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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1989



ENROLLED
Committee Substitute for
SENATE BILL NO. 231

(By Senator *Tucker, Mr. President*)



PASSED *April 8,* 1989

In Effect *from* Passage

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 231

(SENATOR TUCKER, MR. PRESIDENT, *original sponsor*)

[Passed April 8, 1989; in effect from passage.]

AN ACT to amend and reenact article twenty-one, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to a general revision of the law applicable to providing public legal services to indigents subjected to criminal or quasi-criminal proceedings.

Be it enacted by the Legislature of West Virginia:

That article twenty-one, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

ARTICLE 21. PUBLIC DEFENDER SERVICES.

§29-21-1. Legislative findings; purpose.

1 The Legislature finds and declares that in certain
2 proceedings the state is required to provide high
3 quality legal assistance to indigent persons who would
4 be otherwise unable to afford adequate legal counsel;
5 that providing legal representation to those who face
6 an economic barrier to adequate legal counsel will

7 serve the ends of justice in accordance with rights and
8 privileges guaranteed to all citizens by the constitution
9 of the United States of America and the constitution of
10 the state of West Virginia; that the availability of
11 quality legal assistance reaffirms the faith of our
12 citizens in our government of laws; that the present
13 system which utilizes appointed counsel is not operat-
14 ing satisfactorily in some areas of this state and the
15 Legislature is presently unable to determine what
16 system or systems will provide the most efficient
17 means for providing legal representation; that there is
18 a need to explore alternative methods of delivering
19 legal assistance, including the use of salaried public
20 defenders complemented by private panel attorneys;
21 that innovative programs and pilot projects as well as
22 a continuation of the present appointed counsel system
23 are necessary in separate areas of the state to provide
24 information and experience upon which to base future
25 legislative action.

§29-21-2. Definitions.

1 As used in this article, the following words and
2 phrases are hereby defined:

3 (1) "Eligible client": Any person who meets the
4 requirements established by this article to receive
5 publicly funded legal representation in an eligible
6 proceeding as defined herein;

7 (2) "Eligible proceeding": Criminal charges which
8 may result in incarceration, juvenile proceedings,
9 proceedings to revoke parole or probation if the
10 revocation may result in incarceration, contempts of
11 court, child abuse and neglect proceedings which may
12 result in a termination of parental rights, mental
13 hygiene commitment proceedings, paternity proceed-
14 ings, extradition proceedings, proceedings brought in
15 aid of an eligible proceeding, and appeals from or post
16 conviction challenges to the final judgment in an
17 eligible proceeding. Legal representation provided
18 pursuant to the provisions of this article shall be
19 limited to the court system of the state of West
20 Virginia;

21 (3) "Legal representation": The provision of any
22 legal services or legal assistance consistent with the
23 purposes and provisions of this article;

24 (4) "Private practice of law": The provision of legal
25 representation by a public defender or assistant public
26 defender to a client who is not entitled to receive legal
27 representation under the provisions of this article, but
28 does not include, among other activities, teaching;

29 (5) "Public defender": The staff attorney employed
30 on a full-time basis by a public defender corporation
31 who, in addition to providing direct representation to
32 eligible clients, has administrative responsibility for
33 the operation of the public defender corporation:
34 *Provided*, That the public defender may be a part-time
35 employee if the board of directors of the public
36 defender corporation finds efficient operation of the
37 corporation does not require a full-time attorney, and
38 the executive director approves such part-time
39 employment;

40 (6) "Assistant public defender": A staff attorney
41 providing direct representation to eligible clients
42 whose salary and status as a full-time or part-time
43 employee are fixed by the board of directors of the
44 public defender corporation;

45 (7) "Public defender corporation": A corporation
46 created under section eight of this article for the sole
47 purpose of providing legal representation to eligible
48 clients; and

49 (8) "Public defender office": An office operated by a
50 public defender corporation to provide legal represen-
51 tation under the provisions of this article.

§29-21-3. Establishment of public defender services.

1 There is hereby created an executive agency known
2 as public defender services. The agency shall adminis-
3 ter, coordinate and evaluate programs by which the
4 state provides legal representation to indigent persons,
5 monitor the progress of various delivery systems, and
6 recommend improvements. The agency shall maintain
7 its office at the state capitol.

§29-21-4. Purpose and duties of public defender services.

1 The agency shall have as its principal purpose the
2 development and improvement of programs by which
3 the state provides legal representation to indigent
4 persons.

§29-21-5. Executive director.

1 (a) The governor shall appoint, by and with the
2 advice and consent of the Senate, on or before the first
3 day of July, one thousand nine hundred eighty-nine,
4 the executive director of public defender services, who
5 shall serve at the will and pleasure of the governor.
6 The executive director shall be a qualified administra-
7 tor as determined by the governor, and shall be a
8 member of the bar of the supreme court of appeals. In
9 addition to the executive director there shall be such
10 other employees as the executive director determines
11 to be necessary. The executive director shall have the
12 authority to promulgate rules, and shall have such
13 other authority and perform such duties as may be
14 required or necessary to effectuate this article. The
15 executive director shall provide supervision and
16 direction to the other agency employees in the perfor-
17 mance of their duties.

18 (b) The executive director's annual salary shall be as
19 determined by the governor.

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

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

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

14 (c) The agency shall establish and the executive
15 director or his designate shall operate a criminal law
16 research center as provided for in section seven of this
17 article. This center shall undertake directly, or by
18 grant or contract, to serve as a clearinghouse for
19 information; to provide training and technical assis-
20 tance relating to the delivery of legal representation;
21 and to engage in research, except that broad general
22 legal or policy research unrelated to direct representa-
23 tion of eligible clients may not be undertaken.

24 (d) The agency shall establish and the executive
25 director or his designate shall operate an accounting
26 and auditing division to require and monitor the
27 compliance with this article by public defender corpo-
28 rations and other persons or entities receiving funding
29 or compensation from the agency. This division shall
30 review all plans and proposals for loans, grants and
31 contracts, and shall make a recommendation of appro-
32 val or disapproval to the executive director. The
33 division shall prepare, or cause to be prepared, reports
34 concerning the evaluation, inspection, or monitoring of
35 public defender corporations and other grantees,
36 contractors, persons or entities receiving financial
37 assistance under this article, and shall further carry
38 out the agency's responsibilities for records and
39 reports as set forth in section eighteen of this article.

40 Upon the request of the executive director, the
41 accounting and auditing division shall require each
42 public defender corporation to annually report on
43 nonbillable time of its professional employees, includ-
44 ing time utilized in administration of the respective
45 offices, so as to compare such time to similar time
46 expended in nonpublic law offices for like activities.

47 (e) The accounting and auditing division shall
48 provide to the executive director assistance in the
49 fiscal administration of all of the agency's divisions.
50 Such assistance shall include, but not be limited to,
51 budget preparation and statistical analysis.

52 (f) The agency shall establish and the executive
53 director or a person designated by the executive

54 director shall operate an appellate advocacy division
55 for the purpose of prosecuting litigation on behalf of
56 eligible clients in the supreme court of appeals. The
57 executive director or a person designated by the
58 executive director shall be the director of the appellate
59 advocacy division. The appellate advocacy division
60 shall represent eligible clients upon appointment by
61 the circuit courts, or by the supreme court of appeals.
62 The division may, however, refuse such appointments
63 due to a conflict of interest or if the executive director
64 has determined the existing caseload cannot be
65 increased without jeopardizing the appellate division's
66 ability to provide effective representation. In order to
67 effectively and efficiently utilize the resources of the
68 appellate division the executive director may restrict
69 the provision of appellate representation to certain
70 types of cases.

71 The executive director is empowered to select and
72 employ staff attorneys to perform the duties pres-
73 cribed by this subsection. Within the appropriations to
74 the agency, the appellate division shall have its own
75 budget as determined to be appropriate by the execu-
76 tive director and shall maintain vouchers and records
77 for representation of eligible clients, for record pur-
78 poses only.

**§29-21-7. Criminal law research center established;
functions.**

1 (a) Within the agency, there shall be a division
2 known as the criminal law research center which
3 may:

4 (1) Undertake research, studies and analyses and act
5 as a central repository, clearinghouse and disseminator
6 of research materials;

7 (2) Prepare and distribute a criminal law manual
8 and other materials and establish and implement
9 standard and specialized training programs for attor-
10 neys practicing criminal law;

11 (3) Provide and coordinate continuing legal educa-
12 tion programs and services for attorneys practicing

13 criminal law; and

14 (4) Prepare, supplement and disseminate indices and
15 digests of decisions of the West Virginia supreme court
16 of appeals and other courts, statutes and other legal
17 authorities relating to criminal law.

18 (b) The services of the criminal law research center
19 shall be offered at reasonable rates or by subscription,
20 and such service shall be provided to prosecuting
21 attorneys and their professional staffs, panel attorneys,
22 and private attorneys engaged in the practice of
23 criminal law on the same basis as such services are
24 provided to public defender corporations, public
25 defenders and assistant public defenders.

§29-21-8. Public defender corporations.

1 (a) In each judicial circuit of the state, there is
2 hereby created a "public defender corporation" of the
3 circuit: *Provided*, That one such public defender
4 corporation shall serve both the twenty-third and
5 thirty-first judicial circuits. The purpose of such public
6 defender corporations is to provide legal representa-
7 tion in the respective circuits in accordance with the
8 provisions of this article.

9 (b) The public defender corporations are hereby
10 activated in the first, second, third, seventh, eighth,
11 ninth, eleventh, twelfth, thirteenth, fourteenth, fif-
12 teenth, twenty-third and thirty-first combined,
13 twenty-fifth, twenty-eighth and thirtieth judicial
14 circuits. Public defender corporations in other circuits
15 may be activated by the executive director if the judge
16 of a single judge circuit, the chief judge of a multi-
17 judge circuit or a majority of the active members of
18 the bar in the circuit determine there is a need to
19 activate the corporation and certify that fact in writing
20 to the executive director.

21 (c) Public defender corporations may apply in
22 writing to the executive director for permission to
23 merge to form multi-circuit or regional public
24 defender corporations. Applications for mergers shall
25 be subject to the review procedures set forth in section
26 eleven of this article.

§29-21-9. Panel attorneys.

1 (a) In each circuit of the state, the circuit court shall
2 establish and maintain regional and local panels of
3 private attorneys-at-law who shall be available to
4 serve as counsel for eligible clients.

5 (b) An attorney-at-law may become a panel attorney
6 and be enrolled on the regional or local panel, or both,
7 to serve as counsel for eligible clients, by informing
8 the court. A prospective panel attorney shall inform
9 the court in writing, on forms provided by the execu-
10 tive director, of a desire to accept appointments
11 generally, or of the specific types of cases in which he
12 or she will accept appointments. The attorney shall
13 also indicate whether or not he or she will accept
14 appointments in adjoining circuits and, if so, in which
15 circuits. An agreement to accept cases generally or
16 certain types of cases particularly shall not prevent a
17 panel attorney from declining an appointment in a
18 specific case.

19 (c) In all cases where an attorney-at-law is required
20 to be appointed for an eligible client, the appointment
21 shall be made by the circuit judge. In circuits where
22 a public defender office is in operation, the judge shall
23 appoint the public defender office unless such appoint-
24 ment is not appropriate due to a conflict of interest or
25 unless the public defender corporation board of
26 directors has notified the court that the existing
27 caseload cannot be increased without jeopardizing the
28 ability of defenders to provide effective representation.
29 If the public defender office is not available for
30 appointment, the court shall appoint one or more
31 panel attorneys from the local panel. If there is no
32 local panel attorney available, the judge shall appoint
33 one or more panel attorneys from the regional panel.
34 If there is no regional panel attorney available, the
35 judge may appoint a public defender office from an
36 adjoining circuit if such public defender office agrees
37 to the appointment. In circuits where no public
38 defender office is in operation, the judge shall first
39 refer to the local panel and then to the regional panel
40 in making appointments, and if an appointment cannot

41 be made from the panel attorneys, the judge may
42 appoint the public defender office of an adjoining
43 circuit if such public defender office agrees to the
44 appointment. In any circuit, when there is no public
45 defender, or assistant public defender, local panel
46 attorney or regional panel attorney available, the
47 judge may appoint one or more qualified private
48 attorneys to provide representation, and such private
49 attorney or attorneys shall be treated as panel attor-
50 neys for that specific case. In any given case, the
51 appointing judge may alter the order in which attor-
52 neys are appointed if the case requires particular
53 knowledge or experience on the part of the attorney to
54 be appointed.

§29-21-10. Public defender corporation — Intent to apply for funding.

1 (a) Any public defender corporation established by
2 section eight of this article applying to public defender
3 services for financial assistance to establish a program
4 to provide legal representation consistent with this
5 article and any public defender corporation proposing
6 a major substantive modification to an existing pro-
7 gram shall notify the executive director and the circuit
8 judges in the area in which the program will deliver
9 legal representation of the intent to apply for such
10 assistance or modification. Such notice shall be given
11 at least thirty days prior to the filing of an application
12 or a proposal for modification.

13 (b) Notifications shall include a summary description
14 of the proposed program. The summary description
15 shall contain the following information:

16 (1) The identity of the applicant;

17 (2) The geographical area to be served by the
18 proposed program;

19 (3) A brief description of the proposed program,
20 general size or scale, estimated cost, or other charac-
21 teristics which will enable the circuit court to deter-
22 mine how the system for representation of indigents
23 within the circuit may be affected by the proposed
24 program; and

25 (4) The estimated date the public defender corpora-
26 tion expects to formally file an application or modifi-
27 cation proposal.

**§29-21-11. Public defender corporations — Funding applica-
tions; legal representation plans; review.**

1 (a) Any public defender corporation established by
2 section eight of this article or any other entity wishing
3 to take advantage of state financial assistance through
4 the agency must submit a funding application to the
5 executive director.

6 (b) The funding application, which is to be submitted
7 in a form prescribed by the executive director, shall
8 contain a general description of the plans and policies
9 the applicant intends to utilize in providing legal
10 representation, and such other information prescribed
11 by the executive director.

12 (c) All applications for financial assistance from
13 public defender services under the provisions of this
14 article must be submitted to the circuit judges of the
15 circuit for review prior to their submission to public
16 defender services.

17 (d) Completed applications shall include:

18 (1) All comments and recommendations made by the
19 circuit judges, along with a statement that such
20 comments have been considered prior to submission of
21 the application; or

22 (2) If no comments have been received from circuit
23 judges, a statement that the procedures outlined in
24 this section have been followed and that no comments
25 or recommendations have been received.

26 (e) Reviews required under this section shall be
27 completed by circuit judges within fifteen days after
28 receipt. If the public defender corporation or other
29 applicant has not received a response within the
30 fifteen-day period, the public defender corporation
31 may consider the judge to have waived his opportu-
32 nity to review and comment on the proposed program
33 or program modification and may submit the applica-
34 tion to public defender services.

§29-21-12. Public defender corporation funding applications.

1 (a) If an application does not carry evidence that
2 appropriate circuit judges have been given an oppor-
3 tunity to review the application, the application shall
4 be returned with instructions to fulfill the require-
5 ments of section eleven of this article.

6 (b) The executive director shall within seven work-
7 ing days after taking any major action on an applica-
8 tion notify the circuit judges who have reviewed the
9 application of the action taken. Major actions will
10 include program approvals, rejections, returns for
11 amendment, deferrals or withdrawals.

12 (c) If a judge has recommended against approval, or
13 has recommended approval only with specific and
14 major substantive changes, and the executive director
15 approves the application substantially as submitted,
16 the executive director shall provide the judge with an
17 explanation of the approval of the application.

§29-21-13. Approval of public defender corporation funding applications; funding; compensation of corporations and panel attorneys; record keeping by public defender corporations.

1 (a) The accounting and auditing division shall
2 review all funding applications and prepare recom-
3 mendations for an operating plan and budget. The
4 executive director shall review the funding applica-
5 tions and the accounting and auditing recommenda-
6 tions and shall, in consultation with the applicants,
7 prepare a plan for providing legal services to the area
8 which is the subject of the funding application.

9 (b) Upon final approval of a funding application by
10 the executive director, the approved budget shall be
11 set forth in an approval notice. The total cost to the
12 agency shall not exceed the amount set forth in the
13 approval notice and the agency shall not be obligated
14 to reimburse the recipient for costs incurred in excess
15 of such amount unless and until a program modifica-
16 tion has been approved in accordance with the provi-
17 sions of this article, revising the total costs of the

18 program.

19 (c) Funding of public defender corporations or other
20 programs or entities providing legal representation
21 under the provisions of this article shall be by annual
22 grants disbursed in such periodic allotments as the
23 executive director shall deem appropriate.

24 (d) All recipients of funding under this article shall
25 maintain such records as required by the executive
26 director.

27 (e) All panel attorneys shall maintain detailed and
28 accurate records of the time expended and expenses
29 incurred on behalf of eligible clients, and upon com-
30 pletion of each case, exclusive of appeal, shall submit
31 to the appointing court a voucher for services. Claims
32 for fees and expense reimbursements shall be submit-
33 ted to the appointing court on forms approved by the
34 executive director and shall meet the requirements of
35 subsection (i) of this section. The appointing court
36 shall review the voucher to determine if the time and
37 expense claims are reasonable, necessary and valid
38 and shall forward such voucher to the agency, with an
39 order approving payment of the claimed amount or of
40 such lesser sum the court considers appropriate:
41 *Provided*, That notwithstanding any other provision of
42 this section, public defender services may pay by
43 direct bill, prior to the completion of the case, litiga-
44 tion expenses incurred by attorneys appointed under
45 this article.

46 (f) In each case in which a panel attorney provides
47 legal representation under this article, and in each
48 appeal after conviction in circuit court, the panel
49 attorney shall be compensated at the following rates
50 for actual and necessary time expended:

51 (1) For work performed out of court, compensation
52 shall be at the rate of twenty dollars per hour. Out-of-
53 court work shall include, but not be limited to, travel,
54 interviews of clients or witnesses, preparation of
55 pleadings, and prehearing or pretrial research.

56 (2) For work performed in court, compensation shall

57 be at the rate of twenty-five dollars per hour. In-court
58 work shall include, but not be limited to, all time spent
59 awaiting hearing or trial if the presence of the
60 attorney is required at the time.

61 (3) The maximum amount of compensation for out-
62 of-court and in-court work under this subsection is one
63 thousand dollars: *Provided*, That if the eligible client is
64 charged with a felony for which a penalty of life
65 imprisonment may be imposed, the court may approve
66 additional compensation for further work at one half
67 the rates provided in this subsection.

68 (g) Actual and necessary expenses incurred in
69 providing legal representation, including, but not
70 limited to, expenses for travel, transcripts, salaried or
71 contracted investigative services, and expert witnesses
72 shall be reimbursed to a maximum of five hundred
73 dollars unless the court, for good cause shown, gives
74 advance approval to incur expenses for a larger sum.
75 Expense vouchers shall specifically set forth the
76 nature, amount and purpose of expenses incurred and
77 shall provide such receipts, invoices or other documen-
78 tation required by the executive director.

79 (h) For purposes of compensation under this section,
80 an appeal to the supreme court of appeals from a final
81 order of the circuit court shall be considered a separ-
82 ate case.

83 (i) Vouchers submitted under this section shall
84 specifically set forth the nature of the service ren-
85 dered, the stage of proceeding or type of hearing
86 involved, the date and place the service was rendered
87 and the amount of time expended in each instance. All
88 time claimed on the vouchers shall be itemized to the
89 nearest tenth of an hour. If the charge against the
90 eligible client for which services were rendered is one
91 of several charges involving multiple warrants or
92 indictments, the voucher shall indicate such fact and
93 sufficiently identify the several charges so as to enable
94 the court to avoid a duplication of compensation for
95 services rendered. The voucher shall indicate whether
96 the services were rendered by a local panel attorney,

97 a regional panel attorney, or such other private
98 attorney as may have been appointed. The executive
99 director shall refuse to requisition payment for any
100 voucher which is not in conformity with the record
101 keeping, compensation or other provisions of this
102 article and in such circumstance shall return the
103 voucher to the court for further review.

§29-21-14. Limitation on use of funds; exceptions.

1 (a) Funds made available by the agency to public
2 defender corporations or other entities under this
3 article, either by loan, grant or contract, and funds
4 used for payments to panel attorneys shall be used
5 only to provide legal representation for eligible clients
6 involved in proceedings defined by this article as
7 eligible proceedings.

8 (b) Funds received from any source other than the
9 agency shall not be used by a public defender corpo-
10 ration for purposes prohibited by this article.

§29-21-15. Public defender corporations — Board of directors.

1 (a) The governing body of each public defender
2 corporation shall be a board of directors consisting of
3 persons who are residents of the area to be served by
4 the public defender corporation.

5 (1) In multi-county circuits, and in the case of multi-
6 circuit or regional corporations the county commission
7 of each county within the area served shall appoint a
8 director, who shall not be an attorney-at-law. The
9 president of each county bar association within the
10 area served shall appoint a director, who shall be an
11 attorney-at-law: *Provided*, That in a county where
12 there is not an organized and active bar association,
13 the circuit court shall convene a meeting of the
14 members of the bar of the court resident within the
15 county and such members of the bar shall elect one of
16 their number as a director. The governor shall appoint
17 one director, who shall serve as chairman, who may,
18 but need not be, an attorney-at-law, unless such
19 appointment would result in there being an even
20 number of directors, in which event the governor shall

21 appoint two directors, one of whom may be an
22 attorney-at-law.

23 (2) In single-county circuits, the manner of selecting
24 directors shall be the same as that described in
25 subdivision (1) of this subsection, except that the
26 county commission shall appoint two directors rather
27 than one, and the bar shall appoint two directors
28 rather than one.

29 (b) The board of directors shall have at least four
30 meetings a year. Timely and effective prior public
31 notice of all meetings shall be given, and all meetings
32 shall be public except for those concerned with
33 matters properly discussed in executive session.

34 (c) The board of directors shall establish and enforce
35 broad policies governing the operation of the public
36 defender corporation but shall not interfere with any
37 attorney's professional responsibilities to clients. The
38 duties of the board of directors shall include, but not
39 be limited to, the following:

40 (1) Appointment of the public defender and any
41 assistant public defenders as may be necessary to
42 enable the public defender corporation to provide legal
43 representation to eligible clients; and

44 (2) Approval of the public defender corporation's
45 budget and the fixing of professional salaries; and

46 (3) Renewal of the employment contract of the
47 public defender on an annual basis except where such
48 renewal is denied for cause: *Provided*, That the board
49 of directors shall have the power at any time to
50 remove the public defender for misfeasance, malfea-
51 sance or nonfeasance.

52 (d) To the extent that the provisions of chapter
53 thirty-one of this code regarding nonprofit corpora-
54 tions are not inconsistent with this article, the provi-
55 sions of such chapter shall be applicable to the board
56 of directors of the public defender corporation.

57 (e) While serving on the board of directors, no
58 member may receive compensation from the public

59 defender corporation, but a member may receive
60 payment for normal travel and other out-of-pocket
61 expenses required for fulfillment of the obligations of
62 membership.

**§29-21-16. Determination of maximum income levels;
eligibility guidelines; use of form affidavit;
inquiry by court; denial of services; repay-
ment; limitation on remedies against affiant.**

1 (a) The agency shall establish, and periodically
2 review and update financial guidelines for determin-
3 ing eligibility for legal representation made available
4 under the provisions of this article. The agency shall
5 adopt a financial affidavit form for use by persons
6 seeking legal representation made available under the
7 provisions of this article.

8 (b) All persons seeking legal representation made
9 available under the provisions of this article shall
10 complete the agency's financial affidavit form, which
11 shall be considered as an application for the provision
12 of publicly funded legal representation.

13 Any juvenile shall have the right to be effectively
14 represented by counsel at all stages of proceedings
15 brought under the provisions of article five, chapter
16 forty-nine of this code. If the child advises the court of
17 his or her inability to pay for counsel, the court shall
18 require the child's parent or custodian to execute a
19 financial affidavit. If the financial affidavit demon-
20 strates that neither of the child's parents, or, if
21 applicable, the child's custodian, has sufficient assets to
22 pay for counsel, the court shall appoint counsel for the
23 child. If the financial affidavit demonstrates that
24 either of the child's parents, or, if applicable, the
25 child's custodian, does have sufficient assets to pay for
26 counsel, the court shall order the parent, or, if
27 applicable, the custodian, to provide, by paying for,
28 legal representation for the child in the proceedings:
29 *Provided*, That the court may disregard the assets of
30 the child's parents or custodian and appoint counsel
31 for the child, as provided above, if the court concludes,
32 as a matter of law, that the child and the parent or

33 custodian have a conflict of interest that would
34 adversely affect the child's right to effective represen-
35 tation of counsel, or concludes, as a matter of law, that
36 requiring the child's parent or custodian to provide
37 legal representation for the child would otherwise
38 jeopardize the best interests of the child.

39 (c) In circuits in which no public defender office is
40 in operation, circuit judges shall make all determina-
41 tions of eligibility. In circuits in which a public
42 defender office is in operation, all determinations of
43 indigency shall be made by a public defender office
44 employee designated by the executive director. Such
45 determinations shall be made after a careful review of
46 the financial affidavit submitted by the person seeking
47 representation. The review of the affidavit shall be
48 conducted in accord with the financial eligibility
49 guidelines established by the agency pursuant to
50 subsection (a) of this section. In addition to the
51 financial eligibility guidelines, the person determining
52 eligibility shall consider other relevant factors, includ-
53 ing, but not limited to, those set forth in subdivisions
54 (1) through (8) of subsection (d) of this section. If there
55 is substantial reason to doubt the accuracy of informa-
56 tion in the financial affidavit, the person determining
57 eligibility may make such inquiries as are necessary to
58 determine whether the affiant has truthfully and
59 completely disclosed the required financial informa-
60 tion. After reviewing all pertinent matters the person
61 determining eligibility may find the affiant to be
62 eligible to have the total cost of legal representation
63 provided by the state, or may find that the total cost
64 of providing representation shall be apportioned
65 between the state and the eligible person. A person
66 whose annual income exceeds the maximum annual
67 income level allowed for eligibility may receive all or
68 part of the necessary legal representation, or a person
69 whose income falls below the maximum annual
70 income level for eligibility may be denied all or part
71 of the necessary legal representation if the person
72 determining eligibility finds the person's particular
73 circumstances require that eligibility be allowed or
74 disallowed, as the case may be, on the basis of one or

75 more of the eight factors set forth in subsection (d) of
76 this section. If legal representation is made available to
77 a person whose income exceeds the maximum annual
78 income level for eligibility, or if legal representation is
79 denied to a person whose income falls below the
80 maximum annual income level for eligibility, the
81 person determining eligibility shall make a written
82 statement of the reasons for the action and shall
83 specifically relate those reasons to one or more of the
84 factors set forth in subsection (d) of this section.

85 (d) The following factors shall be considered in
86 determining eligibility for legal representation made
87 available under the provisions of this article:

88 (1) Current income prospects, taking into account
89 seasonal variations in income;

90 (2) Liquid assets, assets which may provide collateral
91 to obtain funds to employ private counsel and other
92 assets which may be liquidated to provide funds to
93 employ private counsel;

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

96 (4) Child care, transportation and other expenses
97 necessary for employment;

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

100 (6) Whether the person seeking publicly funded legal
101 representation has made reasonable and diligent
102 efforts to obtain private legal representation, and the
103 results of those efforts;

104 (7) The cost of obtaining private legal representation
105 with respect to the particular matter in which assis-
106 tance is sought; and

107 (8) The consequences for the individual if legal
108 assistance is denied.

109 (e) Legal representation requested by the affiant
110 may not be denied in whole or part unless the affiant
111 can obtain legal representation without undue finan-

112 cial hardship. Persons determined to be eligible by
113 public defender personnel may have the initial deter-
114 mination reviewed by a local circuit judge who may
115 amend, modify or rewrite the initial determination. At
116 any stage of the proceedings a circuit court may
117 determine a prior finding of eligibility was incorrect or
118 has become incorrect as the result of the affiant's
119 changed financial circumstances, and may revoke any
120 prior order providing legal representation. In such
121 event any attorney previously appointed shall be
122 entitled to compensation under the provisions of law
123 applicable to such appointment for services already
124 rendered.

125 (f) In the circumstances and manner set forth below,
126 circuit judges may order repayment to the state,
127 through the office of the clerk of the circuit court
128 having jurisdiction over the proceedings, of the costs
129 of representation provided under this article:

130 (1) In every case in which services are provided to
131 an indigent person and an adverse judgment has been
132 rendered against such person, the court may require
133 that person, and in juvenile cases, may require the
134 juvenile's parents or custodian, to pay as costs the
135 compensation of appointed counsel, the expenses of
136 the defense and such other fees and costs as autho-
137 rized by statute.

138 (2) The court shall not order a person to pay costs
139 unless the person is able to pay without undue
140 hardship. In determining the amount and method of
141 repayment of costs, the court shall take account of the
142 financial resources of the person, the person's ability
143 to pay and the nature of the burden that payment of
144 costs will impose. The fact that the court initially
145 determines, at the time of a case's conclusion, that it
146 is not proper to order the repayment of costs does not
147 preclude the court from subsequently ordering repay-
148 ment should the person's financial circumstances
149 change.

150 (3) When a person is ordered to repay costs, the
151 court may order payment to be made forthwith or

152 within a specified period of time or in specified
153 installments. If a person is sentenced to a term of
154 imprisonment, an order for repayment of costs is not
155 enforceable during the period of imprisonment unless
156 the court expressly finds, at the time of sentencing,
157 that the person has sufficient assets to pay the
158 amounts ordered to be paid or finds there is a reason-
159 able likelihood the person will acquire the necessary
160 assets in the foreseeable future.

161 (4) A person who has been ordered to repay costs,
162 and who is not in contumacious default in the pay-
163 ment thereof, may at any time petition the sentencing
164 court for modification of the repayment order. If it
165 appears to the satisfaction of the court that continued
166 payment of the amount ordered will impose undue
167 hardship on the person or the person's dependents, the
168 court may modify the method or amount of payment.

169 (5) When a person ordered to pay costs is also placed
170 on probation or imposition or execution of sentence is
171 suspended, the court may make the repayment of costs
172 a condition of probation or suspension of sentence.

173 (g) Circuit clerks shall keep a record of repaid
174 counsel fees and defense expenses collected pursuant
175 to this section and shall, quarterly, pay the moneys to
176 the state auditor who shall deposit the funds in the
177 general revenue fund of the state.

178 (h) The making of an affidavit subject to inquiry
179 under this section shall not in any event give rise to
180 criminal remedies against the affiant nor occasion any
181 civil action against the affiant except for the recovery
182 of costs as in any other case where costs may be
183 recovered. A person who has made an affidavit
184 knowing the contents thereof to be false may be
185 prosecuted for false swearing as provided by law.

§29-21-17. Private practice of law by public defenders.

1 (a) No full-time public defender or full-time assis-
2 tant public defender may engage in any private
3 practice of law except as provided in this section.

4 (b) A board of directors may permit a newly

5 employed full-time public defender or full-time assis-
6 tant public defender to engage in the private practice
7 of law for compensation for the sole purpose of
8 expeditiously closing and withdrawing from existing
9 private cases from a prior private practice. In no event
10 shall any person employed for more than ninety days
11 as a full-time public defender or full-time assistant
12 public defender be engaged in any other private
13 practice of law for compensation.

14 (c) A board of directors may permit a full-time
15 public defender or full-time assistant public defender
16 to engage in private practice for compensation if the
17 defender is acting pursuant to an appointment made
18 under a court rule or practice of equal applicability to
19 all attorneys in the jurisdiction and if the defender
20 remits to the public defender corporation all compen-
21 sation received.

22 (d) A board of directors may permit a full-time
23 public defender or full-time assistant public defender
24 to engage in uncompensated private practice of law if
25 the public defender or assistant public defender is
26 acting:

27 (1) Pursuant to an appointment made under a court
28 rule or practice of equal applicability to all attorneys
29 in the jurisdiction; or

30 (2) On behalf of a close friend or family member; or

31 (3) On behalf of a religious, community or charitable
32 group.

33 (e) Violation of the requirements of this section is
34 sufficient grounds for immediate summary dismissal.

§29-21-18. Records and reports.

1 (a) The agency is authorized to require such reports
2 as it deems necessary from any public defender
3 corporation or other entity or person receiving fund-
4 ing under this article regarding activities carried out
5 pursuant to this article.

6 (b) The agency is authorized to prescribe the keep-
7 ing of records with respect to the activities of public

8 defender corporations and other grantees, contractors,
9 persons or entities receiving financial assistance under
10 this article and shall have access to such records at all
11 reasonable times for the purpose of ensuring com-
12 pliance with the terms and conditions upon which
13 financial assistance was provided.

14 (c) Copies of all reports pertinent to the evaluation,
15 inspection, or monitoring of any public defender
16 corporation, other grantee, contractor, person or entity
17 receiving financial assistance under this article shall
18 be maintained by the agency for a period of at least
19 five years subsequent to such evaluation, inspection,
20 or monitoring. Such reports shall be available for
21 public inspection during regular business hours, and
22 copies shall be furnished, upon request, to interested
23 parties upon payment of such reasonable fees as the
24 agency may establish.

§29-21-19. Audits.

1 (a) The accounts of each public defender corporation
2 shall be audited annually. Such audits shall be con-
3 ducted in accordance with generally accepted auditing
4 standards by the state tax commissioner.

5 (b) The audits shall be conducted at the place or
6 places where the accounts of the public defender
7 corporation are normally kept. All books, accounts,
8 financial records, reports, files, and other papers or
9 property belonging to or in use by the public defender
10 corporation and necessary to facilitate the audits shall
11 be made available to the person or persons conducting
12 the audits; and full facilities for verifying transactions
13 with the balances and securities held by depositories,
14 fiscal agents, and custodians shall be afforded to any
15 such person.

16 (c) The report of the annual audit shall be filed with
17 the agency and shall be available for public inspection
18 during business hours at the principal office of the
19 public defender corporation. The report of each such
20 audit shall be maintained for a period of at least five
21 years at the office of the agency.

§29-21-20. Appointed counsel immune from liability.

1 Any attorney who provides legal representation
2 under the provisions of this article under appointment
3 by a circuit court or by the supreme court of appeals,
4 and whose only compensation therefor is paid under
5 the provisions of this article, shall be immune from
6 liability arising from that representation in the same
7 manner and to the same extent that prosecuting
8 attorneys are immune from liability.

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

Frederic L. Parker
.....
Chairman Senate Committee

F. L. Suttis
.....
Chairman House Committee

Originated in the Senate.

In effect from passage.

Paul C. Willis
.....
Clerk of the Senate

Ronald L. Hogg
.....
Clerk of the House of Delegates

Sam D. Trueman
.....
President of the Senate

Bob Call
.....
Speaker House of Delegates

The within *is approved* this the *27th*
day of *April* 1989.

Winston Caperton
.....
Governor

PRESENTED TO THE

GOVERNOR

Date 4/25/89

Time 2:20