ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

WEST VIRGINIA LEGISLATIVE AUDITOR
PERFORMANCE EVALUATION AND RESEARCH DIVISION

Preliminary Performance Review

Public Defender Services

The Legislature Should Consider Enhancing Its Public Defense Repayment System to Help Reduce the Financial Burden to the State in Providing Legal Representation for the Indigent and to Remove Inequities in Its Current Repayment System



June 2004
PE 04-06-317

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

JOINT COMMITTEE ON GOVERNMENT OPERATIONS

Senate

Edwin J. Bowman
Chair

Billy Wayne Bailey, Jr.
Vice Chair

Walt Helmick

Joseph M. Minard

Sarah M. Minear

Citizen Members

Dwight Calhoun

John Canfield

James Willison

W. Joseph McCoy

(Vacancy)

House Of Delegates

J.D. Beane
Chair

Timothy R. Ennis
Vice Chair

Joe Talbott

Craig P. Blair

Otis Leggett

Scott G. Varner, Ex Officio Non-Voting Member

OFFICE OF THE LEGISLATIVE AUDITOR

Aaron Allred
Legislative Auditor

John Sylvia
Director

Denny Rhodes
Research Manager

Matthew Parsons
Research Analyst

Performance Evaluation and Research Division
Building 1, Room W-314
State Capitol Complex
Charleston, West Virginia 25305
(304) 347-4890

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

WEST VIRGINIA LEGISLATURE

Performance Evaluation and Research Division

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX

John Sylvia
Director

June 13, 2004

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

The Honorable J.D. Beane
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 a Preliminary Performance Review of the *Public Defender Services* which will be presented to the Joint Committee on Government Operations on Sunday, June 13, 2004. The issue covered herein is "The Legislature Should Consider Enhancing Its Public Defense Repayment System to Help Reduce the Financial Burden to the State in Providing Legal Representation for the Indigent and to Remove Inequities in Its Current Repayment System."

We transmitted a draft copy of the report to Public Defender Services on May 21, 2004. We held an exit conference with Public Defender Services on June 2, 2004. We received the agency response on May 28, 2004.

Let me know if you have any questions.

Sincerely,

John Sylvia

JS/tlc

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

Contents

Executive Summary 5

Review Objective, Scope and Methodology.....7

Issue 1: The Legislature Should Consider Enhancing Its Public Defense Repayment System to Help Reduce the Financial Burden to the State in Providing Legal Representation for the Indigent and to Remove Inequities in Its Current Repayment System.....9

List Of Tables And Figures

Figure 1: Public Defender Repayment Collections for West Virginia and Other States.....9

Table 1: States With Public Defender Application Fees.....12

Table 2: Kentucky Public Defense repayment Collections in FY 2003.....14

Table 3: Public Defense Repayment Revenue (FY1994 -FY2003).....15

Table 4: Revenue Collection and Caseload by Circuit.....17

Table 5: Application Fee Collections Possible Scenarios.....19

Table 6: General Revenue Repayment Scenarios.....20

List Of Appendices

Appendix A: Transmittal Letter to Agency.....23

Appendix B: States with Similar Public Defender Structures.....25

Appendix C: West Virginia Public Defenders Repayment Collections by County FY 2004.....27

Appendix D: Agency Response.....29

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

Executive Summary

Issue 1 The Legislature Should Consider Enhancing Its Public Defense Repayment System to Help Reduce the Financial Burden to the State in Providing Legal Representation for the Indigent and to Remove Inequities in Its Current Repayment System.

West Virginia has statutorily established a Public Defense Repayment system whereby clients of Public Defender Services may be required to repay a portion of the cost the state incurred to provide the services. However, this is a "may" provision. Consequently not all circuits or counties within circuits impose repayment. This creates some inequities in that some defendants pay some portion of their public defense, while others under similar circumstances in another circuit do not pay for any part of their defense.

The cost of the West Virginia Public Defender Services to provide legal representation to indigent clients has increased from $8.5 million in 1991 to $27 million in FY 2004. In order to reduce the financial burden to the state, West Virginia, like many other states, has statutorily established a Public Defense Repayment system whereby clients of Public Defender Services may be required to repay a portion of the cost the state incurred to provide the services. According to a report by The Spangenberg Group and additional research by the Legislative Auditor found that **31 states** currently participate in Public Defense Repayment Programs, and **20 states** have some sort of application fee with 5 other states allowing counties the discretion to impose such a fee. Among the 31 states that participate in Public Defense Repayment Programs is Kentucky. Kentucky ranks high among other states in the collection of repayment fees at $4,341,830 annually despite its high poverty rate.

Currently under WV Code §29-21-16(g), local judicial circuits may order the repayment of court costs from clients of the public defender system. **Consequently, some circuits do not order any repayment, and among those circuits that do order repayment, there is significant variance.** Given the inconsistent imposition of repayment, the state general revenue fund receives an average of less than $400,000 a year, which is less than half a percent of the total cost for public defender services. This also creates some inequities in that some defendants pay some portion of their public defense, while others under similar circumstances in another circuit do not pay for any part of their defense. The Legislative Auditor recommends that the Legislature establish procedures and guidelines for the Public Defense Repayment fee process and require all judicial circuits to participate in the collection of these fees to ensure the equity of all public defender clients.

Given the inconsistent imposition of repayment, the state general revenue fund receives an average of less than $400,000 a year, which is less than half a percent of the total cost for public defender services.

In addition, the Legislative Auditor also recommends that the Legislature implement a public defender application fee. In a 2001 report, the Spangenberg Group reported that 17 states charged an application fee, and further research by the Legislative Auditor found three additional states that recently implemented an application fee. By charging a public defender application fee of $25 in FY2003, the State could have generated **$1,038,225** or as much as **$4,147,200** with a $100 public defender application fee.

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

The Legislative Auditor also recommends an additional fee for all individuals convicted of a DUI. This fee would help offset the expected rise in costs of the Public Defender system due to passage of a lower blood alcohol limit from .1 to .08. Currently, any individual convicted of a DUI is imposed a $55 fine for which the proceeds are to return to counties to support the overcrowding of jails. For example, if the Legislature imposed a $100 fee on DUI convictions with $55 continuing to go to the counties, and $45 returning to the state general revenue fund, the state could have generated $485,550 in FY 2003.

Based upon the analysis by the Legislative Auditor, the state could receive more than **$5 million annually** if the Public Defense Repayment fee recommendations are implemented. Actual collections could be lower depending on the collection rate of the fees. The Legislative Auditor emphasizes that these potential revenues are intended to supplement Public Defender Service's appropriations rather than replace their appropriations. Also, the Legislative Auditor recommends that the collection of any Public Defense Repayment fees be administered by the circuit courts and **not** the public defender system.

Recommendations

1. *The Legislative Auditor recommends that the Legislature consider amending West Virginia code §29-21-16(g) by requiring Public Defense Repayments be mandatory for all Circuit Courts.*

2. *The Legislative Auditor recommends that the Legislature consider establishing uniform procedures and guidelines in imposing Public Defense Repayment fees.*

3. *The Legislative Auditor recommends the Legislature consider implementation of an application fee on individuals who apply for legal representation from the Public Defender system.*

4. *The Legislative Auditor recommends that the Legislature consider implementing a fine for all DUI offenders that would be deposited into the state general revenue fund.*

5. *The Legislative Auditor recommends that implementation of new repayment fees should be collected by circuit courts through the same process currently used to collect repayment fees.*

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

Review Objective, Scope and Methodology

This Preliminary Performance Review of the Public Defender Services of the West Virginia Department of Administration is required and authorized by the West Virginia Sunset Law, Chapter 4 Article 10 of the West Virginia *Code*, as amended. Public Defender Services provides funds to attorneys and other service providers who defend indigents accused of crimes in order to ensure that constitutionally required due process protections are afforded to all citizens regardless of wealth.

Objective

The objective of this review is to examine Public Defender Repayment Systems in other states, and to determine whether improvements can be made in the repayment of services provided by West Virginia Public Defender Services.

Scope

The scope of this review consisted of analysis of West Virginia Public Defender Repayment revenue from FY94 - FY04, along with an analysis of repayment programs in other states.

Methodology

Information compiled in this report has been acquired through interviews, conversations, and correspondence with the Director of the Public Defender Services. Interviews, surveys and internet research was conducted of other state's Public Defender Repayment systems. In addition, a report from The Spangenberg Group was used which is a nationally recognized research and consulting firm specializing in improving justice programs, along with correspondence with a representative of the National Legal Aid and Defender Association (NLADA) . Repayment data was also collected from the West Virginia State Auditor's Office and the Legislative Auditor's Budget Division. Every aspect of this evaluation complied with **Generally Accepted Government Auditing Standards (GAGAS).**

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

Issue 1

The Legislature Should Consider Enhancing Its Public Defense Repayment System to Help Reduce the Financial Burden to the State in Providing Legal Representation for the Indigent and to Remove Inequities in Its Current Repayment System.

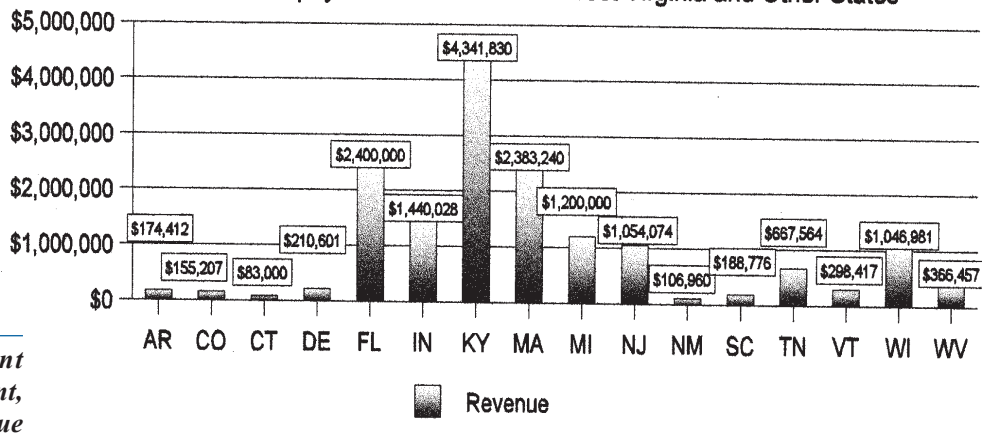
Issue Summary

The cost of the West Virginia Public Defender Services to provide legal representation to indigent clients accused of crimes has increased from $8.5 million in 1991 to $27 million in FY 2004.

The cost of the West Virginia Public Defender Services to provide legal representation to indigent clients accused of crimes has increased from $8.5 million in 1991 to $27 million in FY 2004. In order to reduce the financial burden to the state, West Virginia, like many other states, has statutorily (§29-21-16(g)) established a Public Defense repayment system whereby clients of public defender services may be required to repay a portion of the cost the state incurred to provide the services (see Figure 1). However, the repayment system in West Virginia is optional for circuit judges. Consequently,

Figure 1

Public Defender Repayment Collections for West Virginia and Other States



Given the inconsistent imposition of repayment, the state General Revenue Fund receives on average less than $400,000 a year, which is less than half a percent of the total cost for public defender services.

some circuits do not order any repayment, and among those circuits that do order repayment, there is significant variance. This creates some inequities in that some defendants pay some portion of there public defense, while others under similar circumstances in another circuit do not pay for any part of their defense. Given the inconsistent imposition of repayment, the state general revenue fund receives on average less than $400,000 a year, which is less than half a percent of the total cost for public defender services. Given the rising costs of public defender services and the inequities of the current repayment structure, the Legislature may want to consider a more aggressive and equitable repayment system. The Legislative Auditor recommends the following options:

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

1. Amend the statute to make repayment of public defense costs mandatory instead of optional, and develop guidelines for a uniform collection process.

2. Establish an Application Fee at the initial point of applying for public defender services.

Currently 31 states, including three surrounding states, have some type of Public Defense repayment program in statute for the public defender system.

3. Establish a DUI fee towards recovery of public defenders costs.

Based on analysis by the Legislative Auditor, **West Virginia could generate over $5 million annually for the General Revenue fund if the Legislature implemented these recommendations.**

Thirty One States Participate in Public Defense repayment Programs

Currently 31 states, including three surrounding states, have some type of Public Defense repayment program in statute for the public defender system. Public Defense repayment programs range from administrative fees and application fees to partial Public Defense repayment of the costs of the legal representation. There has been national controversy in charging fees to individuals represented by the public defender system. However, in recent years many states are eagerly looking for new sources of revenue, and many states have looked toward the public defender system in hoping to recover a portion of the cost associated with indigent representation. Several states charge fees in correlation with an individual's income level.

Currently 20 states participate in some sort of application fee with five other states allowing counties the discretion to impose such a fee. Also, another seven states charge Public Defense repayment fees for the cost of legal representation.

According to a report from The Spangenberg Group, a nationally recognized research and consulting firm specializing in improving justice programs, and additional research by the Legislative Auditor found that there are 31 states that allow for Public Defense repayment. Currently 20 states participate in some sort of application fee with five other states allowing counties the discretion to impose such a fee. Also, another seven states charge Public Defense repayment fees for the cost of legal representation. Almost all of the states offer reduced fees, waivers, or payment options for individuals. Some examples of Public Defense repayment programs from other states are listed below, while a more detailed listing is available in Appendix C:

- **Wisconsin -** Charges a $100 fee for misdemeanors and $200 fee for felonies similar to that of an application fee, however, if an individual chooses to pay within thirty days of the file application the fee can be reduced to $50 per offense of

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

both a misdemeanor and felony. An appeal of a case will cost the defendant $1,000. A judge can also assess the total cost of representation as a condition of probation. A private collection agency is also utilized in which Wisconsin receives 50% of all collections.

- **Missouri** - Request liens based upon a predetermined schedule for reasonable value of services, which range from $50 for a misdemeanor pleas to several thousand for a serious felony trial. Missouri utilizes a tax intercept program if collections fail.

- **Maryland** - A $50 application fee for adults and a $25 fee for juveniles is assessed upon application for services whether or not they use the public defender services.

- **Iowa -** May require individuals to pay all or part of attorney fees and costs. If the applicant is employed then they will be required to complete an assignment of wages for which the court shall determine the amount to be paid from each paycheck.

In a 2001 report, The Spangenberg Group reported that 17 states charged an application fee, and further research by the Legislative Auditor found three additional states that recently implemented an application fee.

In a 2001 report, The Spangenberg Group reported that 17 states charged an application fee, and further research by the Legislative Auditor found three additional states that recently implemented an application fee. Table 1 shows the 20 states that participate in charging an application fee to indigent individuals seeking legal representation from the public defender system, and the revenue collected in fiscal year 2000.

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

Table 1
States With Public Defender Application Fees

State	Application Fee	Revenue From Application Fees in FY 2000
Arkansas	$10-$100	$174,412
Colorado	up to $25	$155,207
Connecticut	$25	$83,000
Delaware	$50 or community service	$210,601
Florida	$40	$2,400,000
Indiana	$100 for felony; $50 for misdemeanor	$1,440,028
Kansas	$50 Fee ($100 fee starting 7/1/04)	Just enacted
Kentucky	$50	$873,526
Maryland	$50 for adults $25 for juveniles	Just enacted
Massachusetts	$200	$2,383,240
New Jersey	$50	$226,534
New Mexico	$10	$106,960
North Carolina	$50	Just enacted
North Dakota	$25	Just enacted
Oklahoma	$40	Collected at county level.
Oregon	$20	Collected at county level.
South Carolina	$25	$188,776
Tennessee	$50 - $200	$667,564
Vermont	$25	$298,417
Wisconsin	$200 for misdemeanor $400 for felony	$1,046,981 (FY 2003 Figures)

Source: 2001 Spangenberg Group Report & research by Legislative Auditor

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

In FY 2000, five states collected more than $500,000 from an application fee. **Delaware collected $210,601 in FY 2000 despite its small caseload of 40,226, which is similar to West Virginia's caseload.** The Spangenberg report also identified five other states that give the authority to charge an application fee to the counties: Arizona, California, Georgia, Ohio, and Washington.

In FY 2000, five states collected more than $500,000 from an application fee.

Currently, there are eight states that try to recoup the costs (post disposition) of legal representation from individuals who are represented by the public defender system. Missouri, as noted above, is one of the most successful states in recouping costs. Unlike other states, Missouri does not use the traditional Public Defense repayment procedure, but instead utilizes a predetermined schedule of fees. The fees are presented to the client at the beginning of the case and the clients are asked to contribute to the program either by a single payment or installments of reasonable amounts. In FY 2003, Missouri handled almost 90,000 cases and collected over $1.2 million. The fees set forth in Public Defense repayment are generally assigned at the beginning of the case, and then an individual may either choose a discounted public defender or pay the full cost of a private attorney. States utilize a variety of collection methods to ensure maximum collections that are as follows: payment plans, assignment of wages, tax refund interception, and liens on any and all property when the cost of services exceeds $150. Almost all states with repayment programs require an individual to reimburse the public defender system if the individual has falsified his or her income on the application for request of services. **The Legislative Auditor concludes that West Virginia should consider enhancing its present Public Defense Repayment program by considering alternative fee structures.**

Currently, there are eight states that try to recoup the costs (post dispositon) of legal representation from individuals who are represented by the public defender system.

Kentucky Ranks Among Top With Alternative Public Defense Revenue Sources

Kentucky's public defender system (Department of Public Advocacy) currently receives 15% of its funding from alternative revenue sources. West Virginia receives less than 0.2%.

Kentucky ranks high among states that participate in Public Defense repayment programs in collecting alternative revenue sources to offset the increasing costs associated with the public defenders system. Kentucky's public defender system (Department of Public Advocacy) currently receives 15% of its funding from alternative revenue sources. West Virginia receives less than 0.2% towards public defender services from fees charge its clients. There are currently three fees associated with Kentucky's public defender system which consist of the: court cost fee, DUI conviction fee, and the recoupment/partial fee. **In FY 2003, these fees generated over $4.3 million** as shown in Table 2.

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

Table 2 Kentucky Public Defense repayment Collections in FY 2003	
Cost Repayment Fees	**Total Collections**
Court Cost Fee	$1,499,981
Recoupment/Partial Fee	$1,340,623
DUI Conviction Fee	$1,501,226
Total Fees	**$4,341,830**
Source: Kentucky Department of Public Advocacy	

Kentucky collected $1.3 million dollars in FY 2003 from the recoupment fee.

The court cost fee was implemented in FY 2002 to replace the application fee. After having difficulty collecting the application fee, the Kentucky Legislature decided to stream-line the application fee with other fees into the court cost fee in which they predict will enable more efficient collections. The court cost fee is $100 in **all** criminal cases and 3.5% of collections is allocated to the Department of Public Advocacy (DPA). Of the approximate $42.8 million collected from the court cost fee, the DPA received approximately $1.5 million dollars, which is significantly higher than the $873,526 collected from the application fee in FY 2000.

Kentucky's oldest Public Defense repayment fee is the recoupment fee or partial fee. This fee is imposed at the time of sentencing on individuals who have been determined to be at least partially indigent. If the individual does not pay the assessment then a civil judgement is filed by the judge against them. Kentucky collected $1.3 million dollars in FY 2003 from the recoupment fee.

Kentucky also imposes a $250 fee on all persons convicted of a DUI. Kentucky's DPA receives 25% of this fee. In FY 2003, this fee generated $6,004,904 in total revenue and the DPA received $1.5 million dollars as a part of its share of the revenue.

Kentucky also **imposes a $250 fee on all persons convicted of a DUI.** Kentucky's DPA receives 25% of this fee. In FY2003, this fee generated **$6,004,904 in total revenue** and the DPA received **$1.5 million dollars** as a part of its share of the revenue**.** Per-capita, Kentucky collects more revenue than other states with such fees. **Kentucky has managed to effectively recover indigent defense cost despite having a high pe rcentage of individuals below the national poverty level**. In fact, the Kentucky public defender system has been nationally recognized by The Spangenberg Group as a solid, efficient, and well-managed program.

West Virginia Should Consider Enhancing Its Public Defense Repayment System

Currently under WV Code §29-21-16(g) local judicial circuits may

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

order the repayment of court costs from clients of the public defender system:

> *In every case in which services are provided to an indigent person and* ***an adverse judgment has been rendered*** *against such person, the court may require that person, and in juvenile cases, may require the juvenile's parents or custodian, to pay as costs the compensation of appointed counsel, the expenses of the defense and such other fees and costs as authorized by statute*. (Emphasis Added)

The Executive Director is also unaware of any guidelines or procedures followed by the judicial circuits in the collection of Public Defense Repayment fees.

During FY 2002 and FY 2003, the courts collected $395,875 and $366,457 respectively in Public Defense Repayment fees. The Public Defense Repayment fees are deposited in the state general revenue fund by the State Auditor's Office. According to the Executive Director for the Public Defender Services, Public Defense Repayment fees are collected post-disposition. **The Executive Director is also unaware of any guidelines or procedures followed by the judicial circuits in the collection of Public Defense Repayment fees**. It is conceivable that all the circuits that participate may use different guidelines and procedures when collecting repayment fees. Table 3 below illustrates the history of revenue collections from repayment fees and Table 4 illustrates the FY 2004 revenue collection.

Table 3
Public Defense Repayment Revenue
(FY1994 -FY2003)

Fiscal Year	Net Revenue Collected
1994	$174,065.00
1995	$242,367.00
1996	$218,510.00
1997	$271,437.00
1998	$353,033.00
1999	$375,950.00
2000	$412,568.00
2001	$348,023.00
2002	$395,875.00
2003	$366,457.00

Source: Legislative Auditor's Budget Division

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

In a review of the Public Defense Repayment fees deposited into the State Auditor's Office in FY 2004 up through April 2004, the Legislative Auditor found inconsistency between the circuits in the collection of the fees. In fact, caseload had no correlation with revenue collections and some circuits did not collect any revenue. Table 4 on the following page shows the Public Defender Repayment collections by circuit for FY 2004 through April of 2004. Appendix C displays the collections by county within each judicial circuit.

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

Table 4: Revenue Collection and Caseload by Circuit		
Circuits	**Revenue Collected in FY 04**	**Caseload in FY 03**
1st (Brooke, Hancock, Ohio)	$392	2,513
2nd (Marshall, Tyler, Wetzel)	$7,938	1,218
3rd (Doddridge, Pleasants, Ritchie)	$14,055	387
4th (Wirt, Wood)	$7,073	3,156
5th (Calhoun, Jackson, Roane, Mason)	$4,005	1,458
6th (Cabell)	$380	4,097
7th (Logan)	$9,908	1,229
8th (McDowell)	$20	904
9th (Mercer)	$11,710	2,610
10th (Raleigh)	$216	2,346
11th (Greenbrier, Pocahontas)	$3,383	1,058
12th (Fayette)	$6,653	781
13th (Kanawha)	$1,795	6,301
14th (Braxton, Clay, Gilmer, Webster)	$1,572	680
15th (Harrison)	$0	1,787
16th (Marion)	$9,200	1,519
17th (Monongalia)	$4,625	1,030
18th (Preston)	$1,868	516
19th (Barbour, Taylor)	$9,127	885
20th (Randolph)	$14,900	484
21st (Grant, Mineral, Tucker)	$41,625	712
22nd (Hampshire, Hardy, Pendleton)	$39,289	567
23rd (Berkeley, Jefferson, Morgan)	$12,649	2,630
24th (Wayne)	$0	856
25th (Boone, Lincoln)	$13,814	1,448
26th (Lewis, Upshur)	$32,907	1,019
27th (Wyoming)	$3,251	824
28th (Nicholas)	$3,174	665
29th (Putnam)	$2,237	681
30th (Mingo)	$64	1,166
31st (Monroe, Summers)	$4,613	202

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

The Legislative Auditor concludes that since imposing Public Defense Repayment fees is optional under the law, the amount collected is relatively low, and there is a lack of uniformity in how the fees are imposed. To further substantiate this, the Legislative Auditor recently conducted a survey of judicial circuits to determine what procedures and guidelines, if any, were used to collect Public Defense Repayment fees. With over half of the responses, the Legislative Auditor concluded that not only is there inconsistency in the amount of revenue collected between circuits throughout the state, but it is also inconsistent between counties within circuits. Moreover, some circuits do not participate in the process. Some examples of the differences between the circuits are listed below:

The Legislative Auditor concluded that not only is there inconsistency in the amount of revenue collected between circuits throughout the state, but it is also inconsistent between counties within circuits.

- **Cabell County (6th Circuit)** - Does not participate in the collection of Public Defense Repayment fees.
- **Fayette County (12th Circuit)** - Public Defender attorney costs are assessed as part of criminal court costs by the Court and are assessed upon conviction in any criminal cases.
- **Berkeley County (23rd Circuit)** - All public defender clients are charged a fee of $150, regardless of the case decision.
- **Upshur County (26th Circuit)** - If placed on probation, the defendant is ordered to pay court costs, which includes attorney fees.

With the lack of uniformity in administering Public Defender Repayment fees, not only is the state missing out on potential repayments to the general revenue fund, but the current system creates inequities for public defender clients under similar circumstances.

With the lack of uniformity in administering Public Defender Repayment fees, not only is the state missing out on potential repayments to the general revenue fund, but the current system creates inequities for public defender clients under similar circumstances. **The Legislative Auditor considers this lack of uniformity an unfair process to the indigent individuals who are ordered to repay court costs, while other individuals under similar circumstances are not required to pay anything for their legal representation.** The Legislative Auditor recommends that the Legislature establish uniform procedures and guidelines for the Public Defense Repayment fee process and require all judicial circuits to participate in the collection of these fees to ensure maximum repayments to the general revenue fund, and to ensure the equity of all public defender clients.

Based upon research from twenty other states, the Legislative Auditor recommends that the Legislature consider implementing an application fee for individuals who apply for legal representation from the public defender system and the state could have generated as much as $1,038,225 in FY 2003.

An Application Fee Should Be Considered For Those Applying For A Public Defender

Based upon research from twenty other states, the Legislative Auditor recommends that the Legislature consider implementing an application fee for individuals who apply for legal representation from the public defender system. By charging an application fee of $25 from individuals with a monthly income,

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

the State could have generated as much as **$1,038,225 in FY 2003**. This amount is calculated from the number of opened cases by the Public Defender Corporations and the total claims represented by private attorneys in FY 2003, which is 41,472 (excluding mental hygiene cases). Table 5 below represents scenarios for application fee collections for a $25, $50, and $100 application fee. The table also shows several scenarios for collections, which assume that the collection rate will not be 100%.

Table 5
Application Fee Collections
Possible Scenarios

Collection Rate	Total Collections ($25 Fee)	Total Collections ($50 Fee)	Total Collections ($100 Fee)
100%	$1,036,800	$2,073,600	$4,147,200
75%	$777,600	$1,555,200	$3,110,400
50%	$518,400	$1,036,800	$2,073,600
25%	$259,200	$518,400	$1,036,800

Source: WV Public Defender Annual Report & Legislative Auditor Analysis

The Legislative Auditor assumes that the lower the application fee the higher the collection rate.

The calculation for application fee collections does not represent individuals who applied for a public defender and were denied. According to the Executive Director of Public Defender Services, only a small percentage of individuals are denied annually. The application fees used in Table 5 are values used by the Legislative Auditor to show the potential revenue that could be generated from establishing an application fee. The Legislature could also allow courts to have the option of charging a lower fee or waiving the fee, if the fee would cause the client to have an undue financial hardship. The Legislative Auditor assumes that the lower the application fee the higher the collection rate.

The Legislative Auditor believes that lowering the blood alcohol limit will lead to more individuals being charged with DUI, and could ultimately lead to more cases in the public defender system.

The Legislature Should Consider A Fee For All Individuals Convicted of DUI

During the 2004 Legislative Session, the Legislature passed Senate Bill 166 that would lower the legal blood alcohol limit from .10 to .08. Under the bill, any individual convicted of a DUI is imposed a $55 fine for which the proceeds are to return to counties to support the overcrowding of jails. The Legislative Auditor believes that lowering the blood alcohol limit will lead to more individuals being charged with DUI, and could ultimately lead to more cases in the public defender system. Thus, the state's cost to provide public

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

The Legislative Auditor recommends implementing a stream-lined fee similar to that of Kentucky that would incorporate the original $55 fee continuing to go back to the counties, and an additional fee(s) returning to the state general revenue fund.

defender services may increase as a result. The Legislative Auditor recommends implementing a stream-lined fee similar to that of Kentucky that would incorporate the original $55 fee continuing to go back to the counties, and an additional fee(s) returning to the state general revenue fund. For example, if the Legislature imposed a $100 fee on DUI convictions with $55 continuing to go to the counties, and $45 returning to the state general revenue fund, **$485,550 would have been generated in FY 2003**. This calculation is based on the number of DUI convictions in FY 2003. **The Legislative Auditor recommends that the Legislature consider a fine for all DUI offenders to assist the state in not only recouping public defender services funding, but also assisting the anticipated increased costof representing DUI offenders in the public defender system.**

Possible Revenue Streams if the Legislature Implements these Recommendations

Based on the $27 million Public Defender Services appropriation for FY 2004, the state could have approximately 19% of the Public Defender budget repayed to the general revenue fund.

West Virginia could generate over **$5 million** annually if the above recommendations are implemented. **Based on the $27 million Public Defender Services appropriation for FY 2004, the state could have approximately 19% of the Public Defender budget repayed to the General Revenue fund.** Table 6 summarizes the possible revenue repayment to general revenue.

Table 6
General Revenue Repayment Scenarios

Application Fees (Based on 100% Collection Rate)	Public Defense Repayment Fees (2yr Avg.)	DUI Conviction Fee	Total Revenue Stream
$1,038,225 (@ $25 Fee)	$381,579	$485,550	**$1,905,354**
$2,076,450 (@ $50 Fee)	$381,579	$485,550	**$2,943,579**
$4,152,900 (@ $100 Fee)	$381,579	$485,550	**$5,020,029**

Source: Legislative Auditor Analysis

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

The $381,579 in the Public Defense repayment fee column is a two year average of actual collections from Public Defense Repayment fees in FY 2002 and FY 2003. Actual revenue could be lower depending on the collection rates of the fees. Collections may also increase if the state implements a mandatory and uniform post-disposition repayment process. In addition, the Legislative Auditor must emphasize that these potential revenues are intended to **supplement** or repay Public Defender Service's appropriation rather than replace its appropriations. Although, assuming the agency received a high rate of Public Defense Repayment fees, a significant amount of income could be returned to the state. Also, the Legislative Auditor recommends that the collection of any Public Defense Repayment fees be administered by the courts and **not** the public defender system.

The Legislative Auditor must emphasize that these potential revenues are intended to supplement or repay Public Defender Service's appropriation rather than replace its appropriations.

Conclusion

Based upon research of other states, the Legislative Auditor found that **30 states** currently participate in Public Defense Repayment programs, and **20 states** have some sort of application fee with 5 other states allowing counties the discretion to impose such a fee. Currently, West Virginia code allows courts the option to order the repayment of the public defense costs; however, there is no uniformity or consistency in the collection of these fees between the courts. During FY 2002 and FY 2003, the courts collected $396,700 and $366,457 respectively in Public Defense Repayment fees. The Legislative Auditor recommends that the Legislature establish procedures and guidelines for the Public Defense Repayment fee process and require all judicial circuits to participate in the collection of these fees to ensure the equity of all public defender clients. In addition, the Legislative Auditor recommends that the Legislature implement a public defender application fee and an additional fee for all individuals convicted of a DUI to help offset the expected rise in costs of the Public Defender system due to the lower blood alcohol limit. Based upon this analysis by the Legislative Auditor, the state could generate more than **$5 million annually** if the following recommendations are implemented.

Recommendations

1. *The Legislative Auditor recommends that the Legislature consider amending West Virginia code §29-21-16(g) by requiring Public Defense Repayments be mandatory for all Circuit Courts.*

2. *The Legislative Auditor recommends that the Legislature consider establishing uniform procedures and guidelines in imposing Public Defense Repayment fees.*

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

3. *The Legislative Auditor recommends the Legislature consider implementation of an application fee on individuals who apply for legal representation from the Public Defender system.*

4. *The Legislative Auditor recommends that the Legislature consider implementing a fine for all DUI offenders that would be deposited into the state general revenue fund.*

5. The Legislative Auditor recommends that implementation of new repayment fees should be collected by circuit courts through the same process currently used to collect repayment fees.

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

Appendix A: Transmittal Letter

WEST VIRGINIA LEGISLATURE
Performance Evaluation and Research Division

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX

John Sylvia
Director

May 21, 2004

John A. Rogers, Executive Director
Public Defender Services
Building 3, Room 330
1900 Kanawha Blvd., East
Charleston, West Virginia 25305-0730

Dear Mr. Rogers:

This is to transmit a draft copy of the Preliminary Performance Review of the Public Defender Services. This report is scheduled to be presented during the June 13 - 15, 2004 interim meeting of the Joint Committee on Government Operations. We will inform you of the exact time and location once the information becomes available. It is expected that a representative from your agency be present at the meeting to respond to the report and answer any questions the committee may have.

We need to schedule an exit conference to discuss any concerns you may have with the report. We would like to have the meeting during the week of June 1, 2004. Please contact Matthew Parsons to schedule an exact time. In addition, we need your written response by noon on June 2, 2004 in order for it to be included in the final report. If your agency intends to distribute additional material to committee members at the meeting, please contact the House Government Organization staff at 340-3192 by Thursday, June 10, 2004 to make arrangements.

We request that your personnel not disclose the report to anyone not affiliated with your agency. Thank you for your cooperation.

Sincerely,

John Sylvia

Enclosure

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

Appendix B

States with Similar Public Defender Structures

State	Public Defense Repayment Systems
Alaska	Recoupment fees (assessment of costs)
Arkansas	Application fee that is no more than $100 and no less than $10, if the defendant is unable to pay $10 then the fee is waived.
Arizona	Have an application of fee that is administered on the county level.
California	Counties are given the authority to impose an application fee
Colorado	Imposes a $25 non-refundable application fee
Connecticut	Imposes a $25 flat fee toward the cost of defense
Delaware	$50 Application fee, if defendant is unable to pay then they are order to report to the Department of Corrections to schedule a number of community service hours to discharge the fine.
Florida	$40 application fee for indigency screening; unless found not guilty the judge may require the client to pay attorney's fees for the reasonable value of the services the Public Defender provided. They can also impose a lien on the client's property and file a judgement against the client for the attorney fees, court costs, and restitution.
Georgia	Counties are given the authority to impose an application fee
Indiana	Have a $100 fee for felony and $50 fee for misdemeanor
Iowa	The applicant (defendant) must pay back any sums ordered by the court. If the applicant is employed the applicant shall execute an assignment of the applicants wages.
Kansas	$50 application fee
Kentucky	Have a court cost fee (replaced application fee), recoupment fees, and a $200 fee is assessed against DUI offenders.
Maryland	Have a $50 application fee for adults and $25 for juveniles
Massachusetts	Impose a $200 application fee
Missouri	Have a pre-determined schedule of fees
New Jersey	$50 admin fee; they also must by law pay the Public Defender once the case is completed for reasonable costs associated with the case

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

New Mexico	Impose a $10 application fee, if defendant is unable to pay the fee is waived
Nevada	Courts may reorder the cost of legal representation
North Carolina	Have a $50 application fee
North Dakota	Have a $25 application fee. The fee may be reduced or waived.
Ohio	Counties are given the authority to impose an application fee
Oklahoma	A $40 application fee
Oregon	A $20 application fee
South Carolina	Impose a $25 application fee and have 10% surcharge imposed on all fines levied against defendants convicted of criminal offenses under jurisdiction, excluding non-moving traffic offenses.
Tennessee	Have a $50 fee, however, if the court finds the defendant can pay more then the fee can be increased to no more than $200.
Vermont	Have a $25 fee that is waivable.
Washington	Counties are given the authority to impose an application fee
West Virginia	Counties are given the authority to impose court costs fees
Wisconsin	Charge $400 for felony and $200 for misdemeanor. If pre-paid within 30 days of application felonies and misdemeanors may be reduced to $50 an offense.
Wyoming	Have recoupment fees

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

Appendix C

West Virginia

Circuits	County	Revenue
1st	Brooke	$0
	Hancock	$332
	Ohio	$60
	Total	**$392**
2nd	Marshall	$1,164
	Tyler	$3,238
	Wetzel	$3,536
	Total	**$7,938**
3rd	Doddgride	$9,513
	Pleasants	$375
	Ritchie	$4,167
	Total	**$14,055**
4th	Wirt	$10
	Wood	$7,063
	Total	**$7,073**
5th	Calhoun	$0
	Jackson	$736
	Roane	$3,269
	Mason	$0
	Total	**$4,005**
6th	Cabell	$380
7th	Logan	$9,908
8th	McDowell	$20
9th	Mercer	$11,710
10th	Raleigh	$216
11th	Greenbrier	$3,008
	Pocahontas	$375
	Total	**$3,383**
12th	Fayette	$6,653
13th	Kanawha	$1,795
14th	Braxton	$1,181
	Clay	$116
	Gilmer	$167
	Webster	$108
	Total	**$1,572**
15th	Harrison	$0

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

16th	Marion	$9,200
17th	Monongalia	$4,625
18th	Preston	$1,868
19th	Barbour	$2,803
	Taylor	$6,324
	Total	**$9,127**
20th	Randolph	$14,900
21st	Grant	$23,730
	Mineral	$15,423
	Tucker	$2,472
	Total	**$41,625**
22nd	Hampshire	$18,608
	Hardy	$13,096
	Pendleton	$7,585
	Total	**$39,289**
23rd	Berkeley	$2,585
	Jefferson	$1,108
	Morgan	$8,956
	Total	**$12,649**
24th	Wayne	$0
25th	Boone	$12,763
	Lincoln	$1,051
	Total	**$13,814**
26th	Lewis	$9,661
	Upshur	$23,246
	Total	**$32,907**
27th	Wyoming	$3,251
28th	Nicholas	$3,174
29th	Putnam	$2,237
30th	Mingo	$64
31st	Monroe	$323
	Summers	$4,290
	Total	**$4,613**

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

Appendix D: Agency Response

STATE OF WEST VIRGINIA

GOVERNOR BOB WISE

TOM SUSMAN
CABINET SECRETARY

PUBLIC DEFENDER SERVICES
BUILDING 3, ROOM 330

1900 KANAWHA BOULEVARD, EAST
CHARLESTON, WEST VIRGINIA 25305-0730
304-558-3905

JACK ROGERS

28 May 2004

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

RECEIVED
MAY 28 2004
PERFORMANCE EVALUATION AND RESEARCH DIVISION

Re: Performance Review, Public Defender Services

Dear Mr. Sylvia:

Thank you for the opportunity to respond to your latest review of this agency. The issues you raise have been widely discussed in many jurisdictions.. In principle I have no objection to any of the three categories of fees you set forth (initial application fees, recoupment of costs, special DUI fees) but substantial legal and practical difficulties abound unless some entity other than the Public Defender system is made responsible for collection.

(1) Right to Counsel Cannot be Denied

Whether a private counsel or a Public Defender, the attorney appointed must provide representation to the client pursuant to court order. Failure to pay an application fee cannot be made a condition for denying the constitutional right to counsel. Further, if an attorney were to refuse to represent a client until payment is made, that attorney may also be subject to contempt of court for failure to abide by the court's order to represent the client.

(2) Ethical Limits on Collection; Cost of Collection

Whether the fee is at the front end (application fee) or the back end (recoupment and DUI fee) the attorney cannot be made to collect a fee from his indigent client. The attorney client relationship would not only thereby be destroyed but the additional time and effort to collect would incur so much additional expense that little if any net gain would be achieved.

(3) Improper Incentives

Compounding the clear ethical dilemma posed above, if the funds collected are dedicated to the Public Defender system an unholy incentive is created to encourage guilty pleas or otherwise compromise the representation. If the funding of either a private counsel voucher or a Public Defender salary is dependent on the client's being found guilty the client's interest and the attorney's interest are completely divergent. No reasonable possibility exists of constitutionally adequate representation. A better method is to continue the current practice of remitting recoupment costs to the general revenue fund for appropriation by the Legislature.

These issues aside, a few comments about the Kentucky system are in order. The collection efforts in Kentucky are obviously exceptional and success on this scale should not be expected. The experience of other states should be evidence of the difficulties in extracting funds from an indigent population. (It is also important to note that Kentucky's case load is nearly twice that of West Virginia.) Even in Kentucky application fees were clearly not successful.

ARCHIVED: This PDF has been archived because it contains historical information and data that may not be currently applicable.
For more information, and any accessibility concerns, please contact Dana Eddy at dana.f.eddy@wv.gov.

Nonetheless, it may be possible to collect substantially more funds than are currently collected. If post-conviction recoupment were made mandatory, court probation officers could supervise collections, prosecuting attorneys could bring enforcement actions by moving to revoke probation and Circuit Clerks could collect funds as they now do. Further, initial application fees could be collected by magistrate clerks (with clear notice to the client that representation will be provided even if payment is not made). Failure to pay could be taken into consideration by the sentencing court upon a finding of guilty and recoupment ordered accordingly.

Collection would be more likely if payment plans could be allowed and payment made over a long period in small increments. Circuit Clerks could also supervise this process but would need substantial increases in staff if recoupment is made mandatory in every case. Also, as discussed in your report, alternative collection methods like tax intercepts, liens on property or garnishment of wages can be used.

The one major fallacy in the report, however, is the dollar amount estimated. No system of any kind, anywhere, for any purpose, has a collection rate of 100%. I think you do a disservice to the Legislature by setting up unreasonable expectations. If collections were to come in at a rate of 50% the estimate would be far more reasonable. As noted, Kentucky's case load is nearly double West Virginia's and the wildly successful efforts there yield only $4.3 million. Even with success on the scale of Kentucky's system a more reasonable estimate for West Virginia is $2 million, not the $5 million your report projects.

I would also like to reiterate that the single most effective cost savings is your previous recommendation of the expansion of the Public Defender system. The Legislature has still not acted on this recommendation even though a bill to implement this proposal has now been before the Legislature for seven years and has passed the Senate three times by overwhelming majorities. Despite full expansion, implementation of this system has resulted in substantial reductions in expense. Adjusting for the change in private counsel rates (from $20 and $25 dollars per hour to $45 and $65 dollars per hour, out of court and in court, respectively) indigent defense funding has actually less than doubled while the case load more than tripled ($14 million, adjusted, in FY 1990, with a caseload of approximately 22,000 to a high of $27 million, with a caseload of 69,000). I suggest that you continue to raise this issue with the Legislature.

Again, thank you for the opportunity to comment and I look forward to further discussions.

Sincerely,

John A. Rogers
Executive Director