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Jeremy Cooper jeremy@blackwaterlawpllc.com

Written comment on 89CSR1

Dear Ms. Thompson,

Please find my written comments on proposed legislative rule 89CSR1. I have delineated my comments by rule section:

2.2.i - This definition of "in-court" would exclude parole revocation hearings, which from a practical standpoint are not different in consequence, nor in procedure, to a hearing held in magistrate court or circuit court. I am uncertain what the justification is for excluding a parole revocation hearing from the definition of "in-court" time.

3.11 - Please see comment on 5.14.b regarding the definition of administrative tasks.

4.2.b - It should be clarified whether this permits attorneys who are, for example, driving directly from home to court in the morning, to submit a time entry for travel and/or mileage as though it was from their office if the office is closer to the court than the residence, rather than not being able to submit any travel time at all if their residence is more distant than their office. It seems like the rule intends to permit such billing, but it is not clear from the text.

4.2.c - This rule does not take into account the situation of attorneys who have offices outside of West Virginia, which is extremely common in border counties (of which West Virginia has many). Is this requirement satisfied if the attorney takes appointments in the out-of-state county? Furthermore, this rule does not take into account when travel to represent a client does not traverse the borders of the county of appointment, such as travelling to prison.

Moreover, this limitation on travel billing does not seem to comport with the requirement of the statute that actual travel time be compensated.

5.1 - It is unclear from this rule whether contemporaneous timekeeping in OVS is sufficient to qualify as an "accurate and detailed record". In the past, the executive director of this agency has suggested that such a record-keeping method is permissible. It should be clarified whether duplicative record-keeping is necessary.

5.5 - 5.9 - Because these vouchers may be scrutinized publicly, by persons outside the attorney-client relationship, it should be made permissible to substitute the word "[PRIVILEGED]" for descriptions of services the disclosure of which could conceivably harm the client.

5.14.b - It is unclear whether these examples of "administrative tasks" apply only to investigator and paralegal billing, or to attorneys as well (who are similarly barred from billing for administrative tasks). If this rule is intended to preclude attorneys from billing for the time that is spent "delivering documents to opposing counsel or the court" then it is contrary to the legislative mandate to compensate attorneys for the time expended rendering legal services. There is nothing "administrative" about delivering documents to the court or opposing counsel. That is an essential aspect of legal services, and cannot be grouped in with buying office supplies. If applied to attorneys, this rule would preclude an attorney from obtaining compensation for the time spent travelling from an office to a court to file by a

deadline, for example. There is no sensible definition of legal services that would not incorporate that activity as valid, billable legal services for an attorney.

6.4 - The panel attorneys previously received a message stating that habeas matters could be billed every six months without the limitation of a single interim voucher. Some clarification should be provided as to whether that policy is to continue.

7.4.d - This provision is vague and would have the effect of allowing the agency to second guess the legal decision-making of the attorney in a way that would either threaten the right to counsel of the client or the property interest of the attorney.

Thank you for your consideration of these comments. Please let me know if there are any points of clarification I can provide.

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"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."
Griffin v. Illinois, 351 U.S. 12 (1956)

July 22, 2019

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Re: *Comments to proposed Legislative Rule,* 89CSR1

Mr. Cooper:

The following constitutes the reply of Public Defender Services (the "agency") to your comments on the proposed legislative rule governing *Payment of Fees and Reimbursement of Expenses of Court-Appointed Attorneys.* The rule is to be codified as 89CSR1.

Your comments will be summarized by the agency.

COMMENT #1: *Parole revocation hearings should not be excluded from "in-court" time.*

Since its inception in 1989, the agency has excluded representation before the parole board from the compensation for "in-court time."

The governing statute provides compensation for "work performed in court." W. Va. Code §29-21-13a(j)(2). "Court" is not defined in the governing statute. However, the statute refers to the "circuit court," *see* W. Va. Code §29-21-9(a); to the "family court," *see* W. Va. Code 29-21-9(b); and to "municipal court," *see* W. Va. Code §29-21-2(2). The governing statute also refers to the "court system of the state of West Virginia." *Id.* Essentially, work in court contemplates work in a unit of the court system.

Notably, the governing statute provides that "in-court work includes, but is not limited to, all time spent awaiting hearing or trial before a judge, magistrate, special master, or other judicial

officer." W. Va. Code §29-21-13a(j)(2). The reference to "judicial officer" also contemplates that the work is to be done within a unit of the court system.

CONCLUSION: The agency concludes that "court" means a unit of the judicial branch and not an administrative unit of the executive branch. Accordingly, the parole board would not be considered a "court" and work in a revocation proceeding would not be considered "in-court" work.

COMMENT #2: *Delivering documents to opposing counsel or the court by an attorney should not be considered an administrative task.*

The delivery of a document requires no special skill and can be accomplished in a variety of ways by numerous individuals who do not have the benefit of a legal education. Indeed, the Administrative Office of the Supreme Court is implementing electronic filing by which delivery of a document can be done electronically, eliminating the need to travel to another office or to the courthouse. If an attorney can establish in the particular circumstances of a case that only an attorney could perform the act of delivery, the agency would consider compensation of the act as a "legal service." The agency deems it highly unlikely that this would ever be the case.

CONCLUSION: The agency will not compensate delivery activities as legal services.

COMMENT #3: *Even if the time for travel from a residence to a destination ("Residential Travel") is greater than the time for travel from a business office to the destination ("Business Travel"), the attorney should nonetheless be compensated for what the Business Travel would have been.*

CONCLUSION: The agency agrees. This was the intent of the language in Rule 4.2.b. If necessary, the agency will provide this clarification as a "frequently asked question" as set forth in Rule 10.2.

COMMENT #4: *Travel should not be limited based on the county in which the attorney resides and the county in which representation is provided.*

The comment is made that "this limitation on travel billing does not seem to comport with the requirement of the statute that actual travel time be compensated."

While the statute limits compensation to actual time, the further requirement is that the legal services be "reasonable" and "necessary." W. Va. Code §29-21-13a(c).

The agency's opinion is that it is not reasonable to compensate attorneys who "commute" to their daily work. In this instance, the "travel" is not "attorney work" in the provision of legal services for a specific client, but, instead, is part of the general process of "going to work" to then start the representation of specific clients. Most employees are not compensated for

commuting as residency is their personal choice based on many factors including the distance from the workplace.

This is especially exacerbated in the case of appointed counsel because mileage is charged in addition to the travel time.

With respect to panel attorneys who live out of state, compensation would not be paid if the only work an attorney does is in the in-state county to which the attorney travels daily. This is again deemed to be "commuting." If, instead, it is periodic representation and is in response to a circuit court's need for attorneys, then it will be compensated.

CONCLUSION: Rule 4.2c will not be modified.

COMMENT #5: *It is not clear that the requirement of "detailed and accurate records" is satisfied by the contemporaneous billing encouraged by the executive director of Public Defender Services before promulgation of the legislative rule.*

The governing statutes requires "detailed and accurate records of the time expended and expenses incurred." W. Va. Code §29-21-13a(a). Contemporaneous billing would certainly make the records maintained by the counsel more "accurate." However, discussions during the passage of Senate Bill 103 resulted in intentionally not including a "contemporaneous billing" requirement in the statute. Accordingly, the opinions expressed by the executive director on the issue of contemporaneous billing before passage of Senate Bill 103 in the 2019 Legislative Session have no import.

Instead, the records must be "maintained in a form that will enable the attorney to determine for any day the periods of time expended in tenths of an hour on behalf of any eligible client and the total time expended in tenths of an hour on that day on behalf of all eligible clients." W. Va. Code §29-21-13a(a). The "form" of this recordkeeping is within the counsel's discretion. And, again without requiring contemporaneous billing, the agency would state that such billing would certainly render the resulting records more accurate.

CONCLUSION: Contemporaneous billing is not the standard for detailed and accurate recordkeeping, but may be a means of achieving the standard.

COMMENT #6: *The word "privileged" should suffice for a description of services if the disclosure of the services would conceivably harm the client.*

CONCLUSION: The rule expressly provides that "explanations or descriptions should not disclose either confidential communications between the attorney and client or the work product of the attorney." However, "the explanations or descriptions should be sufficient ... to determine the nature of the legal service provided and to support the amount of time allotted." If necessary, specific instances that arise will be addressed as a "frequently asked question" as set forth in Rule 10.2.

COMMENT #7: *Habeas matters could be billed every six months notwithstanding the single interim voucher requirement.*

The one "interim voucher" is a statutory right if certain conditions are met. *See* W. Va. Code §29-21-13a(i). Additionally, the executive director of the agency has discretion to "authorize periodic payments where ongoing representation extends beyond six months in duration." *Id.* Before the passage of Senate Bill 103, the executive director had generally permitted attorneys in habeas matters to bill every six months due to the nature of habeas matters and the courts' difficulty in finding counsel to take appointments in such matters.

With the adoption of the rules, the "general" permission has been revoked with respect to habeas matters. Instead, such permission will be granted on a "case by case" basis under the authority of the statutory provision.

A concern exists that permitting such payments on a general basis encourages a delay in resolving habeas matters. Moreover, the legislation created a habeas division within the agency so that expertise can be brought to bear in evaluating the time taken to resolve habeas matters on a case by case basis. Accordingly, if an attorney wants to be compensated through submission of additional vouchers in a habeas matter, application must be made to the agency.

CONCLUSION: Rule 6.4 applies to all matters, including habeas matters.

COMMENT #8: *The agency should not have the ability to "reduc[e] the number of hours for itemized legal services that are unnecessary to the completion of the identified task based on the circumstance of the case."*

The commentary includes the statement that "this provision is vague and would have the effect of allowing the agency to second guess the legal decision-making of the attorney in a way that would either threaten the right to counsel of the client or the property interest of the attorney."

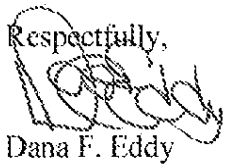
Before Senate Bill 103, the court had the authority to reduce hours for legal services which were deemed to be unnecessary, unreasonable or invalid. Senate Bill 103 now provides that it is the agency that, initially, will "review the voucher to determine if the time and expense claims are reasonable, necessary and valid." W. Va. Code §29-21-13a(c).

Notably, the agency is required to make this reduction within 30 business days after receipt of the voucher. The attorney will then have 15 business days within which to establish that the services should be compensated. If the attorney and agency cannot agree, the agency is required to commence an action with the circuit court which will determine whether the legal services should be compensated as requested.

Simply, the process has not changed substantially. Eventually, a court may make the final determination as the court has done historically without affecting a client's right to counsel or an attorney's livelihood.

CONCLUSION: The rules provide that the agency's reduction of a voucher may be resolved by a court if an attorney so insists.

Respectfully,



Dana F. Eddy
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