

# **A Proposed Statewide Public Defender System For The State of West Virginia**

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**The Criminal Defense Technical Assistance Project**

**A Program of the Adjudication Division, Law Enforcement Assistance Administration, U.S. Department of Justice  
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A Proposed Statewide Public  
Defender System for the State  
of West Virginia

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## 1.0 INTRODUCTION

On December 14, 1979, the Criminal Defense Technical Assistance Project (CDTAP) received authorization from the Law Enforcement Assistance Administration (LEAA) to provide technical assistance in response to a request from The West Virginia State Bar<sup>1</sup> to the Governor's Committee on Crime, Delinquency and Corrections. The request related directly to legislation drafted in West Virginia and supported by The West Virginia State Bar to create a public defender system in that state. We were asked specifically to assess the present cost of criminal defense services to the indigent in West Virginia and to assist in the development of a program and budget necessary to meet the requirements of the proposed legislation.

We were informed that the proposed legislation would be filed in the 1980 session of the West Virginia legislature, limited by law to sixty working days. Given the severe time restraints, it was decided to gather as much data as possible on West Virginia and then to meet for an all day session in our Cambridge, Massachusetts office on Wednesday, January 2, 1980. Caseload and funding data were made available to us by the State Court Administrator's Office and the State Auditor's Office in advance of that meeting. The overall responsibility for the assignment was given to Mr. Robert Spangenberg, Esq., the CDTAP project director. He assigned Dr. Robert Rosenblum and Ms. Vicki Garvin to assist with the technical assistance.<sup>2</sup>

In addition to the three members of the project staff, contact was made with two consultants who agreed to assist on the assignment. Mr. Ronald Brandt, Esq. is the Deputy State Public Defender for the State of Wisconsin and was responsible for the development and implementation of a similar

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<sup>1</sup>Throughout this report, "The West Virginia State Bar" refers to the state bar association of West Virginia, and not to the entire roster of attorneys eligible to practice in the state.

<sup>2</sup>Mr. Robert Spangenberg is a lawyer and Senior Research Associate at Abt Associates. He has extensive experience in the delivery of legal services to the poor. He is also Project Director of the Criminal Defense Technical Assistance Project (CDTAP). Dr. Robert Rosenblum is also a Senior Research Associate at Abt Associates. He is a lawyer and a Ph.D. in political science and is Deputy Project Director for CDTAP. Ms. Vicki Garvin is a research assistant at Abt Associates. She has previously worked as a paralegal in a public defender office.

program in Wisconsin three years ago. Mr. Arnold Rosenfeld, Esq. is the Deputy General Counsel of the Massachusetts Defenders Committee which has primary responsibility for providing criminal defense services to the indigent in Massachusetts.

The meeting on January 2 was attended by the Executive Director and four other private attorneys associated with The West Virginia State Bar. These individuals have actively participated in the criminal trial field as defense counsel, prosecutors, and judges and have spent a substantial period of time studying varying aspects of the legislation. One of those in attendance was the actual draftsman. The group was representative of various geographical areas of the state. Also in attendance were Messrs. Spangenberg, Rosenblum, Rosenfeld, and Ms. Garvin. During the following week Mr. Brandt also came to Cambridge to assist the staff team.

Following the meeting, CDTAP staff made a number of requests for data on the operation of the West Virginia system, caseload and costs. These data have been collected through the cooperation of the State Court Administrator's Office, the State Auditor's Office, county commissioners, various circuit and magistrate courts, and numerous individuals. Much of the data were secured through the efforts of The West Virginia State Bar. These data were supplemented by information gathered from several lengthy and informative telephone calls between project staff and appropriate and knowledgeable officials in West Virginia.

We have been somewhat handicapped in this effort by the lack of time and the availability of pertinent data. We have, however, established an over-all understanding of the current operation and the future requirements of the bill. Where essential data is missing or not available, we make specific reference in the text. This report provides more detailed information on the cost, caseload, and scope of defense services than has previously been available through any other source in West Virginia. We greatly appreciate the cooperation of the State Court Administrator's Office, the State Auditor's Office, The West Virginia State Bar, and particularly its Executive Director, and numerous other individuals who gave generously of their time on behalf of this work.

The following sections of this report include:

Section 2--a description of the current court system in West Virginia, the statutory provisions for the right to counsel, a legislative history of the right to counsel, a description of current practice and problems with the present system and the current project costs for the system.

Section 3--a summary of the proposed 1980 legislation with a description of its improvements and benefits.

Section 4--the projected caseload and budget for the program.

Section 5--conclusions.

## 2.0 BACKGROUND INFORMATION ON WEST VIRGINIA

### 2.1 West Virginia Court Organization

In 1974, the voters of West Virginia approved a constitutional amendment affecting the operation and organization of the state judicial system. Under this amendment, effective November 5, 1974, statutory courts were merged with circuit courts, and all judges of those various courts became judges of the circuit courts. In addition, the legislature was given the authority to establish magistrate courts to replace the existing justice of the peace courts.

Supreme Court of Appeals--West Virginia's highest court is the Supreme Court of Appeals. It is the only appellate court in West Virginia. The Court has general supervisory control over all circuit and magistrate courts. The Supreme Court's appellate jurisdiction extends to criminal cases in which there has been a conviction for a felony or misdemeanor in the circuit court or for which there has been a conviction in an inferior court, which has been affirmed by the circuit court. The Court also has original jurisdiction of proceedings in habeas corpus, for which it receives a large number of petitions annually.

Circuit Court--circuit courts are the state's court of general trial jurisdiction. The state is divided into 31 judicial circuits. Each circuit contains from one to four counties. Court must be held in each county seat at least three times annually. All circuit court judges are lawyers with a minimum of five years legal experience and are elected to eight-year terms.

Circuit courts have original jurisdiction of all felonies and misdemeanors. They also have jurisdiction trial de novo in misdemeanor appeals from all magistrate courts and for felony cases bound over from the magistrate court. Circuit courts also have exclusive jurisdiction in juvenile, mental commitment, and probation revocation hearings.

Magistrate Court--There is one magistrate court for each county, although most counties have at least two and others many more magistrates. The magistrate courts are the court of entry for almost all misdemeanor cases. They have jurisdiction over all misdemeanors committed in the county as well as jurisdiction to conduct preliminary examinations on warrants charging felonies. Except in capital cases a magistrate may set and admit to bail.

The legislature and courts are constitutionally prohibited from requiring magistrates to be attorneys. In fact, only two of the 148 magistrates are currently members of the bar. Magistrates serve four-year terms. In some counties magistrates have sittings in several locations.

Municipal Courts--The legislature has empowered incorporated towns and cities to establish municipal courts. Municipal court criminal jurisdiction is limited to hearing and deciding cases involving municipal ordinance violations. The method of appointment or election is prescribed by local ordinance. Although a violation of some municipal ordinances carries a jail sentence, the new legislation does not provide for representation by the new public defender program for cases involving municipal ordinances.

## 2.2 Present Provisions of the Right to Counsel in West Virginia

Article 3, Section 14 of the Constitution of West Virginia sets down the following requirements for the provision of counsel:

In all such trials (crimes and misdemeanors) the accused shall be fully and plainly informed of the character and cause of the allegation, and be confronted with the witnesses against him, and shall have the assistance of counsel, and a reasonable time to prepare for his defense, and there shall be awarded to him compulsory process for obtaining witnesses in his favor.

The specific provisions of counsel are set forth in the code of West Virginia as enacted by the legislature of West Virginia. They are of course subject to requirements of the U.S. Constitution and decisions of the U.S. Supreme Court. The West Virginia provisions are contained in Chapter 49--Child Welfare, Chapter 50--Magistrate Courts, Chapter 53--Extraordinary Remedies, Chapter 62--Criminal Procedure, and Section 27-5-4 and 27-5-5 of Article 5, Involuntary Hospitalization. This legislation was enacted by the West Virginia legislature in 1977.

Magistrate Courts--Chapter 50-4-3 requires the appointment of counsel in any criminal proceeding in which the applicable statute authorizes a sentence of confinement. If the defendant requests counsel, he/she is required to file an affidavit that he/she is unable to afford counsel. The magistrate must immediately stay the proceedings and request that a judge of the circuit court appoint counsel. Counsel is to be paid in accordance with Chapter 51 of the code.



Circuit Court--Chapter 62-3-1 requires the appointment of counsel to assist the accused at any time upon request. Throughout the provisions of each of these sections the term "needy person" is designated to mean one who is entitled to the appointment of counsel. Where an attorney is appointed in the circuit court, he or she is to be paid for services in accordance with Chapter 51 of the code.

Juvenile Proceedings--Chapter 49-5-10 deals separately with the appointment of counsel in juvenile cases. Under this provision, the child has a right to appointed counsel provided that neither he nor his parent, guardian or custodian can pay for the services of counsel. Following the filing of an appropriate affidavit, the circuit court is charged with appointing counsel to be compensated in accordance with Chapter 51 of the code.

Post-Conviction Habeas Corpus--Chapter 53-4A-4 describes the manner of appointing counsel in habeas corpus proceedings. Upon the filing of a petition in the Supreme Court of Appeals, the court may appoint counsel if convinced that the petitioner is indigent, that the petition was filed in good faith, and that the petition has merit or is not frivolous. In addition, provision is also made for the payment of expenses to include court costs and the cost of furnishing transcripts. Again, the attorney is to be paid in accordance with Chapter 51.

Probation and Parole--Chapter 62-12-22 permits the appointment of counsel to any person accused of a violation of his parole at any hearing held for the purpose of determining whether his parole should be revoked, provided that he files an affidavit with the circuit court and the judge is satisfied that he is unable to afford counsel. Payment of counsel is provided under Chapter 51.

Involuntary Hospitalization--Finally, Chapter 27-5-4 and 27-5-5 provides for the appointment of counsel for certain individuals who are subject to a hearing in regard to involuntary hospitalization. The circuit court may allow a reasonable fee for representation in accordance with Chapter 51.

The right to representation for the indigent in criminal and quasi-criminal cases has a strong statutory base in West Virginia. The system for such representation is spelled out in Chapter 51 in some detail. A strong public policy statement is contained in Section 51-11-1 entitled "Statement of Legislative Findings and Policy":

In order that needy persons who have been charged with the commission of serious crimes against the state, or who have been convicted of crimes, or who are subject to a court having jurisdiction over juveniles, or who are incarcerated or subject to incarceration in a public or private institution pursuant to a judicial commitment order, be afforded the rights and privileges guaranteed to them by the constitution of the United States of America and by the constitution of the state of West Virginia, it is necessary and in the public interest to provide a system of legal representation for persons who are financially unable to employ counsel.

Section 51-11-2 provides a number of definitions, including the following:

A needy person means any person, whether juvenile or adult, who at the time his need is determined is unable to pay counsel to represent him and to pay the other necessary expenses of representation without undue hardship.

Expenses includes the expenses of investigation, other preparation and trial expenses and the cost of transcripts of testimony, not otherwise provided at public expense.

Serious crime means:

- (a) a felony;
- (b) a misdemeanor or offense, the penalty for which involves the possibility of confinement or a fine of more than \$500, or any other offense in which, in the opinion of the court, either the complexity of the matter, or the youth, inexperience, or mental capacity of the accused, may require representation of the accused by an attorney; and
- (c) an act which except for the age of the person involved, would otherwise be a serious crime.

The term serious crime shall not include an alleged violation which is exclusively a violation of a municipal ordinance.

Section 51-11-3 provides representation throughout the entire proceeding, beginning at the time of arrest and through sentencing, including direct, collateral, or post-conviction appeals to state or federal courts.

Section 51-11-5 restates earlier sections regarding the types of cases requiring appointment of counsel, and adds a category for those persons whose order of probation or parole has been revoked. This section also places the determination of indigency upon the circuit court. It further states that subsequent determinations that a person is not indigent shall require revocation of appointment. In this event, the appointed attorney is to be compensated for services rendered to the date of revocation.

Section 51-11-6 deals with standards for the determination of indigency and states:

"In determining whether a person is a needy person, the circuit court shall consider such factors as his net worth and the liquidity of his assets, his disposable income, and the number and ages of his dependents, and may consider such other factors as it may deem pertinent and material, but the fact that the accused has been released on bond shall not be determinative of the question of eligibility."

Section 51-11-8 deals with the amount of compensation for fees and expenses. For each case assigned to an attorney under this article, he/she can be compensated for actual services rendered at the rate of \$20 per hour for work performed out of court and \$25 per hour for work performed in court. The compensation for services cannot exceed \$1,000 per case.

Expenses of the attorney can also be allowed for such items as travel, transcripts, investigative services, and expert witnesses. There is a maximum allowable expense of \$500 per case unless the attorney has received advance approval to incur higher expenses.

Each attorney is required to present to the circuit court an itemized voucher for such services and expenses and an affidavit certifying that these services have been actually rendered. Section 51-11-8 also requires submission of the voucher to the administrative office of the Supreme Court of Appeals for processing. Section 51-11-9 designated the director of the administrative office of the Supreme Court of Appeals as the person responsible for administering the program and resources created by the article. He was directed to employ personnel to assist him in carrying out his functions. However, due to insufficient funds the administrative director, (state court administrator) has only been able to play a very limited role since 1977.

### 2.3 Legislative History

The legislation discussed in the preceding section was enacted by the West Virginia legislature in 1977. However, as far back as the 1800's, the Supreme Court of Appeals for West Virginia interpreted Article 3, section 14 of the West Virginia Constitution to require appointment of counsel in felony cases for indigent defendants upon request. The West Virginia Legislature

first enacted a similar provision in its Code in 1923. Eighteen years later, the legislature expanded the right by requiring counsel for indigent defendants upon request in any criminal case in the circuit court in which an indictment issued. Since the circuit court has original jurisdiction by indictment in both felony and misdemeanor cases, the 1951 amendment expanded the right to counsel in those misdemeanor cases begun by indictment in the circuit court.

In the 1951 amendment provisions were first enacted for the payment of counsel. A maximum of \$25 was allowed for a misdemeanor and \$50 for a felony. For a number of years, the individual county was responsible for payment in misdemeanor cases and the state in felony cases.

In 1971 the Code was again amended to increase the allowable fees to \$50 in misdemeanor cases and \$100 in felony cases.

In 1973, the first attempt was made to introduce legislation to create a statewide public defender system. It failed.

Again in 1975 the Code was amended to increase allowable fees to \$100 in misdemeanor cases and \$200 in felony cases.

In 1976 another legislative effort was made to develop a statewide defender system. It also failed.

In 1976 a lawyer by the name of Partain filed a proceeding in prohibition in the Supreme Court of Appeals of West Virginia challenging his appointment as counsel to represent an indigent defendant. He claimed that the appointment was an unconstitutional taking of his property without adequate compensation. The State Bar of West Virginia filed an amicus curiae brief raising the broader question of the inadequacies of the entire system.

The Court in the case of Partain v. Oakley stated that it was not prepared at that time (1976) to declare the system unconstitutional, although it might clearly do so in the future. The Supreme Court further stated that it had the power and authority to develop a different system but it first wanted to give the state legislature a chance to improve the present system. The Court issued an order staying any further proceedings until July 1, 1977 at which time it would entertain further motions in the case.

Two bills were introduced in the state legislature in 1977. One called again for the establishment of a statewide public defender system. The other provided the detail for a new system, but with no statewide administration. The latter also called for a revision in the system of fees by moving

from a case figure of \$100 for a misdemeanor and \$200 for a felony to an hourly fee of \$20 for out of court time and \$25 for in court time with a maximum of \$1,000 per case.

On April 9, 1977 the legislature passed the second bill, which became effective July 1, 1977. The West Virginia Bar then petitioned the Supreme Court of Appeals in the Partain matter to review the legislation on the basis that it was not sufficient to meet the over-all problems. The court dismissed the case without a hearing.

While no organized efforts were undertaken in 1978 and 1979 to reintroduce the statewide public defender legislation there were many who felt that it was essential to operate under the new program for a sufficient period of time to assess the ongoing costs and the quality of representation. Now, after two years of experience with the legislation, efforts are again underway to create a statewide public defender system. The proposed bill, reproduced in Appendix A of this report, has been introduced in the 1980 legislative session.

#### 2.4 Current Practices

To our knowledge no effort has ever been undertaken to examine the present system for providing criminal counsel to the indigent accused in West Virginia. The effort we have undertaken in a relatively short period of time should not be construed as a definitive study of current practices, the quality of representation, or the actual direct and indirect costs. This report does, however, point out some of the problems with the current system and provides substantially more data than has previously been available in West Virginia. There is a strong likelihood that a more extensive effort would simply provide cumulative data consistent with our findings at a substantial cost. This view is stated for two reasons. First, our experience, and the experience of others who have examined similar systems, points to common problems basic to West Virginia and other jurisdictions with similar structural features. Second, we have received unusual cooperation in gathering pertinent data on the West Virginia system from numerous sources including the State Court Administrator's Office, the State Auditor's Office, The West Virginia State Bar, various circuit court clerks and judges, and officials from various magistrate courts. We also reviewed information from several active

members of the West Virginia bar, located in several different geographical areas. As prosecutors, judges, and defense counsel, these attorneys have had experience in the handling of indigent criminal cases at all levels in the court system. We have also had the opportunity to analyze recent case data reported by both the magistrate courts and the circuit courts to the state court administrator's office. These data have been carefully compiled by that office and verified on a sample basis whenever the numbers raised questions. In addition, personnel from the office have visited most, if not all the courts in West Virginia for purposes which include verification of case data. We are satisfied that the reported case data is well within acceptable limits of accuracy based upon communication we have received from the State Court Administrator's office.

In piecing together the data, the following information can be reported. With one exception, counsel appointed to represent the indigent in West Virginia is provided exclusively by private members of the bar. The exception is that some juvenile cases are handled by two civil legal service programs, the Appalachian Research and Defense Fund, with offices in eight locations, and the West Virginia Legal Services Plan, Inc., with offices in 13 locations. The amount and type of representation in juvenile cases varies widely within these two programs from judicial district to judicial district. Caseload data is not currently available. However, the amount of cases handled by these programs is not substantial and does not impact in any major way on the over-all system.

In at least one county a group of lawyers have agreed to handle all of the required cases, but this is an exception. For the most part, individual lawyers are appointed by the circuit court judge, judicial district by judicial district. While this practice varies across districts, it is the responsibility of the circuit court judge to develop a list of private attorneys who are available for appointment in that district. This can occur in a variety of ways, resulting in a totally voluntary system, a screening process, or simply the development of a list of all attorneys under a certain age who reside in or practice in a particular judicial district. There are some courts, however, in which cases are referred solely on the basis of attorney availability in the courtroom at the time an appointment becomes necessary.

The list of attorneys is maintained in each circuit court and only a circuit court judge can authorize an appointment. If it becomes necessary to appoint a lawyer in the magistrate court, the magistrate clerk is asked to contact the circuit court for the name of an attorney from the list. The attorney is then appointed by the circuit court judge to the case in the magistrate court. If the lawyer is not available for any particular reason, a second request is made using the same process until a suitable appointment is accomplished. If a misdemeanor case is appealed trial de novo to the circuit court, or if a felony case is bound over to the circuit court, in the majority of cases, the same appointed counsel appears in the circuit court. In other cases, a new appointment is made in the circuit court. The system varies from court to court.

For all matters commencing in the circuit court, a similar procedure is followed in that court. Should a case be appealed to the Supreme Court of Appeals from the circuit court, in most cases the trial attorney is reappointed. In others where sufficient reason appears, a new lawyer is appointed. For habeas corpus petitions entered in the Supreme Court of Appeals, that Court appoints counsel where appropriate.

Once the court appointed attorney completes his involvement in the case, he prepares a voucher with a requested fee. This fee is based upon the hourly charges permitted by the statute: \$20 an hour for out of court services and \$25 an hour for in court services up to a maximum of \$1,000 per case. The attorney also lists the expenses directly related to his representation.

This voucher is then sent to the appropriate circuit court for review and processing. A separate ledger is maintained in the clerk's office of each circuit court. Entries are recorded for each court appointment. The circuit court judge then reviews the voucher and enters an order for payment.

Upon receipt of the claim, the state court administrator's office retains a copy of the court of claims form and forwards the material to the State Auditor's Office.

Subject to the availability of funds, the auditor's office prepares a check and then returns the check along with the forms back to the appropriate circuit court. A final entry is made on the court appointment ledger in the circuit court. The check is then issued to the attorney.

It is our understanding that no substantive review is made of the vouchers in either the State Court Administrator's Office or the State Auditor's Office. For those cases arising in the magistrate court, no review of the voucher is conducted by the magistrate judge or the clerk. The review and modification of vouchers, whenever that occurs, is solely a function of the circuit court judge.

The usual practice is to permit only one fee for representation by a lawyer when the representation of a defendant is conducted by that lawyer in the magistrate court and the circuit court. A separate and new fee is generally permitted when the same attorney represents the same defendant on an appeal to the Supreme Court of Appeals.

Based upon the information supplied to us, the practices and policies relating to appointment of counsel and the billing for fees and expenses varies from circuit court to circuit court. Among the variations reported are the following:

- Some circuit court judges permit a separate fee request for multiple charges involving one defendant arising out of a single incident. The result is the approval of fees in a single case above the \$1,000 limitation. The State Auditor's Office reports this practice in some courts and an examination of sample vouchers verified this fact. Judges in other circuit courts strictly apply the \$1,000 limitation regardless of the number of counts in the indictment. The review of a number of sample vouchers disclosed this practice. For example, in one case a lawyer was paid a total of \$2,107.05 for one case which involved four charges. His fee per charge was \$451.40, \$552.25, \$551.45 and \$551.95.
- In some judicial districts, predominantly those in sparsely populated areas, great difficulty is found in securing the appointment of counsel, particularly in the magistrate court. In some cases, the result is to leave defendants without counsel during critical periods of the proceeding, which in some cases may violate the constitutional rights of defendants. Processing time is also adversely affected. Apparent conflicts are sometimes the problem, but the unavailability of counsel is also a serious problem.
- In some judicial districts, requests for reimbursement of expenses are uniformly granted within the \$500 limitation. In others, expenses are either reduced, not approved, or attorneys operate under the assumption they will not be approved. Practices vary substantially.
- In some judicial districts, attorneys no longer submit claims for fees or expenses because of the long time delays in processing. Some attorneys fail to submit claims because of the additional time necessary to pursue their claims.



should the annual appropriation be exhausted. It has been reported that some qualified attorneys are no longer called upon to participate in the program due to these and other problems in the system. The result is that frequently the only available counsel may be a recent law graduate with limited experience in criminal practice.

- While the statute requires representation in some cases immediately following arrest, appointment of counsel is seldom if ever made at that stage of the proceeding for a variety of reasons including those reported in this section.
- While there are specific provisions in the statute for partial payment of fees, we did not hear of one reported case in which this was required.
- There are no standards currently in existence to determine the question of indigency other than the broad statement contained in Section 51-11-6 of the present legislation. The general practice is not to look behind the affidavit to verify the reported data. Almost without exception, if an affidavit is filed, counsel is appointed.
- There do not appear to be any court rules or directives in West Virginia regarding uniform practices for appointment, for accepting a waiver or for standardizing the practice of allowance of fees or expenses.
- Finally, it is reported that for many of the stated reasons, counsel is only infrequently appointed in some magistrate courts. Waivers are made in a high percentage of the cases.

The problems outlined in this section are not unique to the West Virginia system. They have been found in many other jurisdictions with a similar ad hoc system which relies heavily on the practices and policies of individual judges and the cooperation and good will of the private bar. With the present methods of appointment and the added difficulty of securing competent counsel, it is practically impossible to fulfill the requirements of the West Virginia statute and United States constitutional law. No system can meet these requirements unless competent counsel is easily obtainable on short notice and prepared to represent an indigent defendant throughout the criminal proceeding.

To complicate matters, costs seem to be on the rise and can be expected to increase under such a system. The following section deals with the present cost of the system in West Virginia.

## 2.5 Current Costs for Counsel in West Virginia

It is extremely difficult to trace costs of indigent defense services back beyond 1977, because at that time the fee system shifted to an hourly charge. In prior years, the costs were shared between the county and the state: the county absorbed costs for misdemeanor cases and the state assumed the costs for felonies based upon a maximum cost of \$100 for a misdemeanor and \$200 for a felony. Since 1977, the state has paid the entire cost of defense services, except for a handful of cases requiring counsel in the municipal courts for ordinance violations carrying a potential jail sentence. We do know that costs have risen substantially following the institution of the new system in 1977.

The West Virginia legislature appropriated the sum of \$1.5 million to fund the first year of the system in 1977-1978. However, only approximately \$1,010,000 were actually expended. This is due, mainly to the fact that most vouchers paid in that fiscal year related to appointments made under the previous system. Consequently, the legislature appropriated a similar figure of \$1.5 million for the second year, 1978-1979. Unlike the first year, the full amount was expended in the second year and a large number of claims have been filed in the Court of Claims demanding reimbursement. Claims for the 1978-1979 fiscal year could be filed up until January 15, 1980. At the time of the preparation of this report, it was estimated that the additional claims would approximate \$200,000 bringing the direct charges to a figure of \$1.7 million.

There are a number of other costs, however, that are a direct result of the present system, but which do not appear as a line item in the state budget. They include:

- The hundreds of hours spent by circuit court judges and clerks and magistrates and magistrate's clerks recruiting, locating and securing the attendance of court appointed attorneys; the substantial time spent by the 55 circuit court clerks recording and maintaining a separate ledger for information on the appointment of counsel; the time spent by circuit court judges in each judicial district reviewing fee and expense vouchers; negotiating reductions and preparing court orders for the allowance of each fee and expense in over 10,000 cases annually; and the unnecessary burden of delay on all parties necessitated by the difficulty in attempting to secure appointed counsel in a timely fashion.

- The time expended by clerical personnel in the State Court Administrator's Office in processing the same claims.
- The substantial time expended by clerical and administrative personnel in the State Auditor's Office in keeping necessary records, reviewing claims and preparing necessary checks for reimbursement.
- The untold number of hours and time spent processing and deciding disputed claims in the Court of Claims.

The number of hours spent by all of the above personnel at their average hourly salary is of course impossible to obtain. We can be certain that thousands of hours are spent annually as a direct result of the requirements of the 1977 legislation. It could well be that this figure could run from \$200,000 to \$300,000 or more.

The present system has also created another serious cost which cannot be measured in dollar amounts. Many lawyers have ceased to submit claims for fees in appointed cases. Others submit only claims for expenses. This is due to the frustrations they have felt in attempting to be reimbursed for time and expense. One member of the West Virginia bar estimated that between \$100,000 and \$200,000 in fees have not been requested in 1978-1979 from lawyers who despair of the system. The danger, of course, is that in time these lawyers will join others in requesting that they not be appointed to represent indigent defendants in West Virginia.

The legislative appropriation for 1979-1980 is again \$1.5 million. Based upon experiences in other states operating predominantly on an assigned counsel system, it is predictable that the costs this year will exceed the \$1.7 expenditure by another \$200,000 or \$300,000. The cost of assigned counsel programs consistently increase at a percentage rate higher than public defender programs. This is due to a variety of reasons including increases in the over-all hourly rate in a number of states, increased requirements for counsel, unwillingness of judges to apply strict standards to billing practices and an increase in the total charge per case submitted by an attorney. It is particularly important to note that any over-all increase in the fee structure of an assigned counsel system can have a dramatic effect upon costs since it must be applied uniformly to a large number of cases.

Throughout the country, and in neighboring states to West Virginia, the hourly fees and average fees of private attorneys are on the rise. Hourly charges in excess of \$35 an hour are now permitted in eighteen of the

twenty-six states with standardized fee schedules. One state now permits a charge of \$50 per hour in all cases. Many of these states no longer place a maximum limit on a fee for a given case. West Virginia's fees are low. The bar may well seek to increase the fees within the next year or two. If applied to the more than 10,000 court appointed cases the result could prove to be overwhelming.

But the costs of a system should not be measured simply in terms of a dollar amount. There is no way to account for the enormous cost in time of personnel, attorneys, witnesses, and others because of the inefficiency of the present system. The losses are more than financial, for they may result in a loss of respect for the courts and the legal profession as well as a decrease in the quality of representation.

### 3.0 SUMMARY OF PROPOSED LEGISLATION AND ITS BENEFITS

The proposed 1980 legislation would amend the present legislation by establishing a statewide public defender system. The proposed bill makes provision for more efficient appointment and management of counsel for the indigent accused and is capable of responding to the diverse needs of West Virginia's urban and rural populations. Highlights of the changes which are provided by this proposed legislation are described below.

#### 3.1 Summary of Proposed Legislation

Under the proposed legislation, the current ad hoc assigned counsel system, described in Section 2 of this report, would be replaced by a statewide office of the public defender, which would include both a full-time and part-time public defender staff and private assigned counsel. As detailed in 29-21-3 and 29-21-5, the public defender, would be chosen by the Public Defender Board, would be responsible for the overall administration of the provision of legal services to the indigent, including hiring and training all personnel, obtaining the services of private assigned counsel where appropriate, obtaining funds, keeping relevant records and statistical data, and carrying out such other administrative responsibilities as would be required. The board would have important functions in developing policy for the program and reviewing the actions of the public defender in a number of areas spelled out in section 29-21-4. As part of the efforts to carry out these responsibilities, 29-21-7 stipulates that the public defender subject to the approval of the board shall establish regional offices with appropriate staff at convenient locations throughout the state.

Although full-time and part-time public defenders would be used wherever appropriate, section 29-21-12 of the bill allows the public defender to establish, supervise, and determine fee schedules for panels of private attorneys. Under the proposed legislation, panel attorneys could be appointed in (1) any case which requires some particular skill, (2) whenever necessary to meet caseload demands, (3) in such other situations as may be appropriate. Section 29-21-14 gives the public defender additional authority to enter into contracts with public or private non-profit organizations to provide any of the services guaranteed by Article 21.

Section 29-21-11 also mandates the establishment of an appellate division at the seat of the state government to provide for the representation, with assistance of trial counsel where necessary, on appeals and post-convictions.

The legislation provides for the central administration of funds for the defense of the indigent. As described in 29-21-6 of the proposed bill, a public defender fund would be created out of the West Virginia general revenue fund. Following the procedure specified in the West Virginia code, the public defender would have the right to draw against this money to finance the public defender staff, as well as to pay for the panel attorneys and contract services. Any money received under the partial payment provision for the marginally indigent (29-21-10), or as repayment for services that were procured through misrepresentation of financial status (29-21-16), would be placed in the public defender fund. As stipulated in 29-21-17, any person who represents a needy person may not receive any fee for his/her services in addition to that allowed under this chapter.

The new legislation also substantially improves the handling of the appointment of counsel. Article 29-21-9 establishes that it is the responsibility of both the court of record and of the detaining officer to clearly inform the indigent accused of his/her constitutional right to be represented by legal counsel at public expense. Under the proposed bill, the public defender, or one of his/her deputies, assistants, or panel attorneys, must (1) ascertain the financial status of the accused; and (2) represent the accused, providing investigative and other necessary services, at least until there is a formal judicial determination of indigency.

The proposed legislation does not significantly change the eligibility criteria for having counsel appointed, or the types of cases for which representation would be available, except that it does provide for the appointment of substitute attorneys (29-21-13) and for expanded appearance in federal courts (29-21-15) should the U.S. District Court decide to make appointments under the Criminal Justice Act of 1964 and should the public defender determine that federal funds available for this purpose are sufficient for services rendered.

### 3.2 Benefits of the New System

By the establishment of a centralized office of the public defender, the legislature would create an opportunity for the implementation of a more

efficient, economical program than presently exists, capable of meeting the federal and state requirements for the provision of counsel for indigent defendants in criminal cases. The proposed bill would also establish a system with sufficient flexibility to respond to changing problems, while at the same time keeping a lid on the potential costs of providing this constitutionally required service. The new statewide public defender system would also ensure uniformity of appointment, availability of appointment, and improved case processing for both the circuit and magistrate courts.

### 3.2.1 Improved Management

#### A. Centralized Administration

The current public defender system in West Virginia, though statewide, is decentralized and uncoordinated. As previously discussed, each circuit court is responsible for meeting its own needs; each county operates independently. There is no coordination of private attorneys services across courts, no sharing of investigative services, no training program for younger members of the bar, no supervision, no assistance in trial preparation and practice. The result of this ad hoc system is much unnecessary duplication of effort and no administrative method or means of identifying regional legal needs and distributing resources accordingly. Each county, and each court, must now develop a separate list of attorneys and a separate ledger in each court to record data on appointments. In addition, each court is responsible for scheduling, coordinating assignments, processing attorney claims, recruitment, etc.

The proposed legislation will centralize the West Virginia public defender system by creating a state public defender. The needs of each local jurisdiction will be met by the establishment of regional offices each with its own full-time and part-time attorneys as well as a panel of local private attorneys, prepared and willing to accept court appointments. Because of the fact that much of West Virginia is rural and many courts are substantially removed in miles from each other, there will be an obvious need to employ part-time attorneys in most regions. They will be prohibited from practicing criminal law but will be permitted to have a private practice. The establishment of centralized administration will reduce duplication of effort and allow for distribution of resources statewide as needed. In addition, centralized

administration will remove the responsibility for a vast array of administrative tasks (e.g., recruitment, scheduling, recordkeeping, budget preparation and monitoring, etc.) from others already overburdened in the court system. This will permit each regional office to concentrate its efforts on legal representation.

#### B. Controlled Costs

As described in Section 2, there is no accurate way to assess the precise amount of money expended for defense of the indigent in West Virginia. Nor is it possible to account for the enormous amount of time unnecessarily consumed by court personnel, attorneys, witnesses, and others because of inefficiencies.

The proposed legislation provides for the control of these costs. Uniform standards for reporting expenses and collecting fees will be established. Administrative regulations will be adopted and a plan for monitoring provided to ensure uniform compliance with the regulations.

Over time, the additional administrative cost can clearly be justified through economic efficiencies, uniform procedures and practices, and greater respect for the courts and system of justice in West Virginia.

#### C. Availability and Consistency of Public Defender Attorneys

One of the major problems with the current assigned counsel system in West Virginia is recruiting a sufficient number of qualified attorneys. This problem stems both from a paucity of attorneys in some counties and from difficulties experienced in reimbursement, low pay, and lack of administrative mechanisms for recruitment of panel attorneys and equitable assignment of cases. With a maximum allowable fee of \$1,000, lawyers in serious and complex cases bear a severe economic hardship, especially when other office work would provide substantial financial rewards. Some qualified lawyers find that they simply can no longer afford to participate in the program and have asked to be excused from further appointments. While it is clear that a lawyer cannot refuse to accept an appointment, many judges are sympathetic to the problem and do not appoint these attorneys.

The proposed legislation provides the structure and personnel to actively recruit and screen panel attorneys. By combining the administrative



mechanism together with the availability of at least one full-time public defender in each region, the proposed system will ensure the availability and consistency of representation throughout the state.

In addition to improving upon the availability of counsel in the circuit court, the proposed legislation will provide for continuity of representation so that the same attorney handles the case in the magistrate court and the circuit court where appropriate. Under the current system the process for engaging a court appointed attorney is time consuming and difficult and in many cases results in defendants waiving rights in magistrate court in order to proceed quickly in the circuit court. This is particularly true for defendants held in custody. By formalizing recruitment of private attorneys, streamlining the appointment process, and making full-time and part-time public defenders available, representation can occur at a significantly earlier point than is currently the case.

#### D. New Methods of Indigency Determination

Under current court practices there are no formal indigency standards or information review to determine a defendant's actual level of indigency. Private assigned attorneys do not have the opportunity to unilaterally assess their client's financial condition and the courts have no resources to expand on their current in-court inquiry concerning indigency. Under the proposed system each region would have the resources to explicitly determine the ability of defendants to afford counsel. In addition, the proposed system provides for the partial payment by defendants who are not totally impoverished but who cannot afford the full cost of an adequate defense.

#### E. Accountability

In the current system, no single person or office is or can be held accountable for the efficient economical and effective use of public funds for court appointment. While the state court administrator is charged with collecting court and caseload data and the state auditor is responsible for paying the bills charged by private attorneys, there is no office or individual at the local level with responsibility for monitoring day-to-day activities. By establishing a public defender agency with regional offices, there will be, for the first time, an administrative means, independent of the

judges, for monitoring the activities of private attorneys. The staff assigned to these regional offices will be accountable for the quality of representation, the timeliness and appropriateness of attorney appointments, and careful review of both fees and expenses claimed by panel attorneys.

#### F. Uniform Information System and Statistical Base

Under the present system, each circuit court within each county is responsible for processing and reporting court appointed cases and charges. As a result, there is greater variation in the accuracy and efficiency of reporting. Even though the current system is estimated to cost close to \$2 million, the West Virginia legislature cannot be sure of a) exactly how much it is spending on court appointments, b) what the need (caseload) for court appointments is, c) whether the current expenditures are meeting the need, d) whether the costs are reasonable, and e) whether the services provided are of sufficient quality.

In sum, even the most basic cost, workload, and performance data do not exist regarding the current system. Without this data, the legislature is severely constrained in performing its supervisory responsibilities. Under the proposed system, this necessary baseline data would be collected and monitored. For the first time, the legislature, the courts, and the public would have accurate and complete data on the caseload and costs of defense services on both a statewide and individual court basis.

### 3.2.2 Improved Services

#### A. Better Quality Representation

Experience demonstrates that the use of a combined public defender-private bar system results in improved quality representation. Attorneys who spend either full-time or a substantial portion of their time on criminal cases have many advantages over those who have primarily civil practices. They can keep up on the latest legal developments, conduct more thorough investigations, and become more skilled in cross-examination and other aspects of trial practice. Over time, they are also able to develop professional relationships with law enforcement officials, judges and prosecutors,

making them better able to negotiate dispositions than individual attorneys who seldom engage in criminal practice.

Involvement of the private bar is important, however, particularly if the private attorneys are carefully selected. There is no question that some private attorneys have both the interest and capability to handle individual cases. Qualified private attorneys include both more experienced attorneys who have established standards of excellence for representation and younger attorneys who desire to become involved in criminal and/or trial practice.

#### B. Uniform Recruitment and Selection Standards

Judges in West Virginia are currently responsible for both the recruitment and assignment of indigent defense cases to local attorneys. In many jurisdictions the panel of attorneys from which judges appoint is small. Often judges must make a strong personal appeal to an attorney to take a case because no other attorneys are available.

The absence of centralized recruitment and monitoring results in several shortcomings: 1) some lawyers are continuously assigned indigent cases because they are the least experienced or competent and therefore the most often available; 2) appointments at the request of the judge may have the appearance of patronage or conflict, thereby affecting the integrity of the lawyer-client relationship and 3) the availability of attorneys varies from place to place and time to time making scheduling difficult and time-consuming.

The proposed system makes recruitment of panel attorneys the responsibility of the public defender office. While availability and quality of counsel may still be a problem, the structure would become capable of identifying and dealing with these problems.

#### C. Training, Supervision and Retention of Personnel

Currently there are no specialized training programs offered to attorneys before they are assigned a criminal case and no supervision is available while the case is ongoing. One of the benefits of a centralized public defender system is the ability to devote and schedule time and resources necessary for an effective training and development program. Because of the common issues and techniques involved in many criminal defense cases, a uniform training package can be developed and delivered throughout the state

at a low cost, particularly after the initial development cost is absorbed. The training should be offered to both the staff public defenders and private attorneys. The benefits of such a training and supervision program are three-fold: the program a) results in more effective assistance of counsel; b) provides educational rewards to attorneys, thereby reducing turn-over; and c) provides an additional recruitment incentive.

In addition to training, the supervision which would be available through the regional offices would encourage the sharing of experiences and knowledge among public defenders. By reviewing cases both before and after trial, regional supervisors would foster greater professionalism, insure that cases are assigned properly and evenly, and avoid other inefficiencies. The increased efficiency of public defenders would spill over to the prosecutor's office and indeed the entire criminal justice system. Regional supervisors would also help recruitment efforts and improve the quality of representation by recent law school graduates and attorneys who are less experienced in criminal law.

#### D. Investigative Support Services

Investigative support services are often essential to effective representation. Such services are generally economical because the individuals hired to perform these services are less costly than attorneys, even though they can often handle many facets of a case which would otherwise necessitate the time of an attorney. The availability of these services permits the attorney to apply his experience to research, preparation, and trial.

Under the current system investigative services are typically available only for those lawyers who use them on an ad hoc basis at a much higher hourly rate than full-time public defender agency support personnel. In reviewing the sample of vouchers for fees and expenses, we did not come across a single claim for investigative services, even though the services are permitted by the present statute. The assumption is that either the private attorneys are performing the investigative function themselves or are absorbing the expense because they feel they will not be reimbursed by the system.

In addition to providing their traditional investigative services, these personnel could also assist the public defender in determining eligibility of prospective clients. In some jurisdictions, the savings which

accrue from these investigations may be greater than the costs for these positions.

### 3.2.3 Other Improvements

#### A. Reduction in Public Defender Caseload

We have discussed in other sections the potential reduction in caseload resulting from the establishment of uniform eligibility criteria and the administrative resources to test clients against these criteria. The proposed system will serve to reduce the caseload in at least two additional ways. Early intervention is generally acknowledged as necessary for effective and complete representation, but is not always possible in such a highly decentralized system as currently exists in West Virginia. Under the proposed system, the public defender in each region will be notified regarding the presence of indigent defendants in magistrate courts, a procedure that is not now available. As previously noted, representation in magistrate court is presently severely limited. By affording indigents representation in the magistrate courts many of the inappropriate, unsubstantiated and superficial charges which are bound over to the circuit court would be disposed of at the magistrate court level. In addition, with the assistance of counsel, some defendants may gain a realistic assessment of the cases against them resulting in an earlier disposition of the case and reduced court caseload. Finally, early involvement may well divert some offenders away from the criminal justice system and into more appropriate programs to deal with their specific problems.

In some regions the proposed public defender office may be able to intervene as early as the arrest stage. Representation at this stage can also be cost effective. By working with the police, the public defender can often help reduce overcharging at the station house, thereby reducing the level of effort required at formal court proceedings.

In sum, by creating the structure and resources to implement early intervention and eligibility criteria, the proposed public defender agency can reduce the current workload and thereby increase productivity.

#### B. Increased Independence From Judiciary

The national standards pertaining to criminal defense services all recommend that appointment of counsel be independent from the courts. While

national groups differ on some issues of public defense, all agree that appointment of counsel by the judge before whom the public defender must serve jeopardizes the integrity of the relationship between lawyer and client. In addition to causing the defendant to question the loyalty of his counsel, appointment by the judge can give the appearance of patronage and should therefore be avoided. The present system creates a further problem by granting the judge authority to approve the compensation for the attorney. Such authority places the attorney in, at best, an awkward situation. One of the benefits of the new system is that it takes the recruiting, appointing, and compensation responsibility away from the courts and assigns this responsibility to the office of the public defender.

C. Reduced Workload for Judiciary and State Court Administrator

A significant proportion of the administrative workload associated with representation of indigent defendants will be shifted away from the courts. For example, circuit court judges will no longer be responsible for recruiting private attorneys to represent indigents, scheduling court dates to accommodate the private cases of panel attorneys, reviewing and processing attorney's bills for fees and charges, etc. Lodging the administration of public defense in West Virginia in the public defender office will result in reduced paperwork for clerks in the magistrate courts, circuit courts, state court administrator's office, and the state auditors' office. In addition, the current reliance on the various court of claims to judge the appropriateness of disputed lawyer's fees and charges will also be greatly reduced. The proposed public defender agency will promulgate uniform fee schedules. With responsibility for these fee schedules, together with its own investigative service and close monitoring of all lawyers and court cases, the proposed system should effectively eliminate disagreement over fees and charges.

D. Encouragement of Private Bar

Although the proposed public defender system will be administered and staffed in each region of the state by full-time and part-time attorneys, it will also rely heavily on the services of the private bar. In the past, private bar support has not always existed and in some courts judges have not always had a full list from which to select attorneys. It is anticipated that

the proposed system will provide the structural and operational facilities to encourage members of the private bar to more actively participate. Among the benefits that they can expect to accrue from the new statewide program are the following:

- Uniform fee standards
- Case monitoring
- Expeditious fee processing
- Training
- Shared brief bank
- Investigative services
- Identification with a professional group of criminal law attorneys
- Handling of appellate cases

E. A Mixed System

Finally, by proposing a defense delivery system with several different methods of service delivery, the 1980 bill offers two distinct advantages: (1) a relatively smooth phase-in from the existing system of private attorneys; and (2) a flexible way of meeting the diverse needs of West Virginia's rural and urban populations.

#### 4.0 PROJECTED COSTS FOR STATEWIDE PUBLIC DEFENDER SYSTEM

The proposed legislation for a statewide public defender system in West Virginia provides for legal representation for indigent defendants in all felonies, misdemeanors, juvenile delinquency cases, habeas corpus proceedings, probation and parole revocation hearings and all appeals. In order to project the costs for delivering these legal services as well as for the additional services and benefits discussed in Section 3 above, it is necessary to determine the anticipated caseload to be served by the proposed system. The only statewide source of caseload data is the State Court Administrator's Office which receives its caseload figures directly from each court in the state. The data presented below were provided by the State Court Administrator who validated their accuracy by actually visiting many courts and comparing the court records with the figures submitted. Based on these efforts it appears that the caseload data presented below are well within the range of acceptable error.

In the following subsections we present felony, juvenile delinquent, misdemeanor and appellate caseload data for the various courts and the assumptions and conclusions leading to the projected public defender staff needs. Table 1 on the following page summarizes these caseload data, assumptions, and projected staff needs. The next subsection addresses the projected caseload for assigned counsel under the proposed system. This is followed by a discussion of administrative and non-attorney costs and a projected budget. Finally, this section concludes with a discussion of the need and method for phasing in the proposed program and budget.

##### 4.1 Projected Caseload and Staff

Numerous studies have been conducted around the country in an effort to determine the appropriate workload for public defender attorneys. Three of these studies have resulted in the development of national standards designed to ensure the quality of representation for indigent defendants: the National Advisory Commission on Criminal Justice Standards and Goals, (1973) the National Study Commission on Defense Services; Guidelines for Legal Defense Systems in the United States (1976); and the American Bar Association Project on Standards for Criminal Justice; Standards Relating to the Defense Function (1979).

At the present time, many defender programs are working toward meeting the proposed standards. All three of the above-mentioned studies call for



Table 1  
Summary of Caseload and Staff Needs

Type of Case	Total Caseload*	Indigency Rate and Remaining Caseload	Remaining Caseload After Waivers or Summary Dismissals	Remaining Net Caseload After Private Bar Assignments	Recommended Number of Cases Per Attorney Per Year	Projected Number of full-time Equivalent Attorneys Needed
Felony/ Circuit Court	5,449	(47%) 2,561	--	(75% P.D.) 1,921	150	13
Felony/Magis- trate Court [transferred to Circuit Court]	2,225	(47%) 1,046	(40% required lawyer) 418	(75% P.D.) 314	150	2
Felony/Magis- trate Court [processed in Magistrate Court]	1,112	(47%) 523	--	(75% P.D.) 392	150	3
Juvenile Cases/ Circuit Court	3,008	(80%) 2406	--	(75% P.D.) 1,805	200	9
Misdemeanor/ Magistrate Court	38,677	(25%) 9,669	(80% non- waivers) 7,835	(75% P.D.) 5,802	400	15
Appeals	47 appeals 38 habeas corpus petitions Total	(75%) 35 (100%)+ 38 73	--	--	25	3

\*These figures represent actual cases not charges as reported in the official court statistics.

the establishment of maximum caseloads for individual public defenders in felony, juvenile, misdemeanor, and appellate cases. The National Study Commission and the ABA standards place the responsibility for determining the appropriate caseload numbers on the local public defender administrator based on local factors such as travel, court backlog, vertical representation, and the severity and complexity of the cases. These and other factors will have to be weighed by the public defender and the public defender board in West Virginia once the program is established.

In the meantime, it is necessary for us to predicate a budget and lawyer staff based upon existing caseload data. The National Advisory Commission standards permit us to do so. They establish recommended annual caseload figures for felony, juvenile, misdemeanor and appellate cases. Many new programs, created since 1973, have successfully operated public defender agencies based upon these standards which are set forth below.

#### 4.1.1 Felony Caseload

The felony caseload covers both the circuit and magistrate courts. There is a large degree of overlap between the two courts, but unfortunately little information is available to determine the percentage of cases which overlap. Furthermore, the court statistics are expressed in terms of "filings" and not cases. According to the State Court Administrator's Office, filings are defined as charges. An individual defendant may have more than one charge on a given criminal information or indictment. According to the survey of a sample of courts across the state, the State Court Administrator determined that on the average there are two charges (or filings) per defendant (or case). This average is consistent with figures obtained in other states. In 1978, the circuit courts had a statewide total of 10,897 felony "filings." Using the average of two charges per defendant, there were a total of 5,449 "cases" in the circuit court for that period. Based on an assumed rate of 47 percent indigency in felony cases<sup>1</sup> a total of 2,561 felony cases would require representation from the public defender.

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<sup>1</sup>No current national standards have been developed to establish a rate of indigency for felony, juvenile or misdemeanor cases. The Other Face of Justice suggested rates, but they are now seven years old and have not been validated. In preparing for the implementation of the Wisconsin statewide defender program an indigency rate of 47 percent for felony defendants and 25 percent for misdemeanor defendants was used. After two years in operation, these figures seem to have proven accurate. Since many of the demographic characteristics of West Virginia are similar to those of Wisconsin, it seems appropriate to use the same rates of indigency.

The proposed legislation calls for a system which "mixes" public defenders with private counsel appointments. This mixed approach serves to maximize the use of the full-time and part-time public defender staff. Many of the benefits discussed in Section 3 above presume a dominant role for public defender staff. Most jurisdictions using a mixed system rely on assigned counsel to handle the conflict cases (cases with multiple defendants) and to balance the caseload of public defenders. Based on the experience in other statewide systems operating with similar assumptions, it is assumed that the West Virginia system will assign 75 percent of the caseload to public defenders<sup>1</sup> and the remaining 25 percent to the private bar.<sup>2</sup> Based on these proportions the annual public defender caseload in the circuit court would be 1,921. The National Advisory Commission on Criminal Justice Standards and Goals specifies that an attorney handling felony cases exclusively cannot reasonably handle more than 150 cases per year. Under this standard, it would take 13 attorneys to handle the 1,921 cases expected to make up the workload of the proposed public defender staff in the circuit courts.

The magistrate court also handles a large volume of felony cases. The jurisdictions of the magistrate court and the circuit court overlap, as the magistrate court, once it has determined that "probable cause" exists, transfers the case to the circuit court for trial or other appropriate adjudication. The magistrate court does have some limited power to dispose of felony cases, and in the majority of judicial districts most felony cases are initiated at the magistrate court level. In other judicial districts prosecutors begin most felony cases by direct indictment in circuit court. The information as to how many or what percentage of cases are transferred to the circuit court is not available. It is thus necessary to make several assumptions, again based upon practical experience and the operation of court systems generally.

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<sup>1</sup>The proposed legislation also intends for there to be a mix of part-time and full-time public defenders. The exact proportion of each category will be determined by the Board of Directors and the Public Defender. For purposes of this report our projections are in terms of full-time equivalent positions.

<sup>2</sup>The 75/25 percent ratio is simply an average. It may well be that in the sparsely populated areas it will be more efficient to raise the percentage of cases handled by the private bar. Such is the case in Wisconsin.

In 1978, there were a total of 11,123 felony charges filed in the magistrate courts. Applying the two charge per case adjustment discussed above, there were 5,562 cases. Because of the overlap in felony jurisdiction between the two courts, it is assumed that 80 percent of these cases were either transferred to the circuit courts or summarily dismissed in the magistrate court. Our assumption is that of this 80 percent (4,450), half (2,225) were transferred to the circuit court and half (2,225) were summarily dismissed in the magistrate courts. Of the 2,225 cases transferred, it is our assumption that approximately 60 percent (1,335) involved either a waiver of preliminary hearing or required virtually no time in court and thus no need for an attorney. The remaining 40 percent (890) we assume involved a formal preliminary hearing and substantial lawyer time before transfer to the circuit court. (This assumption is substantiated by several lawyers in West Virginia who explain that the preliminary hearing is sometimes used as a discovery device.) Assuming that 47 percent of these 890 cases involve indigent defendants, 418 felony defendants will require representation at the preliminary hearing level of the magistrate courts. If 75 percent (314) of these cases are handled by public defenders, two public defender attorneys will be necessary to process this caseload.

The remaining 20 percent or 1,112 felony cases processed in the magistrate court are those which we assume will be disposed of principally through the reduction to lesser included offenses within the jurisdiction of the magistrate courts. Assuming again that 47 percent of these cases involve indigent defendants, 523 felony defendants will require representation under the proposed system at the magistrate court level. Assuming further that 75 percent of those cases (392) would be handled by a public defender with a caseload of 150 cases per year, an additional staff of three attorneys is required. In sum, five full-time equivalent public defenders are necessary to provide representation for the projected felony caseload.

#### 4.1.2 Juvenile Delinquency Caseload

The data for the circuit court show that 6,016 juvenile filings were made in 1978. Again assuming that every 2 charges filed represent one "case", 3,008 cases were filed against individual children.

Because the definition of indigency in the proposed legislation is directed at the individual rather than the family unit, it is anticipated that 80 percent of the juvenile caseload will involve indigent children. Thus, the program may anticipate 2,406 juvenile delinquency cases annually. Again assuming that 75 percent of those cases would be handled by the public defender, approximately 1,805 juvenile cases may be expected to require representation by a public defender staff attorney.

The National Advisory Commission on Criminal Justice Standards and Goals specifies that an attorney handling delinquency cases exclusively should be assigned no more than 200 per year. Given that standard, the juvenile delinquency caseload will require the services of nine equivalent public defender attorneys.

#### 4.1.3 Misdemeanor Caseload

Perhaps the most difficult projection to be made is in the area of misdemeanor cases. The magistrate court caseload figures, again assuming every two charges filed represent one case, shows that there were 38,677 misdemeanor cases filed in 1978. Assuming that 25 percent of all misdemeanants are indigent (see footnote 1 page 31), there were 9,669 misdemeanor cases involving indigent defendants in 1978.

It is anticipated that some percentage of these cases will be relatively minor involving an informal plea bargain between the defendant and the prosecutor which results in quick disposition of the case with the imposition of a small fine or some other form of non-jail punishment. In some of these minor cases the right to counsel might be waived thereby further reducing the public defender caseload. Without any baseline data it is difficult to estimate the rate of waiver, but based on experiences in Wisconsin and other states, it is assumed that the right to counsel in 20 percent of the misdemeanor cases will be waived leaving 7,735 cases. Assuming further that only 75 percent of the cases will be handled by the public defender staff, the projected caseload involving misdemeanors is 5,802.<sup>1</sup> Based on the

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<sup>1</sup>West Virginia is one of the few remaining states with a trial de novo system for misdemeanor cases. Depending on the percentage of appeals to the Circuit Court these figures may need to be slightly modified. However, these modifications cannot be made until the program is in operation and the data become available.

National Advisory Commission's workload standard of 400 misdemeanor cases per attorney per year, we project a need for 15 equivalent public defender attorneys to handle the misdemeanor caseload statewide.

#### 4.1.4 Projected Appellate Caseload

Under the proposed legislation, the public defender may take any direct collateral or post-conviction appeal which he considers to be meritorious and in the interest of justice to a state or federal appeals court. Section 29-21-12 requires further that the public defender establish an appellate division to be located at the seat of the state government to provide representation in these cases, with the assistance of trial counsel. It is assumed that most of the cases to be handled on appeal by the system will involve the use of full-time public defenders. A few cases will, no doubt, be handled by the trial attorney in the case and some others by private attorneys when the issue of ineffective assistance of counsel is raised.

In 1979, 47 criminal appeals were decided in the Supreme Court of Appeals in West Virginia. Unlike criminal cases at the trial level, we are unaware of any data detailing the proportion of defendants in criminal appeals cases who are indigent. However, we assume the rate of indigency to be very high--75 percent--among criminal appellate defendants. Another 38 cases required the appointment of counsel by the court in habeas corpus petitions in 1979.

The National Advisory Commission recommends that no more than 25 appeals be handled by any one attorney in a given year. Based upon the above assumptions, we recommend an appellate division of three full-time attorneys. Table 1 on page 30 summarizes the caseload data, assumptions and projected staff needs discussed in the above subsections.

#### 4.1.5 Conclusions

Based upon the foregoing analysis, it is projected that the caseload would require a staff of 45 full-time equivalent public defender lawyers on a statewide basis. As noted above, it is expected that, especially in the more rural areas of West Virginia, part-time staff attorneys will be hired to provide the representation. It would appear from the caseload data, that in some areas a one-third time or one-fourth time attorney might be able to

provide the necessary level of representation. Except for the salary of the public defender, which is set at \$35,000 in the legislation, the salaries of the staff attorneys will be determined by the public defender. It is important that there be a range of lawyer salary to allow for advancement and to ensure that there are a sufficient number of senior attorneys with extensive trial experience hired at the early stages of the project. We assume that salaries of the 45 staff attorneys will range between \$14,000 and \$25,000 with the average at approximately \$19,000. The following is an example of a possible mix of salary levels:

<u>Number of Attorneys</u>	<u>Salary</u>	<u>Role</u>
5	\$25,000	Heads of five largest offices
5	22,500	Heads of the five smaller offices
16	20,000	Experienced attorneys/no administrative tasks but supervise new attorneys
9	17,500	Two years experience
<u>10</u>	<u>14,000</u>	Members of The West Virginia Bar/ little or no experience
45	Avg. salary \$19,000	

As will be discussed in the phase-in and implementation section below, planning the staffing pattern is of crucial importance to the success of the program. Many efficiencies due to the size of the program may be encountered, which would allow the public defender to concentrate the staff attorneys in the areas of the greatest need. Moreover, innovative use of the private bar to provide back-up services to the public defender, such as in times of large jumps in the caseload, can help the public defender to maintain an efficient operation.

Thus, the above projections must be viewed with some caution, but not so much that their validity is undermined. What is necessary is that the public defender and the public defender board seek to study the anticipated caseload carefully while implementing the program in order to determine how to most efficiently deploy the staff and take advantage of the economies of scale that are presented by a statewide operation.

#### 4.2 Projected Caseload and Cost for Assigned Counsel

The previous section assumes that 75 percent of the criminal cases involving indigent defendants will be handled by the staff of the public

defender program and 25 percent will be handled by assigned counsel. As evidenced in most statewide systems, the public defender must have the active participation of the private bar in all regions of the state. As noted above, the 75/25 ratio is anticipated to allow the assigned counsel to handle conflict cases and provide the public defender with the ability to control intake. They must also be prepared to play an important role in regions that are sparsely populated.

In addition to the necessary support for the public defender office, involvement of the private bar offers additional advantages. First, there are many highly skilled private practitioners who should remain active in the system. Second, the involvement of the private bar reduces the saturation of public defenders within the courts, and helps to maintain credibility before the courts. In some jurisdictions, familiarity of judges with criminal practitioners breeds discontent. It is better for the indigent clients, the courts and the public defender to make certain that the private bar remains active and involved in the criminal justice system.

Despite its advantages, the use of the private bar is relatively costly. The rate of compensation for assigned counsel under the current statute is \$20 for out-of-court time, \$25 for in-court time, with a maximum of \$1,000 in fees and \$500 in allowable expenses. These rates are unusually low and have resulted in several of the problems with the current system described in Section 2 above. However, even at these low rates, the more cases handled by the private bar the more costly will be the public defender system. Thus, the proposed system will keep the private bar involved, yet will reduce the burden on the private bar to unfairly assume the total responsibility of operating the system.

Under the caseload projections set forth in the preceding section, it may be assumed that the private bar share of the annual caseload will be as follows:

Felony Cases:	Circuit Court	- 640 cases
	Magistrate Court	- <u>235</u> cases
	Total	875 cases
Juvenile Delinquency Cases	611 cases	
Misdemeanor Cases	1,933 cases	



It is difficult to predict, at the above described rate of compensation, what the average cost per case will be. In Wisconsin, for example, where counsel receives \$35 per hour for all work connected with the case, with no maximum limit, and with reimbursement for reasonable expenses, the average felony case costs \$350, the average misdemeanor and traffic case costs \$200, and the average juvenile delinquency case costs \$300. In other states, the rate is more or less, depending on the statute which controls. Given the West Virginia statutory limits on the private bar cost, it would appear that the cost per case will most likely be less expensive than in Wisconsin. In addition, a small sample of 1979 assigned counsel vouchers in West Virginia were examined for each type of case. Based upon this review, the experience in Wisconsin and similar experience in other programs, the following projections of costs for assigned counsel are made for the new public defender system:

<u>Type of Case</u>	<u>Projected Cases</u>	<u>Projected Cost per Case</u>	<u>Projected Total Cost</u>
Felony	875	300	\$262,500
Juvenile	611	200	122,200
Misdemeanor	1,933	150	<u>289,950</u>
Total			\$674,650

In sum, while it appears that the private bar budget will be sizeable, the benefits previously discussed regarding private bar involvement in the program outweigh a policy of further restricting their appointment.

#### 4.3 Non-Attorney Costs and Projected Annual Budget

The two largest cost factors in a public defender program are the salaries of the staff and the cost of the private bar component. The previous two sections have identified those costs. In this section, we discuss non-lawyer costs.

Under the legislation, the public defender would be responsible for providing investigative services for both the staff attorneys and the private bar. In several programs, such as Wisconsin, the investigators required are established on a ratio of one investigator for every four trial staff attorneys. Under these circumstances, it would appear that the legislation's requirements would mandate a staff of ten investigators.

The proposed system will also require clerical support staff. Again drawing from the experience of other programs, a ratio of one secretary to every three attorneys appears to be optimal. Such a formula would require a minimum of 14 clerical persons. An additional factor, however, must be considered. It must be assumed, given the geographical considerations that must play a part in planning the program, that several small offices, with only one or two equivalent staff attorneys, would be created in the rural areas, perhaps to cover two, three, four or five counties. Since a law office cannot operate without clerical support and, assuming that the program will establish at least five such small offices, it is recommended that the program anticipate hiring 20 clerical personnel.

Another important consideration is the amount of travel that will be required by the staff in the program. Many of the offices will serve largely rural areas of the state. Even if the policy decision to utilize part-time staff attorneys in rural areas is made, there will still most likely be a large degree of multi-county representation. The travel cost can therefore be significant. Most likely a requirement for being hired will be ownership of an automobile, and thus the attorneys must be reimbursed for the travel.

In rural offices, it may be assumed that the staff attorneys will travel approximately 1000 miles per month. At that rate, assuming reimbursement at 17 cents per mile, the average staff attorney in rural offices will be reimbursed \$2,040 per year. Since the staff serving the urban communities will most likely not travel as much, it is difficult to predict precisely the actual cost of travel. For the purposes of this report, it is assumed that 12 full-time equivalent trial attorneys will serve the rural areas of the state, which would require reimbursement of approximately \$25,000. The remaining 30 trial attorneys will each travel approximately 300 miles per month, which would add approximately \$18,000 to the travel budget. In addition, meal reimbursement, lodging reimbursement and other forms of travel would bring the travel budget to an estimated \$85,000 annually.

Another area of expense is the rental of office space. It is unknown at this time what the average cost per square foot of office space is in West Virginia. Based on experience with other public defender programs, the rental cost should be approximately five percent of the total budget. In this program, it is anticipated that rental costs will be no more than \$125,000

annually. This figure is without regard to the possibility of obtaining space in one or more locations in either state, county or local government buildings at little or no cost to the program.

In initiating a public defender program, there will be a number of one time only costs, such as the purchase of office equipment, typewriters, xerox equipment, library materials, and the like. Again, it is most difficult to estimate the precise size of the start up costs, but in Wisconsin, for example, the 122 lawyer program received a \$265,000 federal grant to purchase equipment, and added approximately \$60,000 for library and other equipment. As the West Virginia program will require roughly one third the staff, it is reasonable to assume that \$110,000 would cover the start up costs.

The budget must also include expenses related to service needs. The need for expert witnesses in criminal cases is well established and is a costly item. Transcripts and subpoena fees can also be a significant cost. Roughly speaking, approximately five percent of the budget should be set aside for the cost of such services, which may be estimated at \$125,000 in West Virginia. Operational experience in the program would be most helpful in determining the precise size of these expenses in future budgets.

Finally, the program will require a small administrative staff to establish and develop the program. This would include the chief public defender, a chief deputy defender, and an administrative officer to maintain day to day administrative operations. The role of these individuals, while primarily administrative will also include training and in major cases assistance in litigation. In addition, the administrative staff should include a fiscal officer to maintain the private bar accounts, an administrative assistant and a secretary.

In view of the above discussion, the projected budget is as follows:

Trial Divison and Appellate Staff Attorneys; 45 at average annual salary of \$19,000 . . . . .	\$ 855,000
Trial Division Investigators; 10 at an average annual salary of \$12,000 . . . . .	120,000
Clerical personnel; 20 at \$8,000 each . . . . .	160,000
State Public Defender . . . . .	35,000
Chief Deputy Public Defender. . . . .	30,000
Administrative Officer. . . . .	20,000
Administrative Support Staff. . . . .	30,000
Travel Expenses . . . . .	85,000
Rent and Utilities. . . . .	125,000
One time only equipment costs . . . . .	110,000 <sup>1</sup>
Transcript and Expert Witness Fees. . . . .	125,000
Office operation costs (phone, postage, etc.) . . . . .	25,000
Private Bar Fees. . . . .	<u>674,650</u>
Grand Total:	\$2,394,650

It is thus evident that absent the one-time only start-up costs, the program could operate on an annual appropriation of less than \$2.3 million.

#### 4.4 Phase-in of the Program and Budget

The development of a statewide public defender program requires careful planning, substantial recruitment and administrative groundwork prior to implementation. There are no doubt a number of ways to implement the program that should be considered. However, inasmuch as West Virginia maintains a system of annual appropriations, it would appear that the best method for developing the statewide public defender program would be to phase in the system over a twelve-month period. We would recommend the continuance of the present system of private bar assignments for six months, after which the public defender program would assume the full responsibilities for the new program. Flexibility should be provided to permit implementation to occur throughout the entire twelve-month period, but for budgetary purposes, we assume the old program to be in place for the first six months and the new program for the last six months.

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<sup>1</sup> A fraction of these one-time only equipment costs may be incorporated in future years as a maintenance and library improvement cost.

During the "phase-in" period, the public defender board will have to be extremely active in developing policy for the program. It should also choose a public defender as quickly as possible, so that he or she can begin developing the program. Great emphasis must be placed upon the selection of the chief public defender. The chief defender should have previous experience on both the legal and administrative levels. The chief defender must be a highly motivated individual who will establish realistic goals for the program and the person must have the respect of the three branches of government as well as the public at large and the client community. As the early days of the program will establish the credibility of the program, the importance of the position of chief public defender cannot be emphasized strongly enough.

During the start-up, it would also be very important to develop the capability to administer the assigned counsel system, and to further develop the overall program so that it can become a resource center for the bench and bar in the area of criminal law. Through the establishment of a centralized appellate division, research assistance to the private bar could be made available. Procedures could also be established to begin planning an extensive and well thought out training program for lawyer staff and the private bar. Finally, the public defender and the public defender board could use the available time to develop program policies relevant to the practice of criminal law in West Virginia.

To accomplish a smooth phase-in and to allow time for these recommendations to be implemented, the present system of compensating private counsel for assigned cases would have to be continued for the first six months based upon the assumption that the annual level of private bar funding may well reach the \$2 million level by July 1, 1980. The expenses for the public defender program would likewise be basically one-half year, with the exception of the chief defender, the chief deputy, the administrative assistant, and secretary salaries, as well as the one time only start-up costs. As a result, the following budget may be established.

Continuation of present private bar assignment system for six months . . . . .	\$1,000,000
Core staff salaries for six months . . . . .	50,000
Funds for travel, telephone, postage, office rent, etc. during phase-in period (six months) . . . . .	92,325
One time only equipment costs. . . . .	110,000
One half year public defender budget (Excluding one time only equipment costs). . . . .	<u>1,142,325</u>
Grand Total	\$2,394,650

Clearly, initiation of a new statewide public defender program will not be an easy task. However, if the phase-in process can begin on July 1, 1980, the statewide public defender system could be in place by January 1, 1981. The core staff would of necessity have to be a highly motivated one, but it is clear from the experience of other programs that a few dedicated people can accomplish the task of developing the program within a year. The key to development of a viable public defender system in West Virginia, however, is the timely passage of the proposed legislation creating the program and the immediate selection of the most qualified public defender available.

## 5.0 CONCLUSION

In this report we have discussed the judicial and assigned counsel systems in the state of West Virginia and presented the best available data to document the actual costs currently incurred by West Virginia in its attempt to provide legal representation to indigent defendants in criminal cases. Based on the data and insights provided by several members of the West Virginia Bar, the State Court Administrator's Office and the State Auditor's Office we have also assessed the potential benefits and costs of the proposed statewide public defender system. As noted throughout, we were constrained by limited data. However, wherever possible we sought to detail and substantiate the assumptions on which our projections were based. With the the assistance of the Deputy State Public Defender for the State of Wisconsin and the Deputy General Counsel of the Massachusetts Defenders Committee, we were able to test our assumptions against the practical experience of two established statewide public defender systems. We have portrayed the current system as accurately as possible in the time available and we have projected a viable budget for the proposed system, however, the precision of our projection must necessarily be determined after implementation of the new system.

The following conclusions are based on the material covered in the preceding sections:

- The development of a statewide public defender system has been under consideration for seven years in West Virginia. For many the need for such a system has been clear since 1973 when the first attempt was made to introduce legislation. Now that the costs of the ad hoc assigned counsel approach have dramatically increased, there is renewed support for the centralized public defender system proposed in the current legislation.
- Although the present assigned counsel system imposes legislative constraints regarding billing for fees and expenses, the practice varies from county to county with some judges refusing to allow fees in excess of the \$1,000 limit and others imposing no ceiling at all.
- The current system suffers in varying degrees from failure to secure assigned counsel, slow reimbursement for attorney fees, little attempt to test for client eligibility or ability to make partial payment, and a high rate of waivers of counsel by indigent defendants.
- The actual costs of the current assigned counsel system is approximately \$2 million.

- The proposed legislation provides for a full-time public defender and staff to administer and provide the state-wide delivery of legal representation to indigent defendants. The bill envisions a mixed system involving the private bar and full-time and part-time public defenders.
- The anticipated benefits of the proposed system include improved management (e.g., centralized administration, controlled costs, accountability, etc.); improved services (e.g., better quality representation, training and supervision, investigative support services, etc.); and other improvements such as increased independence from the judiciary, and reduction in judicial workload, etc.
- The projected cost for the proposed system is \$2,394,650 which includes \$110,000 for one time only equipment costs. Although the projection is more than estimated costs for 1979, the fee scale currently used is likely to increase dramatically thereby making the current system more expensive than the proposed system.
- The proposed system should be phased in during the first 12 months. The cost for this period will equal the cost of a fully operational system and the process will guard against a reduction in service.

Within the limitations of our resources, we are prepared to provide further technical assistance should the bill be favorably acted upon by the West Virginia legislature.



APPENDIX

Proposed Legislation Relating to the Creation of  
an Office of the Public Defender In the State of  
West Virginia

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10 A BILL to amend chapter twenty-nine of the code of West Virginia,  
11 one thousand nine hundred thirty-one, as amended, by adding  
12 thereto a new article, designated article twenty-one, relating  
13 to the creation of an office of the public defender; declaring  
14 certain policies and findings and making certain definitions  
15 with respect thereto; providing for funding thereof; providing  
16 for the representation of eligible persons; establishing the  
17 public defender board, its appointment, powers and duties;  
18 establishing the method for appointment of the public defender;  
19 establishing the powers and duties of the public defender; pro-  
20 viding for panel attorneys; establishing certain standards for  
21 eligibility to receive the rights and benefits created hereby;  
22 providing for the compensation of the public defender and his  
23 deputies, assistants and investigative and clerical staff;  
24 making it a crime to make false statements regarding eligibility

1 for the benefits conferred hereby and providing a penalty with  
2 respect thereto; and providing for the interpretation of this  
3 article.

4 Be it enacted by the Legislature of West Virginia:

5 That chapter twenty-nine of the code of West Virginia, one  
6 thousand nine hundred thirty-one, as amended, be amended by  
7 adding thereto a new article, designated article twenty-one, to  
8 read as follows:

9 ARTICLE 21. PUBLIC DEFENDER.

10 29-21-1 Statement of legislative findings and policy.

11 In order that needy persons who have been charged with the  
12 commission of serious crimes against this state, or who have  
13 been convicted of such crimes, or who are subject to a court  
14 with jurisdiction over juveniles, be afforded the rights and  
15 privileges guaranteed to them by the constitution of the United  
16 States of America and the constitution of the state of West  
17 Virginia, it is necessary and in the public interest to estab-  
18 lish the office of public defender to counsel and represent  
19 such needy persons.

20 29-21-2. Definitions.

21 For the purpose of this article:

22 "Detain" means to have in custody or otherwise significantly  
23 deprive of freedom of action;

24 "Expenses" includes the expenses of investigation, other

1 preparation and trial expenses and the cost of transcripts of  
2 testimony, not otherwise provided at public expense;

3 "Needy person" means any person, whether juvenile or  
4 adult, who at the time his need is determined is unable to  
5 pay the other necessary expenses of representation without  
6 undue hardship;

7 "Serious crime" means:

8 (a) A felony;

9 (b) A misdemeanor or offense, the penalty for which in-  
10 volves the possibility of confinement or a fine of more than  
11 five hundred dollars, or any other offense in which, in the  
12 opinion of the court, either the complexity of the matter, or  
13 the youth, inexperience, or mental capacity of the accused, may  
14 require representation of the accused by an attorney; and

15 (c) An act which except for the age of the person in-  
16 volved, would otherwise be a serious crime;

17 (d) Any other charge, including revocation of probation  
18 or parole, which involves the possibility of confinement in a  
19 penal institution.

20 The term "serious crime" shall not include an alleged  
21 violation which is exclusively a violation of municipal  
22 ordinance.

23 29-21-3. Creation of office; appointment of public defender  
24 and staff; qualifications; compensation.

1           There is hereby created the office of public defender. The  
2 office shall be controlled and supervised by the public defender,  
3 who shall be appointed by the public defender board. Whenever  
4 there exists a vacancy in that office, the public defender board  
5 shall forthwith appoint the public defender. The public defender  
6 shall be a lawyer, licensed to practice law in this state, and  
7 experienced in the practice of criminal law. He shall not engage  
8 in the private practice of law during his service as public defen-  
9 der. He shall be appointed for a term of six years and, thereafter,  
10 until his successor is appointed. He may succeed himself. He  
11 may be removed by the public defender board, but during his term  
12 may be removed only for incompetency, neglect of duty, gross  
13 immorality or malfeasance in office. The salary of the public  
14 defender shall be thirty-five thousand dollars annually. Terms  
15 of the public defender shall commence on the twenty-first day of  
16 January. The public defender shall employ, within the appropria-  
17 tion made for the operation of his office, such deputy and assis-  
18 tant public defenders as are necessary to provide representation  
19 for needy persons as required of him by this article and fix  
20 their duties and compensation. Deputy and assistant public  
21 defender shall be lawyers licensed to practice in this state,  
22 shall serve at the pleasure of the public defender and shall  
23 not, during their service as public defenders, engage in the  
24 private practice of criminal law. The public defender shall

1 also employ, within the appropriation made for the operation  
2 of his office, such investigators, secretaries, stenographers,  
3 legal assistants, clerks and other personnel as shall be neces-  
4 sary to assist him and the deputy and assistant public defenders  
5 in the performance of their duties and fix their compensation.  
6 In their capacities as public defenders, the public defender  
7 and his assistants will recieve the same immunity from personal  
8 liability that is accorded to prosecuting attorneys.

9 29-21-4. Public defender board.

10 There is hereby created a "Public Defender Board" which  
11 shall be composed of three members, of whom two shall constitute  
12 a quorum for all business. Two of the members shall be lawyers,  
13 engaged in the practice of law in West Virginia, and all three  
14 of the members may not be of the same political party. The mem-  
15 bers of the public defender board shall serve for terms of four  
16 years, except that of the first three members of the board, one  
17 shall have a term expiring the twentieth day of January, one  
18 thousand nine hundred eighty-two; and two shall have terms ex-  
19 priing the twentieth day of January, one thousand nine hundred  
20 eighty-four. The members of the board shall be appointed by the  
21 governor, with the advice and consent of the Senate, each from  
22 a separate list of three nominees submitted to the governor.  
23 One nominee on each list shall be provided by the board of  
24 governors of The West Virginia State Bar, one by the president

1 of the Senate of West Virginia and one by the speaker of the  
2 House of Delegates of West Virginia. Any vacancy occurring  
3 on the board during the term of a member shall be filled by  
4 the governor for the remainder of the unexpired term. The  
5 members of the board shall annually designate a chairman, who  
6 shall preside over meetings and represent the board during his  
7 tenure as chairman.

8 The board shall hold meetings at such times and places as  
9 are designated by the chairman. It shall be the duty of the  
10 board to appoint a public defender and promptly fill vacancies  
11 as they occur; to study and observe generally the operations of  
12 the office of the public defender; to review and approve, modify  
13 or disapprove the actions of the public defender in establishing  
14 regions; in employing and terminating the employment of personnel  
15 and setting their salaries; in selecting and supervising panels  
16 of attorneys and establishing fee schedules for panel attorneys;  
17 in expending funds; and in making contracts as described in  
18 section fourteen of this article; in providing representation  
19 under a plan of a United States district court as provided in  
20 section fifteen of this article; and to report yearly to the  
21 governor on the operation of the office of the public defender.  
22 All actions of the public defender subject to review by the  
23 public defender board shall be effective until disapproved  
24 or modified by the public defender board. The public defender

1 board may adopt and promulgate such rules and regulations as  
2 may be deemed necessary to fulfill its obligations.

3 The members of the public defender board shall serve with-  
4 out compensation except that they shall be reimbursed out of  
5 the fund created by section five of this article for all neces-  
6 sary expenses, including travel, actually incurred in the per-  
7 formance of their duties.

8 29-21-5. Public defender - General duties and powers.

9 The public defender:

10 (a) Shall administer, control and coordinate the providing  
11 of services under this article and be responsible for the overall  
12 supervision of all personnel;

13 (b) Shall supervise the training of deputy and assistant  
14 public defenders and other personnel and establish such training  
15 programs as shall be appropriate;

16 (c) Shall obtain such funds as may become available from  
17 government grants or other lawful source;

18 (d) Shall keep records and statistical data with respect  
19 to the providing of services under this article and submit such  
20 reports as may be required by the public defender board;

21 (e) May establish programs to utilize law students and  
22 the facilities of accredited law schools in the rendering of  
23 services under this article;

24 (f) Shall endeavor by research and consultation to improve



1 the administration of criminal justice and the operation of the  
2 office of the public defender;

3 (g) Shall submit an annual report to the public defender  
4 board with recommendations for appropriations.

5 29-21-6. Funding of office.

6 All salaries and expenses incurred under this article shall  
7 be paid from a special fund in the state treasury, to be known  
8 as the "Office of Public Defender Fund", in accordance with  
9 appropriations by the Legislature. The public defender shall  
10 have the right to draw in a manner prescribed by the West Vir-  
11 ginia code against the money placed in said special fund for  
12 the use and benefit of his office such amounts as are necessary  
13 to fulfill his obligations under this article.

14 29-21-7. Location of offices.

15 The office of the public defender shall be at the seat of  
16 the state government. The public defender shall establish  
17 regional offices at convenient locations throughout the state,  
18 and assign such of his staff to them as necessary and convenient  
19 to perform his duties in that region.

20 29-21-8. Right to representation; stages at which represen-  
21 tation available.

22 A needy person who is being detained by a law-enforcement  
23 officer, or who is under formal charge of having committed, or  
24 is being detained under a conviction of, a serious crime, is

1 entitled to be represented by the public defender or one of  
2 his deputies or assistants or panel attorneys and to be pro-  
3 vided, by the office of the public defender, with the necessary  
4 services or representation, including investigation and other  
5 preparation. The counsel, representation, services and faci-  
6 lities, and the cost and expense thereof, shall be provided to  
7 such needy persons by the office of public defender at all stages  
8 of the proceedings through sentencing. Following the sentencing  
9 of any needy person represented pursuant to this article, the  
10 public defender may take any direct, collateral, or post-conviction  
11 appeals to state or federal courts which he considers to be meri-  
12 torious and in the interest of justice, and shall file a notice  
13 of appeal and proceed with one direct appeal to the Supreme Court  
14 of Appeals of West Virginia, upon a timely request after senten-  
15 cing from any such convicted needy person, subject to the public  
16 defender's right to apply to the court to withdraw from represen-  
17 tation in any appeal which he deems to be frivolous.

18 The right of a needy person to a benefit conferred by this  
19 section is not affected by his having provided a similar benefit  
20 at his own expense, or by his having waived it, at an earlier  
21 stage.

22 29-21-9. Notice; representation provided; waiver.

23 If a person who is being detained by a law-enforcement  
24 officer, or who is under formal charge of having committed, or

1 is being detained under conviction of, a serious crime, or  
2 who is subject to possible incarceration in a public or private  
3 institution pursuant to a judicial commitment order, and main-  
4 tains he cannot afford to employ counsel, is not represented by  
5 counsel under conditions in which the right to representation is  
6 granted to such person by law, the detaining officer concerned  
7 or the court having jurisdiction of such person, as the case may  
8 be, shall clearly inform him of the right of a needy person to  
9 be represented by the office of public defender at public ex-  
10 pense, and notify the appropriate office of the public defender  
11 that the person so detained or charged, as the case may be, is  
12 not represented by counsel. Upon notification that a person is  
13 not represented, and maintains he cannot afford to employ counsel,  
14 the office of public defender shall represent him until a deter-  
15 mination can be made regarding his eligibility as a needy person  
16 under this article. The office of public defender shall ascertain  
17 the financial status of such persons as soon after beginning rep-  
18 resentation as it may conveniently do so. Any person entitled  
19 to representation under this article may intelligently waive his  
20 right to representation. The waiver may be for all or any part  
21 of the proceedings.

22 29-21-10. Determination of need; certified statements;  
23 penalties for false statements.

24 The determination of whether a person is needy as defined

1 in this article shall be deferred until his first appearance in  
2 a court of record or in an action for reimbursement as herein-  
3 after provided, whichever occurs first. Thereafter, the court  
4 before whom such person appears at any stage of the proceedings  
5 against him shall determine, or cause to be determined, whether  
6 he is a needy person. In determining whether a person is a  
7 needy person, the court concerned shall consider such factors  
8 as his income, property owned, outstanding obligations and the  
9 number and ages of his dependents, and the court may consider  
10 such other factors as it deems material to the question. Release  
11 on bail does not necessarily prevent one from being a needy per-  
12 son. In each case, the person involved shall certify in writing  
13 to be made part of the record such material factors relating to  
14 his ability to pay as the court prescribes.

15 To the extent that a person is able to pay for the counsel,  
16 services, facilities and representation provided for in this  
17 article, without undue hardship to such person or his dependents,  
18 the court having jurisdiction over him may order that he make  
19 such payment. Of such person shall willfully give false infor-  
20 mation to the court with respect to his financial position, he  
21 shall be guilty of a misdemeanor, and upon conviction thereof,  
22 shall be fines not more than five hundred dollars, or imprisoned  
23 in the county jail not less than three months nor more than one  
24 year, or both fined and imprisoned. Before making such deter-

1 mination of need the court shall advise the person of the  
2 penalties for giving false information and the possibility  
3 of a suit for recoupment under section sixteen of this article.

4 29-21-11. Establishment of appellate division.

5 The public defender shall establish within the office an  
6 appellate division which shall be located at the seat of the  
7 state government and which shall provide the representation,  
8 with the assistance of trial counsel where appropriate, for  
9 appeals and post-convictions remedies authorized by this  
10 article.

11 29-21-12. Panel attorneys.

12 The public defender shall establish and maintain one or  
13 more panels of private attorneys-at-law who shall be available  
14 to serve as counsel for needy persons eligible for services  
15 under this article. The public defender shall appoint one or  
16 more panel attorneys to represent a needy person eligible for  
17 services under this article in any case which requires some  
18 special skill or experience not available among staff attorneys,  
19 or whenever necessary to meet caseload demands, or in situations  
20 as may be appropriate. The primary duty of all attorneys ren-  
21 dering services under this article shall be to the individual  
22 defendant, with like effect and to the same purpose as though  
23 privately engaged by the needy person and without regard to the  
24 use of public funds to provide the service. The public defender

1 shall supervise the rendering of services by panel attorneys  
2 and shall compensate panel attorneys for services rendered and  
3 expenses incurred in accordance with fee schedules established  
4 from time to time by the public defender. Compensation shall  
5 be from the fund established pursuant to section six of this  
6 article. Any attorney seeking compensation for legal fees or  
7 expenses disapproved by the public defender or in excess of  
8 those authorized for payment may seek review of the actions of  
9 the public defender by petitioning the public defender board  
10 within thirty days of the date of the decision of the public  
11 defender. The public defender shall provide such assistance  
12 or advice to panel attorneys as may be appropriate.

13 29-21-13. Substitute attorneys.

14 At any stage the court may for good cause shown appoint  
15 one or more substitute attorneys to replace any attorney pro-  
16 viding representation pursuant to this article. The substitute  
17 attorney shall have the same duties with respect to the needy  
18 persons as the attorney whom he replaces. Compensation for  
19 any such substitute attorney shall be from the funds appropriated  
20 for the office of the public defender and shall be in accordance  
21 with the fee schedule maintained by the public defender for  
22 payment to panel attorneys and shall be approved by the court  
23 making the appointment.

24 29-21-14. Authority to contract.

1           The public defender is authorized to enter into contracts  
2 with public or private nonprofit organizations to provide any  
3 of the services to which needy persons are entitled under this  
4 article. Any such contract shall be terminable by either party  
5 by giving at least six months notice of intention to do so.  
6 Services rendered under any such contract shall be under the  
7 general supervision of the public defender.

8           29-21-15. Federal courts.

9           This article applies only to representation in or with  
10 respect to the courts of this state. It does not prohibit the  
11 office of public defender from representing a needy person in  
12 a federal court of the United States, if:

13           (a) The matter arises out of or is related to an action  
14 pending or recently pending in a court of criminal or juvenile  
15 jurisdiction of the state; or

16           (b) Representation is under a plan of the United States  
17 District Court such as permitted by the Criminal Justice Act  
18 of 1964 or like federal statute, and the public defender concludes  
19 that payment to his office is sufficient for services rendered.

20           29-21-16. Action to recover for services provided by  
21 public defender.

22           The prosecuting attorney of any county in which a person  
23 receives any benefits provided for by this article shall attempt  
24 to recover payment or reimbursement, whichever is appropriate,

1 from any person receiving any such benefit (a) to which he was  
2 not entitled, or (b) with respect to which he was not a needy  
3 person when he received same, or (c) with respect to which he  
4 has failed to make the certification required by ~~this~~ section *ten*  
5 and for which he, upon demand, refuses to pay or reimburse.

6 Any such action shall be brought within five years excluding  
7 time during which the person was imprisoned after the date on  
8 which the last of such benefits was received. The prosecuting  
9 attorney may likewise recover payment or reimbursement, which-  
10 ever is appropriate, from any person, other than one described  
11 in the first sentence of this section who has received any  
12 benefits provided by this article and who, on the date on which  
13 the action is brought, is able to ~~pay~~ or reimburse for such  
14 benefits according to the standards set out in section ten of  
15 this argicle. Any such action shall be brought within three  
16 years after the date on which the last of such benefits was  
17 received.

18 Any amount~~g~~ paid or recovered under this section shall be  
19 paid into the fund created by section six of this article.

20 29-21-17. Additional fees forbidden.

21 A person who represents a needy person under this chapter  
22 may not receive any fee for his services in addition to that  
23 provided under this chapter.

24 29-21-18. Interpretation.



1           Nothing in this article shall be interpreted to exclude any  
2 protection or sanction that the law otherwise provides. Nothing  
3 in this article shall be interpreted to affect the rules governing  
4 the admissibility of evidence. This article shall not be inter-  
5 preted to repeal the provisions of article eleven, chapter fifty-  
6 one, or section one, article three, chapter sixty-two of this  
7 code, which shall remain in full force and effect for the pro-  
8 vision of services not available under this article. Provided,  
9 that when services are available under this article, they shall  
10 be provided hereunder.

11           29-21-19. Severability.

12           The provisions of this article are severable, and if any  
13 provision, sentence, clause, section or part thereof is held  
14 invalid or unconstitutional, such invalidity or unconstitution-  
15 ality shall not affect or impair any of the remaining provisions,  
16 sentences, clauses, sections or parts of this article or their  
17 application to other persons or circumstances.

**END**