 son, the person's ability to pay and the nature of the burden
76 that payment of costs will impose. The fact that the court
77 initially determines, at the time of a case's conclusion, that
78 it is not proper to order the repayment of costs does not pre-
79 clude the court from subsequently ordering repayment should
80 the person's financial circumstances change.

81 (3) When a person is sentenced to repay costs, the court
82 may order payment to be made forthwith or within a specified
83 period of time or in specified installments. If a person is
84 sentenced to a term of imprisonment, an order for repayment
85 of costs is not enforceable during the period of imprisonment
86 unless the court expressly finds, at the time of sentencing,
87 that the person has sufficient assets to pay the amounts ordered
88 to be paid or finds there is a reasonable likelihood the person
89 will acquire the necessary assets in the foreseeable future.

90 (4) A person who has been sentenced to repay costs, and
91 who is not in contumacious default in the payment thereof,
92 may at any time petition the sentencing court for modification

93 of the repayment order. If it appears to the satisfaction of the
94 court that continued payment of the amount ordered will im-
95 pose undue hardship on the person or the person's immediate
96 family, the court may modify the method or amount of pay-
97 ment.

98 (5) When a person sentenced to pay costs is also placed on
99 probation or imposition or execution of sentence is suspended,
100 the court may make the repayment of costs a condition of pro-
101 bation or suspension of sentence.

102 (e) Circuit clerks shall keep a record of repaid counsel
103 fees and defense expenses collected under this section's provi-
104 sions and shall, quarterly, pay the moneys to the state auditor.

105 (f) The making of an affidavit subject to inquiry under this
106 section shall not in any event give rise to criminal remedies
107 against the affiant nor occasion any civil action against the
108 affiant except for the recovery of costs as in any other case
109 where costs may be recovered: *Provided*, That a person who
110 has made an affidavit knowing the contents thereof to be
111 false may be prosecuted for false swearing as provided by law.

§29-21-22. Restriction on activation of corporations.

1 Notwithstanding any other provision of law to the contrary,
2 no public defender office created by section nine of this article,
3 other than those corporations designated and activated by sub-
4 section (b) of said section nine, shall be activated so as to
5 transact any business or exercise its power under this article
6 before the first day of April, one thousand nine hundred
7 eighty-three.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Donald B. Baker
Chairman Senate Committee

Donald Anello
Chairman House Committee

Originating in the House.

Takes effect July 1, 1983.

Todd C. With
Clerk of the Senate

Donald L. Kopp
Clerk of the House of Delegates

Walter P. McHew
President of the Senate

W. H. Lee, Jr.
Speaker House of Delegates

The within *is approved* this the *29*
day of *March* 1983.

John P. Ryle
Governor

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