



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-
MAKING REVIEW COMMITTEE**

AGENCY: Public Defender Services TITLE-SERIES: 89-01
RULE TYPE: Legislative Amendment to Existing Rule: No Repeal of existing rule: No
RULE NAME: 89-01 Payment of Fees and Reimbursement of Expenses of Court Appointed Attorneys

PRIMARY CONTACT

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CITE STATUTORY AUTHORITY: W. Va. Code §29-21-5; §29-21-13a; §29-21-18; §30-18-1; Frasher v.
Ferguson, 355 S.E.2d 39, 177 W.Va. 546 (1987)

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF
THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY
PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

This rule is filed pursuant to SB 103 enacted during the 2019 legislative session, which amended and reenacted
W. Va. Code §29-21-6 and §29-21-13a. The bill authorized the filing of emergency and legislative rules.

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 5/20/2019

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 6/21/2019

COMMENTS RECEIVED: Yes

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO
COMMENTS)

PUBLIC HEARING: No

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND
TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

A Notice of Filing of Legislative Rule was submitted on May 20, 2019 through the PDS Message Center to every attorney who receives payment from PDS for court-appointed work, advising them that the rule was open for public comment until June 21, 2019. A link to the rule was provided in the message, and prominently displayed on the agency website at pds.wv.gov.

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

This rule establishes the processes for voucher preparation and submission; sets forth the compensation, expense reimbursement, conditions, and limitations of payments to court-appointed attorneys; and establishes a process for the resolution of disputes arising from the reduction or rejection of vouchers.

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

SB 103 enacted during the 2019 legislative session transferred initial voucher approval authority from the circuit courts to the agency and raised the rate of compensation of court-appointed attorneys by \$15 an hour. This rule is necessary to establish the processes as delineated in SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE above.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

SB 103 increased the rates of compensation for court-appointed attorneys by \$15 an hour. Based on the reported hours of service in Fiscal Year 2017, the increase would result in additional payments in the amount of \$7,361,265. With certain offsets as explained in D. EXPLANATION OF ABOVE ESTIMATES below, the agency estimates a net increase of total costs of \$5,345,834.

B. ECONOMIC IMPACT OF THE LEGISLATIVE RULE ON THE STATE OR ITS RESIDENTS:

This rule would implement the provisions of SB 103 enacted during the 2019 legislative session, which authorized an increased expenditure of state funds to fulfill its constitutional obligation to provide legal counsel to indigent defendants facing the loss of liberty through state action.

C. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2019 Increase/Decrease (use "-")	2020 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	5,427,862	0	5,427,862
Personal Services	82,028	0	82,028
Current Expenses	5,345,834	0	5,345,834
Repairs and Alterations	0	0	0
Assets	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

D. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

SB 103 increased the rates of compensation for court-appointed attorneys by \$15 an hour. Based on the reported hours of service in Fiscal Year 2017, Public Defender Services, Annual Report 2017, p. 244, the increase would result in additional payments in the amount of \$7,361,265. The bill also transferred the initial voucher approval authority from the circuit courts to the agency. Because the agency has the ability to review vouchers in relation to other submissions by the individual attorneys, it estimates that this transfer will result in a reduction of expenditures from general revenue in an annual amount of \$639,720 in the specific instances of known overbilling and an additional \$560,000 from the review of all vouchers. Further, as set forth in this rule, the agency intends to curtail billing for certain administrative tasks that have historically been permitted even though the statute does not provide for such payment. The agency estimates that the reduction for these payments would be \$815,711. These reductions result in a net increase of total costs of \$5,345,834 as set forth in C. FISCAL NOTE DETAIL.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Brenda K Thompson -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 89
LEGISLATIVE RULE
PUBLIC DEFENDER SERVICES

SERIES 1
PAYMENT OF FEES AND REIMBURSEMENT OF EXPENSES
OF COURT-APPOINTED ATTORNEYS

§89-1-1. General.

1.1. Scope. -- This rule establishes guidelines for the submission of vouchers to Public Defender Services for payment of fees and reimbursement of expenses of attorneys appointed by the court to represent eligible indigent clients.

1.2. Authority. -- W. Va. Code §29-21-5; §29-21-13a; §29-21-18; §30-18-1; *Frasher v. Ferguson*, 355 S.E.2d 39, 177 W.Va. 546 (1987).

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Sunset Provision. -- This rule shall terminate and have no further force or effect upon the expiration of 5 years from its effective date.

§89-1-2. Definitions.

2.1. Terms Defined by Statute -- Terms defined in W. Va. Code §§29-21-1, *et seq.*, have the same meanings when used in this rule unless the context or subject matter clearly requires a different construction.

2.2. Terms Defined -- As used in this rule, these terms have the designated meanings unless the context or subject matter clearly requires a different construction:

2.2.a. “Agency” means Public Defender Services, an executive agency established by the provisions of W. Va. Code §29-21-3.

2.2.b. “Attorney’s work” means services provided by a panel attorney in the course of legal representation and does not include administrative or non-legal tasks even if performed by an attorney.

2.2.c. “Capital case” means a criminal proceeding in which a potential sentence is life imprisonment.

2.2.d. “Day,” unless otherwise identified as a calendar day, means a day other than a Saturday, a Sunday, a legal holiday as defined by the provisions of W. Va. Code §2-2-1, or a day on which the agency is closed by reason of an executive order of the Governor.

2.2.e. “Eligible client” means a person identified in the provisions of W. Va. Code §29-21-2(2).

2.2.f. “Eligible proceeding” means a proceeding identified in the provisions of W. Va. Code §29-21-2(3).

2.2.g. “Executive director” means the person appointed pursuant to the provisions of W. Va. Code §29-21-5.

2.2.h. “Governing statute” means the provisions of W. Va. Code §§29-21-1, *et seq.*

2.2.i. “In-court” means legal representation in the presence of a judge or other judicial officer, but does not include representation (1) before an administrative board, a parole board, or a drug-court or other specialty court team or (2) in a multidisciplinary team meeting.

2.2.j. “Investigative services” means services performed in the course of an investigation to obtain information about matters enumerated in the provisions of W. Va. Code §30-18-1.

2.2.k. “Legal representation” means the provision of legal services or legal assistance as legal counsel or guardian *ad litem* to an eligible client or ward in an eligible proceeding.

2.2.l. “Out-of-court” means attorney’s work or paralegal’s work which is not in-court or waiting in-court.

2.2.m. “OVS” means the agency’s online system for the preparation and submission of a voucher.

2.2.n. “OVS Help Desk” means the technical assistance provided by the agency to panel attorneys or service providers that is accessed by the phone number, (304) 741-8650.

2.2.o. “Panel attorney” means an attorney appointed to represent eligible clients in eligible proceedings pursuant to the provisions of W. Va. Code §29-21-9.

2.2.p. “Paralegal services” means services provided by a person under the supervision of a panel attorney which, if performed by the panel attorney, would constitute attorney’s work.

2.2.q. “Stand-in counsel” means a counsel standing in for a panel attorney and can be another panel attorney or an attorney associated with the appointed panel attorney.

2.2.r. “Supreme Court” means the Supreme Court of Appeals of West Virginia.

2.2.s. “Travel” means the traversing of the distance between two points to provide legal representation.

2.2.t. “Value billing, block billing or pattern billing” means the attribution of time to an itemized legal service that is not based upon the actual time expended by the panel attorney but, rather, is based on a predetermined value of a service or is time that would have been expended in the original preparation of utilized forms or is time of a staff or administrative person other than the panel attorney that is represented by the panel attorney to be his or her own time.

2.2.u. “Waiting-in-court” means presence within the courtroom or other in-court venue from the designated start time for a hearing or other in-court proceeding until actual commencement of the hearing or proceeding.

2.2.v. “Website” means the agency’s website maintained at www.pds.wv.gov.

§89-1-3. Compensation; conditions and limitations.

3.1. An overriding principle in the governing statute is that, as set forth in the provisions of W. Va. Code §29-21-13a(d), compensation is paid only for the actual time expended. As the Supreme Court opined in *Frasher v. Ferguson*, 177 W. Va. 546, 355 S.E.2d 39, 40 (1987), the governing statute's use of the term "actual" time "clearly envisages that court-appointed lawyers will be compensated only for hours actually worked and expenses actually incurred in rendering services, and that duplicative compensation is unauthorized." [Emphasis in original.] Accordingly, compensation can only be requested once for the actual period of time involved, notwithstanding that multiple services were provided for one or more clients.

3.2. Panel attorneys are to be compensated for legal representation. In addition to compensation for the panel attorneys' legal representation, compensation may be paid to the panel attorney for the services of a paralegal or investigator. However, compensation will not be paid to the panel attorney or a paralegal for conferences between the panel attorney and a paralegal. The panel attorney's review and revision of a paralegal's produced work product will be compensated.

3.3. Compensation for attorney's work performed out-of-court will be at the rate of sixty (60) dollars an hour.

3.4. Compensation for attorney's work performed in-court or while waiting-in-court will be at the rate of eighty (80) dollars an hour.

3.5. Compensation to a panel attorney for paralegal's work will be at the rate of twenty (20) dollars an hour.

3.6. Compensation to a panel attorney for investigative services will be at the rate of thirty (30) dollars an hour.

3.7. Compensation for paralegal's work or investigative services will not be considered compensation for attorney's work in calculating the maximum amount of compensation, but compensation for paralegal's work or investigative services will be considered expenses of the panel attorney in the course of legal representation and will be processed accordingly.

3.8. Compensation for paralegal's work in-court will not be paid unless the services of a paralegal in-court has been approved by an order of the presiding court in advance of the services. The maximum amount of compensation for paralegal's work in-court in a matter will be one thousand dollars (\$1,000) and the amount of the compensation requested for the in-court work will require an order of the court approving the amount to be compensated. Forms for this purpose will be available on the website. The order approving this compensation is to be uploaded with the voucher that is submitted to the agency by the panel attorney for compensation in the eligible proceeding to which the services related.

3.9. Compensation for legal services or legal assistance as guardian *ad litem* in a proceeding other than an eligible proceeding will not be compensated by the agency. Compensation for these services is governed by the provisions of Rules 21.01 through 21.06 and Rules 39.01 through 39.03 of the West Virginia Trial Court Rules.

3.10. Compensation will be paid to a panel attorney appointed to represent an eligible client for the services of another attorney as stand-in counsel. However, compensation will not be paid to the

appointed panel attorney for conferences with the stand-in counsel or for review of the work product of a stand-in counsel.

3.11. Compensation will not be paid for the performance of administrative tasks including, but not limited to, the preparation of vouchers for submission to the agency, the opening of a file for a newly appointed client for administrative purposes, or the closing of a file for a client for administrative purposes. Any work performed by an attorney that is not attorney's work will not be compensated and will be considered an administrative task. Any work performed by a paralegal that is not paralegal's work will not be compensated and will be considered an administrative task.

3.12. Any services provided by an investigator that are not considered investigative services will be compensated as paralegal's work if it so qualifies or, otherwise, will be considered an administrative task and will not be compensated.

3.13. In a proceeding other than a capital case, the maximum amount of compensation for attorney's work is three thousand dollars (\$3,000) unless the court approves payment of additional compensation upon good cause having been shown by the panel attorney. In a capital case, no cap exists on the compensation for attorney's work. Forms for obtaining the approval of the court for additional compensation will be made available on the website. The order approving this compensation is to be uploaded with the voucher that is submitted to the agency by the panel attorney for compensation in the eligible proceeding to which the services related.

§89-1-4. Expenses; conditions and limitations.

4.1. Panel attorneys will be reimbursed for the actual and necessary expenses incurred in legal representation. To be reimbursed, expenses over ten (10) dollars require supporting documentation including invoices or receipts.

4.2. Travel -- Reimbursement for expenses related to travel will be made consistent with the reimbursement of state employees related to travel, including whether reimbursement will be made for overnight lodging, meals or otherwise. The provisions regarding reimbursement for state employees and the schedule of these reimbursements will be posted on the website.

4.2.a. Mileage for which reimbursement is claimed should be consistent with the calculation of mileage made by online services such as MapQuest or Google Maps or an equivalent application and if inconsistent, must be explained.

4.2.b. Travel will be necessary when it involves traveling from the business office of the panel attorney to another location in order to provide legal representation. Travel from a panel attorney's residence to a location will be reimbursed only if the travel is less than the travel from the panel attorney's business office or if the residence is the panel attorney's business office.

4.2.c. If a panel attorney is regularly taking appointments in a judicial circuit other than the judicial circuit in which the panel attorney's business office is situated and is not taking appointments within the judicial circuit in which the panel attorney's business office is situated, then the travel to be reimbursed will not include the distance from the panel attorney's office to the border of the judicial circuit in which appointments are taken.

4.3. Transcripts -- Expenses related to the preparation of transcripts of proceedings are governed by the provisions of W.Va. Code §29-21-13a(e). However, the expenses related to the ordering of transcripts for the purposes of an appeal to the Supreme Court are governed by the provisions of W. Va.

Code §51-7-7, and requests for payments of the transcripts are to be submitted by the court reporter to the Supreme Court in accordance with the established rules and procedures of the court.

4.3.a. If a proceeding is one for which a court reporter is required to report the proceeding, then the rates for production of the transcript are established by the provisions of W. Va. Code §51-7-4. These rates will be published on the website. An appearance fee will be paid for a court reporter only if no payment is sought for the production of a transcript for the proceeding in which the court reporter appeared.

4.3.b. If a proceeding is required to be electronically recorded pursuant to the provisions of W. Va. Code §50-5-8, then no expenses will be reimbursed for the production of a transcript by a court reporter. One (1) dollar per page will be the reimbursement made for the expense of a transcription of the electronic recording.

4.3.c. No reimbursement or payment will be made for an hourly fee charged by a court reporter for time or travel.

4.4. Videotaping or digital recording -- If a panel attorney intends to incur the expense of a videotaping or other digital recording of a proceeding, the expense will be reimbursed only if the taping or recording is approved by the presiding court in advance of incurring the expense. The payment of the final amount of the expense will require an order of the court approving the payment. Forms of an order permitting such expenses to be incurred and approving the final amount of these expenses will be available on the website. The order approving this reimbursement is to be uploaded with the voucher that is submitted to the agency by the panel attorney for compensation in the eligible proceeding to which the services related.

4.5. Copies -- If a panel attorney necessarily incurs charges from a copying service for the copying or reproduction of material, reimbursement will be made at the actual cost if supporting documentation is provided.

4.5.a. For copies or reproductions made by the panel attorney within his or her office, reimbursement will be made at the rate of fifteen (15) cents per page.

4.5.b. The agency will not reimburse panel attorneys for the scanning of documents onto computer drives or external drives. The agency will reimburse the expenses of printing of such documents at the rate of fifteen (15) cents per page.

4.6. Clothing -- Within seven days of a trial date, a panel attorney may incur an expense to obtain clothing for an eligible client and will be reimbursed up to the amount of fifty (50) dollars for such clothing if a trial is commenced. A receipt for the purchase must be provided. The time expended for obtaining this clothing will not be compensated as it will be considered an administrative task.

4.7. Fees -- Fees for filing and service of process are not reimbursable as indigent defendants are not to be assessed such fees. If a fee is permitted to be imposed for service of process related to defense of an eligible proceeding, such as service outside a jurisdiction, then the fee to be reimbursed will be capped at the amount that would be assessed by the Office of the Sheriff in the county in which the matter is pending. If fees have to be incurred in excess of these limits, reimbursement will require that the incurring of the expense first be approved by the presiding court. The order approving this reimbursement is to be uploaded with the voucher that is submitted to the agency by the panel attorney for compensation in the eligible proceeding to which the services related.

4.8. Extraordinary expenses -- Fees for experts, investigators or other service providers that are

not ordinarily required in legal representation require the approval of the presiding court before being incurred pursuant to the provisions of Rules 35.01 through 35.05 of the West Virginia Trial Court Rules. Approval of the court may consist of complying with a previously issued administrative order of the court. The final amount of such expenses will require an order of the presiding court approving the amount of the expenses. Forms of an order permitting such expenses to be incurred and approving the final amount of these expenses will be available on the website. The order approving this reimbursement is to be uploaded with the voucher that is submitted to the agency by the panel attorney for compensation in the eligible proceeding to which the services related.

4.8.a. The expenses of an evaluation of an eligible client are governed by the provisions of Rule 35.05 of the West Virginia Trial Court Rules requiring payment or reimbursement (1) by the West Virginia Department of Health and Human Resources if it is an evaluation ordered or conducted pursuant to W. Va. Code §27-6A-1(a)-(e) or W. Va. Code §62-12-2(e); (2) by the Supreme Court if otherwise ordered by the presiding court on its own motion or for its own assistance; and (3) by the agency if the services were requested by the panel attorney in the course of legal representation. The order approving this reimbursement is to be uploaded with the voucher that is submitted to the agency by the panel attorney for compensation in the eligible proceeding to which the services related.

4.8.b. The expenses of an interpreter are to be reimbursed by the Supreme Court if the interpreter is necessary to the conduct of proceedings in the presiding court. The expenses of an interpreter are to be reimbursed by the agency if the interpreter is necessary to the interaction between the panel attorney and the client and the incurring of the expense is approved by the presiding court. The final amount of the expense will require an order of the court approving the amount. The order approving this reimbursement is to be uploaded with the voucher that is submitted to the agency by the panel attorney for compensation in the eligible proceeding to which the services related.

4.8.c. Request for payment of extraordinary expenses as approved by the presiding court may be made directly to the agency rather than requiring payment by the attorney who would then await reimbursement. The service provider is required to be registered as a vendor with the state. The OVS Help Desk will assist the service provider with such registration. The request for direct payment must be submitted with an invoice detailing the services, the dates of services, and the calculation of the compensation together with the order or administrative order approving the incurring of, and the order approving the amount of, these services, and the panel attorney's information sheet including the panel attorney's certification that (1) he or she has reviewed the invoice; (2) the charges and claims made on the invoice are true and correct to the best of his or her knowledge; and (3) the services set forth on the invoice were provided in the course of the panel attorney's legal representation of the identified eligible client. The forms for making a request for direct payment of an expense will be made available on the website. At present, this request must be submitted by mail to the agency and not electronically through OVS.

4.9. Non-reimbursable expenses – The expenses related to general office overhead, office supplies, personal items, and nonlegal personal services are not reimbursable as expenses necessarily incurred in legal representation. For example, compact disks or thumb drives purchased for the recording of documents will be considered general office supplies and the costs of purchasing these items will not be reimbursed.

4.10. In a proceeding other than a capital case, the maximum amount of the reimbursement of qualifying general expenses is one thousand and five hundred dollars (\$1,500) unless the court approves additional reimbursement upon good cause having been shown by the panel attorney. In a capital case, no cap exists on the amount of qualifying general expenses to be reimbursed. Forms for obtaining the approval of the presiding court for additional reimbursement will be made available on the website. The order approving this reimbursement is to be uploaded with the voucher that is submitted to the agency by

the panel attorney for compensation in the eligible proceeding to which the services related.

§89-1-5. Voucher preparation and submission.

5.1. The preparation of a voucher is to be based on accurate and detailed records of the panel attorney regarding the legal services provided to an eligible client in an eligible proceeding. The records are to be maintained in a manner that, if audited by the agency, an attorney can readily provide for any day the clients for whom services were provided, the nature of the services provided, and the time expended for each of the services. The failure to maintain accurate and detailed records will be a reason provided by the agency to a court for the rejection or reduction of vouchers notwithstanding that legal representation was actually provided.

5.2. Vouchers are to be prepared using OVS. Instructions for accessing OVS and establishing an account and designating users for the account are set forth on the website. If assistance is needed, the OVS Help Desk is to be contacted. Registration as a vendor with the State of West Virginia will be required for payment. The OVS Help Desk will assist with registration as a vendor.

5.3. Preparation of a voucher will require completion in OVS of an information page, an itemized statement of legal services, and an itemized statement of expenses. These documents are to be completed fully and accurately.

5.4. In completing the forms for the voucher required by OVS, the identification of the client is to be done in the following manner: Last name, first name. Identification of minors is to be done by initials.

5.5. Legal services are to be itemized and are to be coded according to the classifications provided by the agency. Explanations or descriptions of an itemized service are to be provided. The explanations or descriptions should not disclose either confidential communications between the attorney and client or the work product of the attorney. The explanations or descriptions should be sufficient, however, to determine the nature of the legal service provided and to support the amount of time allotted for the service. A list of abbreviations that may be used in providing explanations or descriptions is published on the website.

5.6. Explanations or descriptions for conferences, phone calls, or other communications are to identify the person or persons involved, either by title, position, or relationship to the client.

5.7. Explanations or descriptions for research are to state the subject of the research without revealing strategy or work product.

5.8. Explanations or descriptions for motions are to state the purpose of the motions.

5.9. Explanations or descriptions for hearings are to state the purpose of the hearing.

5.10. Explanations or descriptions for travel for which compensation of time is sought are to include a point of origin and a destination and an indication whether the travel is for one direction or for a round trip. If a period of time is billed as travel, compensation cannot be requested for any other services provided during that time such as a telephone conversation or dictation of a work product. The statutory requirement of "actual" time precludes such billing.

5.11. If services are split between different clients, the explanation or description is to provide some identification of the other client to which time has been allotted. If services such as travel, waiting-in-court, or research relate to more than one client, panel attorneys are encouraged to split the time

between or among the clients because this allotment of time provides a better analysis of costs per case and provides a better record of services in any subsequent proceeding challenging the effectiveness of representation.

5.12. Explanations or descriptions for services on the same date that are identical should be further explained or described. For example, if phone conversations with a client occur on the same day multiple times and are itemized separately, the explanation or descriptions should make reference to the “first” phone call, the “second” phone call, and so forth. The absence of such further explanation or description may result in a reduction of the amount requested for compensation based on the possible duplication of entries.

5.13. Waiting-in-court -- Explanations or descriptions for services itemized as waiting-in-court are to include the designated time for the commencement of the proceeding and the actual time of commencement.

5.13.a. Waiting-in-court does not include recesses or other breaks in the proceedings of one hour or longer. Provided, That such break time can be billed as out-of-court if attorney’s work is done during that time period. The time between submission of a matter to a jury and awaiting a jury verdict may be billed as waiting-in-court for the time the jury is actually deliberating.

5.13.b. If time is billed as waiting-in-court, compensation cannot be requested for other legal representation for the same or different client during that same period of time. The statutory requirement of “actual time” precludes such billing.

5.14. Investigative services and paralegal services -- Compensation for investigative services will be made to persons engaged in the private investigation business as defined by the provisions of W. Va. Code §30-18-1.

5.14.a. Services that are not investigative services but could be paralegal services will be compensated at the rate for paralegal services. Examples of services that would be treated as paralegal services are preparing and filing motions, obtaining orders or other court documents, summarizing discovery responses, or accompanying attorneys to hearings or conferences unless the appearance is relevant to the course of an ongoing investigation.

5.14.b. Services that are administrative tasks will not be compensated in any amount. Examples of services that would be treated as administrative tasks are transporting clients to hearings, delivering documents to opposing counsel or the court, purchasing clothing for clients, or obtaining supplies for the attorney.

5.14.c. Services that are submitted as paralegal services but which are actually administrative services will not be compensated.

5.15. Stand-in attorney -- Compensation for services in a case will be made by warrants that are payable to the actually appointed panel attorney. The panel attorney’s request for compensation may include the time of stand-in counsel. The explanation for such services must include the initials of the attorney actually performing the services. No compensation will be paid for conferences between the appointed panel attorney and the stand-in attorney and no compensation will be paid for the review of the work product of a stand-in attorney.

5.16. A panel attorney in the preparation of the statement of legal services is required to set forth with specificity the nature of the service rendered, the stage of proceeding or type of hearing involved, the date and place the service was rendered and the amount of time expended in each instance. The services

are to be itemized. The time expended for each itemized service is to be expressed to the nearest tenth of an hour. The agency interprets this requirement as permitting the “rounding up” for any time expended even if it is less than three minutes, but panel attorneys are directed to group similar tasks into one billing item if the collective amount for such tasks remains under six minutes. For example, if an order and accompanying documents are received and the review of the entirety of the documents is less than six minutes, this is to be one itemized service for which the time expended is set forth as one-tenth of an hour rather than separately listing each document and entering time for review of each document as one-tenth of an hour. As another example, the review of emails that relate to the same subject and which collectively are reviewed in less than six minutes are to be one itemized service for which the time expended is set forth as one-tenth of an hour rather than separately listing each email and entering time for the review of each email as one-tenth of an hour. As another example, if phone calls are made to a client without any answer, these phone calls should be grouped as one item and billed collectively as one tenth of an hour, rather than listing each phone call separately and billing one tenth of an hour for each phone call. The explanations or descriptions for each of these grouped services is to indicate the multiple tasks involved.

5.17. Value billing, block billing or pattern billing are prohibited and will not be compensated. A determination that value billing, block billing, or pattern billing has occurred will result in a referral to the Office of Disciplinary Counsel for investigation or, if warranted in the circumstances, will result in a referral to the Commission on Special Investigations within the West Virginia Legislature for possible criminal prosecution.

5.18. An electronic signature of the panel attorney submitting a voucher must be affixed to the voucher and will be a declaration, under the penalty of perjury as set forth in the provisions of W. Va. Code §39-1-10a, that (i) the voucher complies with the provisions of W. Va. Code §29-21-13a; (ii) the attorney time set forth in the itemized statement of legal services represents the actual and necessary time of the undersigned attorney expended on legal services for the identified client; and (iii) the expenses set forth in the itemized statement of expenses represent actual and necessary expenses incurred in providing legal representation for the identified client.

5.19. The electronic signature is also an acknowledgment by the panel attorney submitting the voucher that the voucher is subject to an audit by the agency. Audits may be done randomly or may be necessitated by anomalies discovered in the review of vouchers.

5.20. When a voucher is electronically submitted to the agency for its processing, the panel attorney will receive an electronic acknowledgment from the agency that the voucher has been received.

5.21. When a voucher is electronically submitted to the agency, the panel attorney will then have the option to print a copy of the voucher as submitted.

§89-1-6. Timing of voucher submission.

6.1. Compensation will be paid at the conclusion of an eligible proceeding. An appeal will be considered the commencement of a separate eligible proceeding for this purpose. Proceedings after sentencing will be considered the commencement of separate proceedings from the original proceedings for this purpose.

6.2. Panel attorneys at their election are permitted to request compensation at the completion of a critical stage within a proceeding. A critical stage is when the jurisdiction of a matter may transfer from magistrate court to circuit court or from juvenile jurisdiction to adult jurisdiction. Further proceedings after that point will be considered the commencement of a separate proceeding. A proceeding which is

“bound over” will not be considered at a critical stage and requests for compensation cannot be made until the indictment issues or the matter is dismissed or otherwise concluded. A critical stage is also when the prosecution of a matter is delayed pending the compliance of a defendant with certain conditions that may result in dismissal or reduction of charges.

6.3. The panel attorney is required to submit the request for compensation within ninety (90) days after the conclusion of an eligible proceeding. If the panel attorney elects to request compensation at a critical stage, the request is to be made within ninety (90) days after the completion of the critical stage.

6.4. The executive director has discretion to permit a voucher to be submitted to the agency before the conclusion of an eligible proceeding if the proceeding has been pending for more than six (6) months. By this rule, the executive director is exercising discretion to permit any panel attorney to submit an interim voucher if the proceeding has been pending for more than six (6) months. Only one (1) interim voucher may be submitted.

6.5. If an interim voucher is submitted, the panel attorney must submit all time expended before the date of the submission. A subsequent voucher cannot have dates of service included that could have been included in the preceding voucher. Subsequent vouchers in any instance relating to legal representation of the same client in the same eligible proceeding that include dates of services that are prior to the last date of service on a preceding voucher will be reduced by the amount of compensation requested for those services.

6.6. If a voucher is to be submitted untimely, the panel attorney must obtain an order of the presiding court stating that good cause has been shown for the untimely submission. Forms for such an order will be available on the website. The order approving this untimely submission is to be uploaded with the voucher that is submitted to the agency by the panel attorney for compensation in the eligible proceeding to which the services related.

§89-1-7. Voucher processing; reduction; rejection; resolution of disputes.

7.1. The agency will review a voucher to determine if the time and expense claims are reasonable, necessary and valid based upon the information provided on the information page, the itemized statement of legal services, and the itemized statement of expenses. The agency may review the vouchers of counsel for other parties in the matter in making this determination and may make additional inquiries as deemed to be necessary to this determination. The agency may review other vouchers of the panel attorney which include dates of service set forth in the voucher being reviewed. The agency may also contact the panel attorney submitting the voucher with questions regarding the voucher being reviewed.

7.2. Within thirty (30) days after the receipt of a voucher, the agency may reject the voucher for the following reasons:

7.2.a. The voucher is not submitted electronically to the agency in the OVS system;

7.2.b. The voucher is submitted more than ninety (90) days after the last entry for an actual and necessary legal service on behalf of the eligible client and no order of the presiding court showing good cause for the late submission is uploaded with the voucher;

7.2.c. The documents comprising the voucher have not been completed fully and accurately;

7.2.d. The amount set forth in the voucher exceeds any statutory cap on the fees or expenses either in the voucher itself or when added to the amount of compensation paid or expenses reimbursed in

previously submitted vouchers in the same matter and no order of the presiding court showing good cause for exceeding the limits is uploaded with the voucher;

7.2.e. The voucher is for services in a matter that is not an eligible proceeding;

7.2.f. The voucher is for services provided to a person who is not an eligible client;

7.2.g. The statement of legal services contains time entries that suggest value billing, block billing, pattern billing, or other billing that does not reflect actual time;

7.2.h. The statement of legal services contains explanations or descriptions of the legal services from which the agency cannot determine the nature and extent of the legal services;

7.2.i. Hours on certain dates of service cause the attorney to exceed eighteen billable hours on a day and an explanation for exceeding this number of hours is not provided with the submission;

7.2.j. In-court hours are listed for paralegal services without an accompanying order permitting compensation for paralegal's work in-court;

7.2.k. In-court compensation for paralegal services exceed the maximum amount;

7.2.l. As a whole, the compensation requested does not represent reasonable, necessary or valid services;

7.2.m. The voucher is a duplicate of a previously submitted voucher; or

7.2.n. The voucher in some manner fails to comply with the agency's guidelines, this legislative rule, the governing statute, or the rules of the Office of the Auditor for the State of West Virginia.

7.3. If a voucher is rejected, the panel attorney will be notified by email of the reasons for the rejection and will have a period of fifteen (15) days within which to correct the deficiencies in the submission, if possible, and submit the corrections to the agency with an explanation. A certification from the court regarding the reasonableness or necessity of services will only be obtained if demanded by the agency in its notification to the panel attorney. If not resolved by communication between the panel attorney and the agency, the resolution of disputes regarding the rejection of a voucher is governed by the provisions of W. Va. Code §29-21-13a(d)(2).

7.4. Within thirty days after the receipt of a voucher, the agency may revise a voucher by reducing the amount of compensation to be approved for payment for the following reasons:

7.4.a. Striking the dates of service on the voucher that precede the last date of service of a preceding voucher in the same matter;

7.4.b. Reducing the number of hours on a date of service set forth in the voucher so that the panel attorney's accumulated hours on that date do not exceed eighteen hours unless the panel attorney has submitted an explanation for the excess hours;

7.4.c. Striking the itemized services for which the explanation or description is not discernible or decipherable;

7.4.d. Reducing the number of hours for itemized legal services that are unnecessary to the completion of the identified task based on the circumstances of the case;

7.4.e. Striking entries which appear to be duplicated in the voucher and that have no accompanying explanation or description explaining the apparent duplication;

7.4.f. Striking the itemized services which constitute administrative tasks and not the delivery of legal services;

7.4.g. Reducing compensation for investigative services to the rate for paralegal services;

7.4.h. Striking itemized services that duplicate services itemized on a voucher in the same case or in another case; or

7.4.i. Striking items which are inconsistent with this legislative rule, the agency's guidelines, the governing statute, or the rules of the Office of the Auditor for the State of West Virginia.

7.5. If a voucher is revised, the attorney will be notified by email of the reasons for the reduction and will be told what records must be produced in order for the agency to approve the compensation in the amount requested by the panel attorney. The panel attorney will have fifteen (15) days within which to submit additional records or other documentation supporting the payment of compensation for the struck or reduced items. If the agency and the panel attorney cannot agree on the compensability or lack of compensability of an item, the agency will process for payment the uncontested amount of the request for compensation and will move the presiding court to enter its order resolving the dispute between the agency and the panel attorney.

§89-1-8. Child abuse and neglect.

8.1. Priority in the payment of compensation is provided for legal representation in child abuse and neglect proceedings.

8.2. Priority in payment is achieved by permitting panel attorneys providing legal representation in child abuse and neglect proceedings to submit vouchers after each dispositional hearing held in the proceedings, without regard to the number of such vouchers that are eventually submitted. If a voucher is submitted after a dispositional hearing, the panel attorney must submit all time expended before the date of the submission. A subsequent voucher cannot have dates of service included that could have been included in the interim voucher. Subsequent vouchers including dates of services that precede the last date of service in an interim voucher will be reduced by the amount of compensation requested for those services.

§89-1-9. Directions for payment.

9.1. Payment of compensation for legal services and reimbursement of expenses will be made in the name of the panel attorney actually appointed to represent the eligible client.

9.2. The original directions for the delivery or deposit of the payment of the compensation will not be changed with regard to such payments until any and all persons or entities identified in the original directions have agreed to the changes.

9.3. If a dispute arises between the panel attorney and other persons or entities identified in the directions regarding payment, the agency will suspend the processing of a voucher until all parties submit a written agreement regarding the directions for payment or an order of a court is received directing the

payment.

§89-1-10. Additional guidelines.

10.1. The agency may publish additional guidelines for the preparation, submission and processing of vouchers for payment as circumstances make necessary.

10.2. The guidelines will be posted on the website and may include explanations for the guidelines in the form of “frequently asked questions.”