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# STATE OF WEST VIRGINIA

# Department of Administration
# Update of the
# PRELIMINARY PERFORMANCE REVIEW OF THE

# Public Defender Services

**Public Defender Services is in Non-Compliance**
**with Recommendation 3**
**Partial Compliance with Recommendation 4**
**Non-Compliance with Recommendation 5**

**OFFICE OF LEGISLATIVE AUDITOR**
**Performance Evaluation and Research Division**
**Building 1, Room W-314**
**State Capitol Complex**

**CHARLESTON, WEST VIRGINIA 25305**
**(304) 347-4890**

**December 2001**

**PE01-25-224**

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**December 2001**

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# WEST VIRGINIA LEGISLATURE

*Performance Evaluation and Research Division*

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John Sylvia
Director

December 9, 2001

The Honorable Edwin J. Bowman
State Senate
129 West Circle Drive
Weirton, West Virginia 26062

The Honorable Vicki V. Douglas
House of Delegates
Building 1, Room E-213
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0470

Dear Chairs:

Pursuant to the West Virginia Sunset Law, we are transmitting an Update of the Preliminary Performance Review of the *Public Defender Services,* which will be presented to the Joint Committee on Government Operations on Sunday, December 9, 2001. The issues covered herein are "Public Defender Services is in Non-Compliance with Recommendation 3;" "Partial Compliance with Recommendation 4;" and "Non-Compliance with Recommendation 5."

We transmitted draft copies of the Update to the Department of Administration and the Public Defender Services on November 28, 2001. We conducted an exit conference with the Department of Administration and the Public Defender Services on December 3, 2001. We received the agency response on December 7, 2001.

Let me know if you have any questions.

Sincerely,

John Sylvia

JS/wsc

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# Executive Summary

Public Defender Services was created by the Legislature in 1989 in order to provide high quality legal assistance to indigent persons who would be otherwise unable to afford adequate legal counsel. The Legislative Auditor conducted a Preliminary Performance Review on Public Defender Services, which resulted in a report being issued in January of 1999. The following issues were discussed in the report:

1. Public Defender Services Should Maximize the Use of Public Defender Corporations to Cut Costs of Defending Indigent Persons.

2. Public Defender Services Does Not Adequately Monitor Improvement Needs, Compliance, and Quality of Legal Services as Required by Statute.

This Compliance Monitoring of the Preliminary Performance Review uses the following designations of levels of compliance.

**Table 1**
**Levels of Compliance**

| |
|---|
| In Compliance - Public Defender Services has corrected the problems identified in the 1999 audit report. |
| Partial Compliance - Public Defender Services has partially corrected the problems identified in the 1999 audit report. |
| Planned Compliance - Public Defender Services has not corrected the problem but has provided sufficient documentary evidence to find that the Commission will do so in the future. |
| In Dispute - Public Defender Services does not agree with either the problem identified or the proposed solution. |
| Non-Compliance - Public Defender Services has not corrected the problem identified in the 1999 audit report. |
| Requires Legislative Action - The recommendation was intended to call to the attention of the Legislature to one or more statutory issues. |

Public Defender Services is in **Non-Compliance** with Recommendation 3; **Partial Compliance** with Recommendation 4; and **Non-Compliance** with Recommendation 5.

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## Issue 2: Public Defender Services Does Not Adequately Monitor Improvement Needs, Compliance, and Quality of Legal Services as Required by Statute.

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## Recommendation 3:

*Public Defender Services should begin gathering data that can be used to measure the quality of legal representation. Conviction rates, court and out-of-court time, research time, costs, etc., of felony cases should be collected for public defenders and private attorneys. Statistical analysis should be conducted to determine if differences between public defenders, private attorneys, and within Public Defender Corporations are statistically significant. The agency should also develop data on costs, billable and nonbillable time, and administrative time that is comparable for a meaningful and accurate comparison between public defenders and private attorneys. The agency should implement caseload standards for Public Defender Corporations to identify staffing needs and monitor threats to quality legal representation.*

**Level of Compliance: Non-Compliance**

The Executive Director of Public Defender Services (PDS) has informed the Legislative Auditor that in FY 2001 funds were allocated to Public Defender offices to hire IS&C to complete a project which would enable Public Defender Services to identify types of cases, specific charges, in-court and out-of- court time, total hours spent per case, per attorney, per county, and per circuit, as well as the usual costs per case and costs per hour. IS&C began work on the project in June of 2000 and has completed the first stage of gathering Public Defender data for analysis. The agency's goal is to be able to use their Oracle data base, currently in use for private counsel data since October of 1998, to gather similar data for Public Defenders. Preliminary data has been transmitted to the agency and they are in the process of analyzing the data for errors or duplication. Public Defender Services plans to have a complete report by January of 2002.

With regards to caseload standards for Public Defender Corporations, PDS has not implemented any. However, the Executive Director of PDS informed the Legislative Auditor that almost every Public Defender office meets or exceeds the National Legal Aid and Defense Association's (NLADA) caseload standards. According to the Executive Director, there is an "insidious danger" to setting caseload standards. The Executive Director goes on to state that,

> *If every attorney is under pressure simply to produce numbers, the focus changes from providing adequate representation to simply producing numbers. There is always a temptation to cut corners in order to raise "output".... Putting artificial goals in place simply so we can say we have goals sends the message that we do not care about representing clients, only about producing numbers.*

The Executive Director's comments on caseload standards is inconsistent with their intent.

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Caseload standards are not "goals" or output measures, nor are they used as an incentive to "produce numbers" or "raise output". Caseload standards are a measure of what would be considered a manageable workload for an employee. Anything above the caseload standard would represent an unmanageable workload and a threat to quality work. The usefulness of caseload standards is that they can be used in part to measure the quality of legal representation by public defenders. Caseloads well in excess of standards represent a compromise of quality service. Caseload standards also help to identify whether or not a Public Defender office is understaffed, **which in turn does have a direct impact on the quality of legal representation.** Any caseload standard must incorporate the differences between types of cases or create separate standards for several types of cases. The Legislative Auditor contends that Public Defender Services needs to implement caseload standards for Public Defender Corporations to monitor staffing needs, justify greater use of private attorneys, and to facilitate quality legal representation.

For this recommendation, the Legislative Auditor assigned a ranking of **Non-compliance**. While there is planned compliance with the first part of the recommendation, there has been no action taken with caseload standards since the original report three years ago. The Legislative Auditor feels that this recommendation should have been acted upon more expeditiously since the requirement of comparing public defenders and private attorneys is required by West Virginia Code §29-21-6(d) which states as follows:

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

The Executive Director did state that he has been attempting to increase the gathering of data by requesting additional staff for Public Defender Services for the past ten years. He went on to state that:

> *Because of the denial of that request* (new staff additions), *and the pitiful amount of fund we had to work with, we were unable to gather Public Defender data with the high level of sophistication possible for private attorney billings.*

The Legislative Auditor does commend the agency for contracting with IS&C to gather and evaluate the additional data to measure legal representation.

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## Recommendation 4:

*Public Defender Services should develop a system that uses statewide average private attorney expense claims for each case category to compare with individual private attorney expense claims for similar cases. The agency should consider providing each circuit court with these statewide averages to assist them in determining if private attorney expenses are reasonable or*

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*necessary. The agency should require additional documentation to justify an expense claim that exceeds the average by an established percentage. The agency should develop a dialogue with courts and private attorneys that intends to discourage any continuance of unjustified excessive expense claims of attorneys.*

**Level of Compliance: Partial Compliance**

In response to the Legislative Auditor's recommendation of Public Defender Services developing a system that uses statewide average private attorney expense claims for each case category to compare with individual private attorney expense claims for similar cases, Public Defender Services has incorporated average costs for specific charges into its annual report. Therefore, Public Defender Services is complying with this portion of the recommendation.

With respect to Public Defender Services requiring additional documentation to justify an expense claim that exceeds the average by an established percentage, the Executive Director states:

> *The documentation already required is very substantial and does not need to be supplemented.*

In addition, according to the Executive Director all Circuit Court Judges receive a copy of the annual report, which they can use as a guide in setting payments. Nonetheless, Public Defender Services is not in compliance with this part of the recommendation.

The "third part" of Recommendation 4 pertains to Public Defender Services developing a dialogue with courts and private attorneys that intends to discourage any continuance of unjustified excessive expense claims of attorneys. According to the Executive Director:

> *The "dialogue" with private attorneys and judges has been continuous and occasionally contentious since December, 1989 when I was first appointed to head Public Defender Services.*

Furthermore, the Executive Director informed the Legislative Auditor that to the best of his knowledge no unjustified excessive expense claims have been paid since 1989, when he was appointed as the Executive Director. While evidence of whether there is a continuous dialogue with private attorneys and judges is hard to obtain, the Legislative Auditor does acknowledge some improvements such as a website developed by Public Defender Services and scheduling several continuing education seminars for private attorneys. In addition, the question of unjustifiable expense claims could be arguable, since in the January 1999 Preliminary Performance Review, the Legislative Auditor cited ten private attorneys with higher costs per case averages. The intention of this section of the recommendation was for the agency to express its concern with these higher claim averages, and to communicate with the private attorneys and judges its concern. Despite this, the Legislative Auditor will designate this part of the recommendation as being in compliant, because of some of the improvements made. The agency should continue a dialogue with the private

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attorneys and judges to discourage any potential abuse of payments to private attorneys.

Overall, the designation for this recommendation is **Partial Compliance** since the agency has not complied with all portions of the recommendation.

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## Recommendation 5:

*Public Defender Services should monitor the reasons for private attorneys being assigned cases rather than Public Defender Corporations to assist in maximizing the use of public defenders.*

**Level of Compliance: Non-Compliance**

Conflicts and excessive caseloads are the main reasons that private attorneys receive cases rather than Public Defender Corporations. During the original audit, Public Defender Corporations staff stated that case overloads were a factor in assigning cases, however, the Executive Director was not aware of this and indicated that conflicts were the only reason that private attorneys received cases. In the January 1999 original report, the Legislative Auditor recommended that Public Defender Services provide data that would monitor the reasons for cases being assigned to private attorneys (conflicts or excessive caseloads). At the present time, the agency is still not keeping data on the number of times that private attorneys are assigned cases instead of Public Defender Corporations and the exact reasons for these assignments. The agency could not provide the data, and the Executive Director stated in 1999 that:

> *...this number is not kept since it is meaningless.*

The Legislative Auditor disagrees. Monitoring reasons why cases are assigned to private attorneys is a very important management tool, because data can assist in identifying where excessive caseloads are a problem and in maximizing the use of public defenders by analyzing staffing needs in each Public Defender Corporation. Private attorneys typically are more expensive and, therefore, Public Defender Services needs to be aware of why cases go to private attorneys. The Executive Director recently stated that:

> *Absent the opening of more Public Defender offices, very little can be gained by further changes. While attractive on their face, nothing contained in the above recommendations will have any measurable effect on either the cost or the effectiveness of representation for indigents and may in fact simply increase costs for no good reason if more data entry is required to obtain more management information.*

In essence, the Executive Director sees no value in collecting new information. The Legislative Auditor feels that it is imperative that Public Defender Services adhere to this recommendation and keep track of the reasons why cases go to private attorneys, since the cost to the state is higher for the use of private attorneys. Collecting the data should be relatively simple and inexpensive by

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simply keeping track of the reason for a case being assigned to a private attorney: 1) caseload; 2) conflict; or 3) unknown/other reasons. Thus Public Defenders has not complied with this recommendation.

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# APPENDIX A

## Transmittal Letter to Agency

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**WEST VIRGINIA LEGISLATURE**
*Performance Evaluation and Research Division*

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John Sylvia
Director

November 28, 2001

Gregory A. Burton, Cabinet Secretary
Department of Administration
Building 1, Room E-119
1900 Kanawha Blvd., East
Charleston, WV 25305

Dear Mr. Burton:

This is to transmit a draft copy of the Update of the Public Defender Services. This report is scheduled to be presented at the Sunday, December 9, 2001 interim meeting of the Joint Committee on Government Operations. It is expected that a representative from your agency be present at the meeting to orally respond to the report and answer any questions the committee may have. We would like to schedule an exit conference to discuss the report with you as soon as possible. Please contact us by Thursday, November 29, 2001 to schedule this conference. We would appreciate your written response by Thursday, December 6, 2001 in order for it to be included in the final report.

Thank you for your cooperation.

Sincerely,

John Sylvia

John Sylvia

c: John A. Rogers, Executive Director, Public Defender Services
Enclosure

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# APPENDIX B

## Agency Response

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**STATE OF WEST VIRGINIA**

BOB WISE
GOVERNOR

GREGORY A. BURTON
CABINET SECRETARY

**DEPARTMENT OF ADMINISTRATION**
PUBLIC DEFENDER SERVICES
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1900 KANAWHA BOULEVARD, EAST
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JOHN A. ROGERS
EXECUTIVE DIRECTOR

RECEIVED
DEC 07 2001
PERFORMANCE EVALUATION AND RESEARCH DIVISION

6 December 2001

Mr. John Sylvia
Director, Performance Evaluation
Room W-314
State Capitol

Re: Response to draft report

Dear Mr. Sylvia:

At your kind invitation, I am writing to respond to the comments in your recent performance review update. In the order presented, the following comments are in order. Each recommendation is answered on a separate page.

I hope that these comments are useful to the committee and I look forward to the discussion on Sunday, 9 December 2001.

Sincerely,

John A. Rogers
Executive Director

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Recommendation 3

Public Defender Services should begin gathering data that can be used to measure the quality of legal representation. Conviction rates, in-court and out-of-court time, research time, costs, etc. of felony cases should be collected for public defenders and private attorneys. Statistical analysis should be conducted to determine if differences between public defenders, private attorneys, and within Public Defender Corporations are statistically significant. The agency should also develop data on costs, billable and nonbillable time, and administrative time that is comparable for a meaningful and accurate comparison between public defenders and private attorneys. The agency should implement caseload standards for Public Defender Corporations to identify staffing needs and monitor threats to quality legal representation.

Response:

As previously noted, because of the recent shifting of funds from the line item used to pay for Public Defender Corporations and appointed counsel, we have been able to begin work on a system that will enable us to generate far more data in far more detail than ever before. By this time next year, substantially more data will be available.

Also, we are adopting NLADA standards as our guide, beginning January 1, 2002. Those standards are already well known. It is a simple matter to make them our official standard. I am delighted that you share my concern about quality of work. However, I am still fearful that maximums will become minimums and that these numbers will be used to the detriment of our clients.

Since W.Va. Code 29-21-6(d) was mentioned, I must point out yet again that we comply with the provisions of that section in regard to gathering sufficient data to compare Public Defender work with that of the private Bar. Neither the implementation of caseload standards nor the additional data which will become available will enhance the comparisons or affect quality of representation and I object to even the mere suggestion that we do not comply with the statute.

It is important to note that the Public Defender system is not without standards for performance. I refer you to the Performance Guidelines for Criminal Defense Representation adopted by the National Legal and Defender Association in 1994 and published in 1995. All of our Public Defender offices have used these standards as a guide since 1995.

Finally, the entire Department of Administration is engaging in a new round of customer surveys. Public Defender Services' part of that effort will survey Judges, Chief Public Defenders, Corporation Chairs and private payees. The data from that survey will be used to make adjustments as necessary to improve satisfaction with our services.

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Recommendation 4: require additional documentation whenever a private attorney claim exceeds the average of billings for a particular charge; establish dialogue with courts, private attorneys.

Response:

Public Defender Services is not in control of the private appointed system. Only a circuit judge can determine reasonable compensation in a given case After that determination is made an order is signed directing this agency to pay. This agency has assumed the responsibility, voluntarily, of reviewing each of the vouchers for error (the Auditor of course also does his own checking, as he should). The Code does not specifically require that this agency engage in this activity but in the spirit of accuracy, responsibility and dedication to the taxpayers, we have always done so. When we return a voucher, the technical result is that we have violated a court order. The legal excuse for doing so is that the judge made an error of fact and we are simply correcting what is presumed to be an oversight (we have blanket authority from every circuit judge to make "corrections" as necessary). The net result is a reduction in billings of $350,000 to $400,000 a year (and an award from the Auditor for the fewest number of rejected claims).

The other result is that a handful of attorneys and other service providers complain loudly and occasionally none too politely. Requiring further justification for what is widely considered to be a cumbersome, irksome and lowly-paid activity invites mass revolt. I have been personally called to task three times pursuant to a rule to show cause why I should not be held in contempt for failure to abide by a court order. So far, I have managed to have all three dismissed but the automatic return process suggested would almost certainly result in a contempt citation.

As to the judges themselves, some judges do occasionally seek my advice regarding payment. I am flattered and provide as much help as possible. But it is both insulting to the Court and counterproductive to suggest that I return vouchers automatically whenever an average cost is exceeded. Exceeding the average costs per case is easily explainable. Far from suggesting that the billings are false, the higher amounts may demonstrate that these attorneys, who do a substantial amount of work in the criminal area, are competent enough to know that more work is required in a given matter. It is equally likely that judges assign them a disproportionate share of the more complex cases which require additional work. Regardless of the reasons for the higher costs, the Court approved the bill.

Each case must be considered on its own. For three years now, the courts have had before them the average cost of each charge (DUI, murder, robbery, etc.) and can make their own judgements accordingly; they are also provided the total amount of billings per payee. I suggest that if this issue continues to be viewed as a problem, then the Legislature should require that the vouchers be sent back. Currently, I do not have statutory authority to perform this function. Clearly, no savings will result since the Court will almost certainly confirm its original judgement.

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Recommendation 5:

Public Defender Services should monitor the reasons for private attorneys being assigned cases rather than Public Defender Corporations to assist in maximizing the use of Public Defenders.

Response:

No one in the Public Defender system (including private counsel) has anything to do with assignment of cases. That authority rests solely with the Circuit Court. W.Va. Code 29-21-9 already requires all cases to go to the Public Defender office where an office exists. Only conflict cases and occasional overload cases are to be assigned to private counsel. Simply put, this agency has no authority. The Court is in control.

That being said, by 1 January 2002 we will alter our form order to provide for a check off and send a separate memo to each Circuit Judge requesting that the Judge inform us of why an assignment has been made to a private attorney. In Circuits with Public Defenders we will also request that those defender offices provide information as to why they are not accepting cases.

This last recommendation raises the point I have now been making for nearly ten years: only an expansion of the Public Defender system will improve the system in terms of cost-effectiveness . While some private counsel would disagree, I concur with what I take to be your belief that Public Defender usage would also improve quality. Expansion of the Public Defender system can only happen by legislative enactment. To date, the Legislature has not acted. Until the Legislature acts, all cases in Circuits without Public Defenders will go to private counsel.