

## YOUNG LAWYERS

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## WE'RE IN BIG TROUBLE: THE ISSUE OF TIMELY PAYMENT OF COURT APPOINTED COUNSEL

“We’re in big trouble.” These were the words of Jack Rogers, executive director of West Virginia Public Defender Services, in a Dec. 8, 2002, article in the Sunday Gazette-Mail when asked to describe the dilemma his agency faced due to a shortfall of state funds to pay court-appointed attorneys. Almost seven years later, the West Virginia lawyers who rely on court appointments are still waiting for a permanent solution.

By way of background for those who may be unfamiliar, Public Defender Services (PDS) is the state agency responsible for providing funds and support services to attorneys who represent indigents accused of crimes and other wrongdoings. There are two separate methods of representation funded by this agency: (1)

private attorneys appointed on a case-by-case basis and (2) full-time public defenders. PDS pays each private attorney on an hourly basis for each case pursuant to a court order, following review and approval by a Circuit Court Judge. Full-time public defenders, on the other hand, are employees of state-run public defender corporations that are organized at the Circuit Court level and funded directly by PDS. Currently there are 17 public defender corporations covering 29 of the state’s 55 counties.

In the July/August 2008 edition of *The West Virginia Lawyer*, Martin J. Wright, the immediate past chairperson of the Young Lawyers Section, highlighted the urgency of addressing this issue when he concluded that “countless ... explanations have been

asserted and debated, but the time has come for agreement that the system is ‘broken’ and needs a ‘solution.’”

For example, during the 2001 fiscal year, PDS only had enough money to process court-appointed attorney vouchers for 9½ months out of the year and was forced to begin the 2002 fiscal year with a \$6-million deficit. A similar and substantial backlog of payments occurred in 2007 as well. Unfortunately, this scenario is not uncommon; it has gotten to the point where some lawyers have turned to payday-lender-like finance companies for advances on their unpaid vouchers, with the lender keeping at least one-fifth of the voucher’s value in exchange for the advance. Much has happened since Wright issued this call to action, though nothing

in the form of a long-term fix to what has obviously become an annual problem.

The events thus far in 2009 are a case in point. The PDS budget for the 2009 fiscal year that ended on June 30, 2009, was approximately \$31.7 million. The agency exhausted all of its funds on March 10, 2009—a full three months before the end of the fiscal year. A combination of factors contributed to the unusually large funding shortfall, including a change in state law that shortened the time for court-appointed lawyers to submit pay vouchers from four years to 90 days.

Typically, the Legislature approves a supplemental appropriation to PDS each year at the same time it approves the next fiscal year's budget (which normally occurs in mid-March, and the money becomes available in April). This year, however, the Legislature put off the budget conference until the last week of May. Nonetheless, and thanks to continually robust video lottery revenues, the Legislature passed a \$21-million supplemental appropriation during its May budget session that will eventually clear the backlog of payments to court-appointed lawyers across West Virginia (for this year).

Solutions to this ongoing problem have been debated for more than a decade. Putnam County Circuit Judge O.C. Spaulding told an interim legislative committee in November 1997 that the state could stem the rising cost of legal services for indigent defendants by creating a public defender office in every county in the state. This option is attractive to some because creating new offices, even on a part-time basis in some counties, would at least give lawmakers an annual budget with which to work. Under the current system in counties where public defender offices do not exist, private attorneys appointed by the courts bill the state for their services. It has become increasingly difficult for PDS (and the Legislature) to predict the number of appointed cases that will arise in a given year, or the fee requests resulting from those appointments.

Other, less feasible options include requiring defendants to pay back court costs and making parents pay the legal fees of their children when they are charged as juveniles. Still another alternative would be for lawmakers to lessen the penalties for crimes such as shoplifting, writing bad checks, driving with a suspended license, etc. Taking away the possibility of jail time for these and other offenses would reduce the need for public defenders or court-appointed counsel.

Further, the Legislature created the Indigent

Defense Commission in 2008 and charged it with providing assistance and recommendations concerning the general policies and procedures of PDS. The Commission recommended that four more public defender offices be opened around the state. The Commission also recognized that hourly rates for court-appointed counsel had not changed since 1990 and consequently recommended that the hourly rate rise to \$75 per hour for work performed out of court and \$105 per hour for in-court appearances. Unfortunately, the legislation recommended by the Commission did not pass during the 2009 regular session. Even if this recommendation had been adopted, it would have only raised the hourly rates to those of many paralegals in the state. At the abysmal \$45-\$60 hourly rates currently paid, many lawyers cannot afford to take these cases because it is less than their overhead. (This, of course, is assuming payment is actually made in a timely manner).

But certainly give Gov. Joe Manchin credit for trying. He has, on at least two occasions, caused legislation to be introduced that would implement changes similar to those recommended by the Commission. One of the Governor's more recent proposals advocated increasing the PDS budget by \$4.5 million to open additional public defender offices. The fact remains that lawmakers, for whatever reason, have not made it a priority to increase funding to pay lawyers who represent indigent criminal defendants. In my opinion, if the legislature will not step up and rectify this continual problem, lawyers around the state who are not paid in a timely manner should consider bringing a class action against PDS.

The inevitable result of continuing the current funding process for court-appointed counsel is that a greater number of attorneys will refuse to accept appointed cases. This refusal will undoubtedly cause a critical shortage of qualified and dedicated attorneys to represent those who do not qualify for representation by one of the public defender offices, yet are still entitled to a lawyer under the state and federal constitutions. If no action is taken in the very near future, we're definitely in big trouble.

*I would like to thank Jason Pizatella for his significant contribution to this article. Mr. Pizatella practices in Charleston with Spilman, Thomas and Battle PLLC and is a member of the Young Lawyers Executive Committee. He was very instrumental in educating me on many of the issues contained herein.* **WVWL**