

SB 94

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WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1996



ENROLLED

SENATE BILL NO. 94

(By Senator Wootton, et al)



PASSED March 15, 1996

In Effect from Passage

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

ENROLLED

Senate Bill No. 94

(BY SENATORS WOOTON, ANDERSON, BOWMAN, DITTMAR,
GRUBB, OLIVERIO, ROSS, SCHOONOVER, WAGNER,
BUCKALEW AND SCOTT)

[Passed March 15, 1996; in effect from passage.]

AN ACT to amend and reenact sections two, six, eight, nine, thirteen-a, fifteen and seventeen, article twenty-one, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to public defender services generally; defining eligible proceedings to include ancillary proceedings to enhance sentences and for the forfeiture of property; defining legal representation to include services as guardian ad litem; requiring public defender corporations to file periodic reports; removing the requirement that one public defender serve two certain judicial circuits; eliminating requirement that panel attorneys file written request for appointments to represent

eligible clients; compensation rates for attorney and paralegal services; limitations on reimbursements for transcripts, court reporter and transcription services, travel expenses and investigative services; voucher requirements and corrections; terms of governor's appointees to boards of directors of public defender corporations; public notice required for meetings of such boards of directors; limitations on compensation benefits to part-time employees of public defender corporations; removal of such employees; eligibility of member of such boards of directors to represent eligible clients; and dismissal of certain employees of public defender corporations for violation of provisions restricting the part-time practice of law by such employees.

Be it enacted by the Legislature of West Virginia:

That sections two, six, eight, nine, thirteen-a, 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, all to read as follows:

ARTICLE 21. PUBLIC DEFENDER SERVICES.

§29-21-2. Definitions.

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

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

7 (2) "Eligible proceeding": Criminal charges which may
8 result in incarceration; juvenile proceedings; proceedings
9 to revoke parole or probation if the revocation may
10 result in incarceration; contempt of court; child abuse
11 and neglect proceedings which may result in a termina-
12 tion of parental rights; mental hygiene commitment
13 proceedings; extradition proceedings; proceedings which
14 are ancillary to an eligible proceeding, including, but not
15 limited to, proceedings to enhance sentences brought

16 pursuant to sections eighteen and nineteen, article
17 eleven, chapter sixty-one of this code, forfeiture pro-
18 ceedings brought pursuant to article seven, chapter
19 sixty-a of this code, and proceedings brought to obtain
20 extraordinary remedies; and appeals from or post-
21 conviction challenges to the final judgment in an eligible
22 proceeding. Legal representation provided pursuant to
23 the provisions of this article is limited to the court
24 system of the state of West Virginia, but does not include
25 representation in municipal courts unless the accused is
26 at risk of incarceration;

27 (3) "Legal representation": The provision of any legal
28 services or legal assistance as counsel or guardian ad
29 litem consistent with the purposes and provisions of this
30 article;

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

36 (5) "Public defender": The staff attorney employed on
37 a full-time basis by a public defender corporation who,
38 in addition to providing direct representation to eligible
39 clients, has administrative responsibility for the opera-
40 tion of the public defender corporation. The public
41 defender may be a part-time employee if the board of
42 directors of the public defender corporation finds
43 efficient operation of the corporation does not require a
44 full-time attorney and the executive director approves
45 such part-time employment;

46 (6) "Assistant public defender": A staff attorney
47 providing direct representation to eligible clients whose
48 salary and status as a full-time or part-time employee
49 are fixed by the board of directors of the public defender
50 corporation;

51 (7) "Public defender corporation": A corporation
52 created under section eight of this article for the sole

53 purpose of providing legal representation to eligible
54 clients; and

55 (8) "Public defender office": An office operated by a
56 public defender corporation to provide legal representa-
57 tion under the provisions of this article.

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

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

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

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 grant
18 or contract, to serve as a clearinghouse for information;
19 to provide training and technical assistance relating to
20 the delivery of legal representation; and to engage in
21 research, except that broad general legal or policy
22 research unrelated to direct representation of eligible
23 clients may not be undertaken.

24 (d) The agency shall establish and the executive
25 director or his designate shall operate an accounting and
26 auditing division to require and monitor the compliance
27 with this article by public defender corporations and
28 other persons or entities receiving funding or compensa-
29 tion from the agency. This division shall review all plans
30 and proposals for grants and contracts, and shall make
31 a recommendation of approval or disapproval to the

32 executive director. The division shall prepare, or cause
33 to be prepared, reports concerning the evaluation,
34 inspection or monitoring of public defender corporations
35 and other grantees, contractors, persons or entities
36 receiving financial assistance under this article, and
37 shall further carry out the agency's responsibilities for
38 records and reports as set forth in section eighteen of
39 this article.

40 The accounting and auditing division shall require
41 each public defender corporation to periodically report
42 on the billable and nonbillable time of its professional
43 employees, including time utilized in administration of
44 the respective offices, so as to compare such time to
45 similar time expended in nonpublic law offices for like
46 activities.

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

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

70 The executive director is empowered to select and
71 employ staff attorneys to perform the duties prescribed
72 by this subsection. The division shall maintain vouchers
73 and records for representation of eligible clients for
74 record purposes only.

§29-21-8. Public defender corporations.

1 (a) In each judicial circuit of the state, there is hereby
2 created a "public defender corporation" of the circuit.
3 The purpose of these public defender corporations is to
4 provide legal representation in the respective circuits in
5 accordance with the provisions of this article.

6 (b) If the judge of a single-judge circuit, the chief judge
7 of a multi-judge circuit or a majority of the active
8 members of the bar in the circuit determine there is a
9 need to activate the corporation, they shall certify that
10 fact in writing to the executive director. The executive
11 director shall allocate funds to those corporations so
12 certifying in the order in which he or she deems most
13 efficient and cost effective.

14 (c) Public defender corporations may apply in writing
15 to the executive director for permission to merge to form
16 multi-circuit or regional public defender corporations.
17 Applications for mergers shall be subject to the review
18 procedures set forth in section 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 serve
4 as counsel for eligible clients.

5 An attorney-at-law may become a panel attorney and
6 be enrolled on the regional or local panel, or both, to
7 serve as counsel for eligible clients, by informing the
8 court. An agreement to accept cases generally or certain
9 types of cases particularly shall not prevent a panel
10 attorney from declining an appointment in a specific
11 case.

12 (b) In all cases where an attorney-at-law is required to
13 be appointed for an eligible client, the appointment shall
14 be made by the circuit judge. In circuits where a public
15 defender office is in operation, the judge shall appoint
16 the public defender office unless such appointment is not
17 appropriate due to a conflict of interest or unless the
18 public defender corporation board of directors or the
19 public defender, with the approval of the board, has
20 notified the court that the existing caseload cannot be
21 increased without jeopardizing the ability of defenders
22 to provide effective representation.

23 If the public defender office is not available for ap-
24 pointment, the court shall appoint one or more panel
25 attorneys from the local panel. If there is no local panel
26 attorney available, the judge shall appoint one or more
27 panel attorneys from the regional panel. If there is no
28 regional panel attorney available, the judge may appoint
29 a public defender office from an adjoining circuit if such
30 public defender office agrees to the appointment.

31 In circuits where no public defender office is in opera-
32 tion, the judge shall first refer to the local panel and then
33 to the regional panel in making appointments, and if an
34 appointment cannot be made from the panel attorneys,
35 the judge may appoint the public defender office of an
36 adjoining circuit if the office agrees to the appointment.
37 In any circuit, when there is no public defender, or
38 assistant public defender, local panel attorney or re-
39 gional panel attorney available, the judge may appoint
40 one or more qualified private attorneys to provide
41 representation, and such private attorney or attorneys
42 shall be treated as panel attorneys for that specific case.
43 In any given case, the appointing judge may alter the
44 order in which attorneys are appointed if the case
45 requires particular knowledge or experience on the part
46 of the attorney to be appointed.

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

1 (a) All panel attorneys shall maintain detailed and
2 accurate records of the time expended and expenses

3 incurred on behalf of eligible clients, and upon comple-
4 tion of each case, exclusive of appeal, shall submit to the
5 appointing court a voucher for services. Claims for fees
6 and expense reimbursements shall be submitted to the
7 appointing court on forms approved by the executive
8 director. Claims submitted more than four years after
9 the last date of service shall be rejected.

10 The appointing court shall review the voucher to
11 determine if the time and expense claims are reasonable,
12 necessary and valid, and shall forward the voucher to the
13 agency with an order approving payment of the claimed
14 amount or of such lesser sum the court considers appro-
15 priate.

16 (b) Notwithstanding any other provision of this section
17 to the contrary, public defender services may pay by
18 direct bill, prior to the completion of the case, litigation
19 expenses incurred by attorneys appointed under this
20 article.

21 (c) Notwithstanding any other provision of this section
22 to the contrary, a panel attorney may be compensated for
23 services rendered and reimbursed for expenses incurred
24 prior to the completion of the case where: (1) More than
25 six months have expired since the commencement of the
26 panel attorney's representation in the case; and (2) no
27 prior payment of attorney fees has been made to the
28 panel attorney by public defender services during the
29 case. The amounts of any fees or expenses paid to the
30 panel attorney on such an interim basis, when combined
31 with any such amounts paid to the panel attorney at the
32 conclusion of the case, shall not exceed the limitations
33 on fees and expenses imposed by this section.

34 (d) In each case in which a panel attorney provides
35 legal representation under this article, and in each
36 appeal after conviction in circuit court, the panel attor-
37 ney shall be compensated at the following rates for
38 actual and necessary time expended for services per-
39 formed and expenses incurred subsequent to the effec-
40 tive date of this article:

41 (1) For attorney's work performed out of court, com-
42 pensation shall be at the rate of forty-five dollars per
43 hour. For paralegal's work performed out of court for the
44 attorney, compensation shall be at the rate of the parale-
45 gal's regular compensation on an hourly basis or, if
46 salaried, at the hourly rate of compensation which would
47 produce the paralegal's current salary, but in no event
48 shall the compensation exceed twenty dollars per hour.
49 Out-of-court work includes, but is not limited to, travel,
50 interviews of clients or witnesses, preparation of plead-
51 ings and prehearing or pretrial research.

52 (2) For attorney's work performed in court, compensa-
53 tion shall be at the rate of sixty-five dollars per hour. No
54 compensation for paralegal's work performed in court
55 shall be allowed. In-court work includes, but is not
56 limited to, all time spent awaiting hearing or trial if the
57 presence of the attorney is required.

58 (3) The maximum amount of compensation for out-of-
59 court and in-court work under this subsection is as
60 follows: For proceedings of any kind involving felonies
61 for which a penalty of life imprisonment may be im-
62 posed, such amount as the court may approve; for all
63 other eligible proceedings, three thousand dollars unless
64 the court, for good cause shown, approves payment of a
65 larger sum.

66 (e) Actual and necessary expenses incurred in provid-
67 ing legal representation for proceedings of any kind
68 involving felonies for which a penalty of life imprison-
69 ment may be imposed, including, but not limited to,
70 expenses for travel, transcripts, salaried or contracted
71 investigative services and expert witnesses, shall be
72 reimbursed in such amount as the court may approve.
73 For all other eligible proceedings, actual and necessary
74 expenses incurred in providing legal representation,
75 including, but not limited to, expenses for travel, tran-
76 scripts, salaried or contracted investigative services and
77 expert witnesses, shall be reimbursed to a maximum of
78 fifteen hundred dollars unless the court, for good cause

79 shown, approves reimbursement of a larger sum.

80 Expense vouchers shall specifically set forth the
81 nature, amount and purpose of expenses incurred and
82 shall provide such receipts, invoices or other documenta-
83 tion required by the executive director and the state
84 auditor:

85 (1) (A) Reimbursement of expenses for production of
86 transcripts of proceedings reported by a court reporter
87 is limited to the cost per original page set forth in section
88 four, article seven, chapter fifty-one of this code. Reim-
89 bursement of the cost of copies of such transcripts is
90 limited to twenty-five cents per page.

91 (B) (i) There shall be no reimbursement of expenses for
92 or production of a transcript of a preliminary hearing
93 before a magistrate or juvenile referee, or of a magistrate
94 court jury trial, which has been reported by a court
95 reporter at the request of the attorney, where the prelim-
96 inary hearing or jury trial has also been recorded elec-
97 tronically in accordance with the provisions of section
98 eight, article five, chapter fifty of this code or court rule.

99 (ii) Reimbursement of the expense of an appearance fee
100 for a court reporter who reports a proceeding other than
101 one described in subparagraph (i) of this paragraph, or
102 who reports a proceeding which is not reported by an
103 official court reporter acting in his or her official capac-
104 ity for the court, is limited to twenty-five dollars. Where
105 a transcript of such proceeding is produced, there shall
106 be no reimbursement for the expense of any appearance
107 fee. Where a transcript is requested by the attorney after
108 an appearance fee has been paid, reimbursement of the
109 expense incurred to obtain the transcript is limited to
110 the cost of producing the transcript, within the pre-
111 scribed limitations of paragraph (A) of this subdivision,
112 less the amount of the paid appearance fee.

113 (iii) Reimbursement of travel expenses incurred for
114 travel by a court reporter is subject to the limitations
115 provided by subdivision (2) of this subsection.

116 (iv) Except for the appearance fees provided in this
117 paragraph, there shall be no reimbursement for hourly
118 court reporters' fees or fees for other time expended by
119 the court reporter, either at the proceeding or traveling
120 to or from the proceeding.

121 (C) Reimbursement of the cost of transcription of tapes
122 electronically recorded during preliminary hearings or
123 magistrate court jury trials is limited to the rates estab-
124 lished by the supreme court of appeals for the reim-
125 bursement of transcriptions of electronically recorded
126 hearings and trial.

127 (2) Reimbursement for any travel expense incurred in
128 an eligible proceeding is limited to the rates for the
129 reimbursement of travel expenses established by rules
130 promulgated by the governor pursuant to the provisions
131 of section eleven, article eight, chapter twelve of this
132 code and administered by the secretary of the depart-
133 ment of administration pursuant to the provisions of
134 section forty-eight, article three, chapter five-a of this
135 code.

136 (3) Reimbursement for investigative services is limited
137 to a rate of thirty dollars per hour for work performed by
138 an investigator.

139 (f) For purposes of compensation under this section, an
140 appeal from a final order of the circuit court, or proceed-
141 ing seeking an extraordinary remedy, made to the
142 supreme court of appeals, shall be considered a separate
143 case.

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

153 indicate such fact and sufficiently identify the several
154 charges so as to enable the court to avoid a duplication
155 of compensation for services rendered. The executive
156 director shall refuse to requisition payment for any
157 voucher which is not in conformity with the record-
158 keeping, compensation or other provisions of this article
159 and in such circumstance shall return the voucher to the
160 court or to the service provider for further review or
161 correction.

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

1 (a) The governing body of each public defender corpo-
2 ration shall be a board of directors consisting of persons
3 who are residents of the area to be served by the public
4 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 area
10 served shall appoint a director, who shall be an attorney-
11 at-law: *Provided*, That in a county where there is not an
12 organized and active bar association, the circuit court
13 shall convene a meeting of the members of the bar of the
14 court resident within the county and such members of
15 the bar shall elect one of their number as a director. The
16 governor shall appoint one director, who shall serve as
17 chairman, who may be an attorney-at-law, unless such
18 appointment would result in there being an even number
19 of directors, in which event the governor shall appoint
20 two directors, one of whom may be an attorney-at-law.
21 The governor's appointees shall serve four-year terms
22 which terms shall coincide with the term of the governor.
23 Appointments may be made for unexpired terms as may
24 be necessary. Other board members' terms shall be as
25 determined by the board; and

26 (2) In single-county circuits, the manner of selecting
27 directors shall be the same as that described in subdivi-
28 sion (1) of this subsection, except that the county com-

29 mission shall appoint two directors rather than one, and
30 the bar shall appoint two directors rather than one.

31 (b) The board of directors shall have at least four
32 meetings a year. Timely and effective prior public notice
33 of all meetings shall be given pursuant to rules promul-
34 gated in accordance with the provisions of section three,
35 article nine-a, chapter six of this code, and all meetings
36 shall be public except for those concerned with matters
37 properly discussed in executive session.

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

44 (1) Appointment of the public defender and any
45 assistant public defenders as may be necessary to enable
46 the public defender corporation to provide legal repre-
47 sentation to eligible clients; and

48 (2) Approval of the public defender corporation's
49 budget and the fixing of professional and clerical
50 salaries: *Provided*, That the compensation paid to any
51 part-time public defender, part-time assistant public
52 defender or other part-time employee shall not include
53 benefits such as retirement, health insurance or paid
54 leave time for illness or vacation unless public defender
55 services has certified in writing to the board of directors
56 that there exists sufficient funding to provide such
57 benefits and the board of directors authorizes such
58 benefits to be included in the compensation; and

59 (3) Removal of any public defender, assistant public
60 defender or other employee for misfeasance, malfeasance
61 or nonfeasance.

62 (d) To the extent that the provisions of chapter thirty-
63 one of this code regarding nonprofit corporations are not
64 inconsistent with this article, the provisions of said
65 chapter shall be applicable to the board of directors of

66 the public defender corporation.

67 (e) While serving on the board of directors, no member
68 may receive compensation from the public defender
69 corporation, but a member may receive payment for
70 normal travel and other out-of-pocket expenses required
71 for fulfillment of the obligations of membership and may
72 accept appointments to represent eligible clients so long
73 as he or she does not discuss a particular case with any
74 public defender, assistant public defender or other
75 employee of the office governed by the board. Directors
76 may not serve as cocounsel with the public defender or
77 assistant public defender in any matter.

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

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

4 (b) A board of directors may permit a newly employed
5 full-time public defender or full-time assistant public
6 defender to engage in the private practice of law for
7 compensation for the sole purpose of expeditiously
8 closing and withdrawing from existing private cases
9 from a prior private practice. In no event shall any
10 person employed for more than ninety days as a full-time
11 public defender or full-time assistant public defender be
12 engaged in any other private practice of law for compen-
13 sation: *Provided*, That until the first day of January, one
14 thousand nine hundred ninety-three, the prohibition
15 against the private practice of law does not apply to
16 full-time public defenders employed in Class II, III or IV
17 counties as defined by article seven, chapter seven of this
18 code.

19 (c) A board of directors may permit a full-time public
20 defender or full-time assistant public defender to engage
21 in private practice for compensation if the defender is
22 acting pursuant to an appointment made under a court
23 rule or practice of equal applicability to all attorneys in
24 the jurisdiction and if the defender remits to the public

25 defender corporation all compensation received.

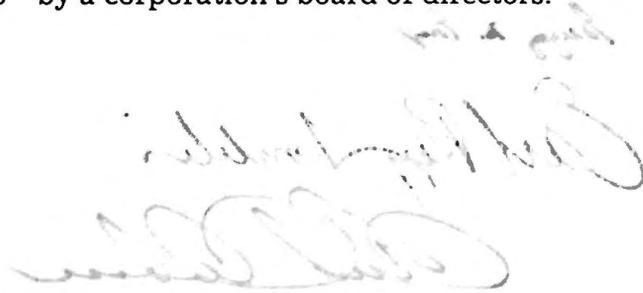
26 (d) A board of directors may permit a full-time public
27 defender or full-time assistant public defender to engage
28 in uncompensated private practice of law if the public
29 defender or assistant public defender is acting:

30 (1) Pursuant to an appointment made under a court
31 rule or practice of equal applicability to all attorneys in
32 the jurisdiction; or

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

34 (3) On behalf of a religious, community or charitable
35 group.

36 (e) Violation of the requirements of this section is
37 sufficient grounds for immediate summary dismissal
38 regardless of the conditions of employment established
39 by a corporation's board of directors.



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

[Handwritten Signature]
.....
Chairman Senate Committee

[Handwritten Signature]
.....
Chairman House Committee

Originated in the Senate.

In effect from passage

[Handwritten Signature]
.....
Clerk of the Senate

[Handwritten Signature]
.....
Clerk of the House of Delegates

[Handwritten Signature]
.....
President of the Senate

[Handwritten Signature]
.....
Speaker House of Delegates

The within *is approved* this the *1st*
day of *April*, 1996.

[Handwritten Signature]
.....
Governor

PRESENTED TO THE
GOVERNOR

Date 3/20/96

Time 2:46 pm