

CHAPTER 87

(HB 264)

AN ACT relating to public advocacy.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔Section 1. KRS 31.100 is amended to read as follows:

The following terms and standards shall apply, subject to further definition and regulation by the Department of Public Advocacy:~~[-]~~

- (1) *"Defending attorney" means any attorney who is representing a needy or indigent person;*
- (2) *"Department" means the Department of Public Advocacy;*
- (3) *"Detain" means to have in custody or otherwise deprive of freedom of action;*
- ~~(4)(2)~~ *"Expenses," when used with reference to representation under this chapter, includes the expenses of investigation, other preparation, and trial, together with the expenses of any appeal;*
- ~~(5)(3)~~ *"Needy person" or "indigent person" means:*
 - (a) A person eighteen (18) years of age or older or *an* emancipated minor under the age of eighteen (18) who, at the time his or her need is determined, is unable to provide for the payment of an attorney and all other necessary expenses of representation;
 - (b) A minor, under the age of eighteen (18), who is *a* party defendant in an action of being an habitual runaway from his or her parent or person exercising control or supervision of the child brought under KRS 630.020(1) or of being beyond the control of parents brought under KRS 630.020(2), and at the time his or her need is determined is unable to provide for the payment of an attorney and all other necessary expenses of representation;
 - (c) An unemancipated minor, under the age of eighteen (18), who allegedly has committed an offense as described in KRS 610.010(1), or who allegedly is beyond the control of the school as described in KRS 610.010(2)(a), or who allegedly is an habitual truant from school as described in KRS 610.010(2)(b), or who allegedly is an habitual runaway as described in KRS 610.010(2)(c), whose custodial parent or guardian at the time the need of the minor is determined is unable to provide for the payment of an attorney and all other necessary expenses of representation, and who cannot personally so provide; or
 - (d) An unemancipated minor, under the age of eighteen (18), alleged to have committed an offense as described in KRS 610.010(1) or (2)(a), (b), or (c), whose custodial parent or guardian at the time the need of the minor is determined has interests adverse to the child relevant to the charged offenses and who is able to provide for the payment of an attorney and all other necessary expenses of representation, when such representation is not provided or is not consented to by the unemancipated minor;
- (6) *"Non-lawyer assistants" shall:*
 - (a) *Have the same meaning contemplated by SCR 3.130(5.3) "Responsibilities regarding non-lawyer assistants"; and*
 - (b) *Be subject to the Rules of Professional Conduct and the Rules of Evidence as they relate to client confidentiality, attorney-client communications, and attorney-client privilege.*

All non-lawyer assistants hired by the department who are independently licensed or certified shall practice under the attorney-client privilege, irrespective of other obligations or duties arising with their independent licenses or certifications. Nothing in this subsection shall authorize the disclosure of confidential information to non-lawyer assistants within the department who are not performing duties at the direction of an attorney;

- (7) *"Plan" means an agreement between the Department of Public Advocacy and attorneys for the representation of indigent persons who are entitled to representation under KRS Chapter 31 and who, by reason of conflict or otherwise, cannot be represented by the department; and*

(8)~~(4)~~ "Serious crime" includes:

- (a) A felony;
- (b) A misdemeanor or offense any penalty for which includes the possibility of confinement;
- (c) Any legal action which could result in the detainment of a defendant; and
- (d) An act that, but for the age of the person involved, would otherwise be a serious crime.

➔Section 2. KRS 31.030 is amended to read as follows:

The authority and duties of the Department of Public Advocacy shall include but are not limited to:

- (1) Administering the statewide public advocacy system created by this chapter or by any other appropriate legislation or court decision;
- (2) Providing technical aid to local counsel representing *indigent persons*~~[indigents]~~;
- (3) Assisting local counsel on appeals or taking appeals for local counsel, in the same manner as such appeals for the Commonwealth are presently handled by the Attorney General;
- (4) Developing and promulgating standards and *administrative* regulations, rules, and procedures for administration of the defense of indigent defendants in criminal cases ~~that~~~~[which]~~ the public advocate, statutes, or the courts determine are subject to public assistance;
- (5) Determining necessary personnel for the department and appointing *staff attorneys, who shall be "assistant public advocates,"* and *non-lawyer assistants*~~[secretarial, clerical, and other personnel]~~ within the merit system, subject to available funding and employee allotments;
- (6) Maintaining and exercising control over the department's information technology system, and working with the Commonwealth Office of Technology to ensure that the department's information technology is in conformity with the requirements of state government;
- (7) Reviewing *and approving* local plans for providing counsel for *indigent persons*~~[indigents]~~;
- (8) Conducting research into, and developing and implementing methods of, improving the operation of the criminal justice system with regard to indigent defendants and other defendants in criminal actions, *including participation in groups, organizations, and projects dedicated to improving representation of defendants in criminal actions in particular, or the interests of indigent or impoverished persons in general*;
- (9) Issuing~~[such]~~ rules, *promulgating administrative* regulations, and *establishing* standards as may be reasonably necessary to carry out the provisions of this chapter, the decisions of the United States Supreme Court, the decisions of the Kentucky Supreme Court, Court of Appeals, and other applicable court decisions or statutes;
- (10) Being authorized to pursue legal, administrative, and other appropriate remedies to ensure the protection of the rights of persons with disabilities;
- (11) Being authorized to purchase liability insurance for the protection of all full-time public advocates, deputy public advocates, and assistant public advocates to protect them from liability for malpractice arising in the course or scope of employment and for the protection of attorneys with whom the Department of Public Advocacy contracts to protect them from liability for malpractice arising in the course or scope of the contract;
- (12) Being authorized to seek and apply for and solicit funds for the operation of the defense of~~[the]~~ indigent *persons*~~[]~~ or protection of the persons with disabilities programs from any source, public or private, and to receive donations, grants, awards, and similar funds from any legal source. Those funds shall be placed in a special account for the Department of Public Advocacy and those funds shall not lapse;
- (13) Being authorized to assign *an*~~[a substitute]~~ attorney, *including a conflict attorney under a plan*, for good cause, at any stage of representation, including *trial*, appeal, or other post-conviction *or post-disposition* proceeding, *including discharge revocation hearings, preliminary parole revocation hearings, and conditional discharge revocation hearings, regardless of whether the hearings are conducted by constitutional judges or executive branch administrative law judges*~~;~~~~[The substitute attorney shall have the same functions with respect to the needy person as the attorney for whom he or she is substituted; and]~~
- (14) *Filing with the Legislative Research Commission an annual report, by September 30 of each year, setting forth the total number of cases assigned to the department, the average number of cases per department attorney, all funding available to the department, the average amount of state funds expended per assigned*

case, and any other information requested by the Legislative Research Commission or that the Public Advocate finds necessary to inform the General Assembly, the judicial or executive branches, or the public of the activities conducted by the department during the previous fiscal year; and

- (15) Do ~~such~~ other **activities** ~~things~~ and institute ~~such~~ other programs as ~~are reasonably~~ necessary to carry out the provisions of this chapter, or those decisions or statutes which are the subject of ~~subsection (9) of~~ this section.

➔ Section 3. KRS 31.110 is amended to read as follows:

- (1) A needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, or who is accused of having committed a public or status offense or who has been committed to the Department of Juvenile Justice or Cabinet for Health and Family Services for having committed a public or status offense as those are defined by KRS 610.010(1), 610.010(2)(a), (b), (c), or 630.020(2) is entitled:
- (a) To be represented by an attorney to the same extent as a person having his or her own counsel is so entitled; and
- (b) ***Except as provided in subsection (2)(c) of this section,*** to be provided with the necessary services and facilities of representation, including investigation and other preparation. The courts in which the defendant is tried shall waive all costs.
- (2) A needy person who is entitled to be represented by an attorney under subsection (1) of this section is entitled:
- (a) To be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his ***or her*** own counsel would be entitled to be represented by an attorney and including revocation of probation or parole;
- (b) To be represented in any appeal; and
- (c) To be represented in any other post-conviction, or, if a minor under the age of eighteen (18), post-disposition proceeding, ***including any appeal from a post-conviction or post-disposition action*** ~~that the attorney and the needy person considers appropriate~~. However, if the ***department*** ~~counsel appointed in such post-conviction, or, if a minor under the age of eighteen (18), post-disposition remedy,~~ ***and*** ~~with~~ the court ***of competent jurisdiction*** ~~involved,~~ determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense, there shall be no further right to be represented by counsel under the provisions of this chapter.

In cases involving a minor under the age of eighteen (18), prior to making a determination on whether or not a post-disposition action is a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense, an attorney with the department shall be granted access to the court file of the minor:

1. ***Without the requirement of a formal court order in which the attorney has provided a release signed by the minor or the minor's legal guardian authorizing the use of the records; and***
 2. ***Notwithstanding any other statute prohibiting the disclosure of a juvenile court file.***
- (3) A needy person's right to a benefit under subsection (1) or (2) of this section is not affected by his or her having provided a similar benefit at his or her own expense, or by he or she having waived it, at an earlier stage.
- (4) A person, whether a needy person or not, who is a minor under the age of eighteen (18) and who is in the custody of the Department of Juvenile Justice and is residing in a residential treatment center or detention center is entitled to be represented on a legal claim related to his or her confinement involving violations of federal or state statutory rights or constitutional rights. ***Prior to representation, an attorney with the department shall be granted access to the court file of the minor and residential treatment center or detention center records pertaining to the juvenile:***
- (a) ***Without entering an appearance as an attorney of record; and***
- (b) ***Notwithstanding any other statute prohibiting the disclosure of a juvenile's record, including KRS 15A.0651, 610.320, 610.340, or 610.345.***

➔ Section 4. KRS 31.120 is amended to read as follows:

- (1) (a) The determination of whether a person covered by KRS 31.110 is a needy person shall be deferred no later than his **or her** first appearance in court or in a suit for payment or reimbursement under KRS 31.211, whichever occurs earlier.
 - (b) ~~Thereafter,~~ The court **of competent jurisdiction in which the case is pending**~~[concerned]~~ shall **then** determine, with respect to each step in the proceedings, whether he **or she** is a needy person. However, nothing~~[herein]~~ shall prevent appointment of counsel at the earliest necessary proceeding at which the person is entitled to counsel, upon declaration by the person that he **or she** is needy under the terms of this chapter. In that event, the person involved shall be required to make reimbursement for the representation~~[involved]~~ if he **or she** later is determined not a needy person under the terms of this chapter.
 - (c) ***A person who, after conviction, is sentenced while being represented by a public defender shall continue to be presumed a needy person, and the court, at the time of sentencing, shall enter an Order In Forma Pauperis for purposes of appeal without having to show further proof of continued indigency, unless the court finds good cause after a hearing to determine that the defendant should not continue to be considered an indigent person.***
- (2) In determining whether a person is a needy person and in determining the extent of his **or her**~~[,]~~ and, in the case of an unemancipated minor under KRS 31.100(5)~~(3)~~(c), his **or her** custodial **parents' or guardians'**~~[parent's or guardian's]~~ inability to pay, the court concerned shall consider such factors as:
- (a) Income;
 - (b) Source of income;
 - (c) Property owned;
 - (d) Number of motor vehicles owned and in working condition;
 - (e) Other assets;
 - (f) Outstanding obligations;
 - (g) The number and ages of his or her dependents;
 - (h) The poverty level income guidelines compiled and published by the United States Department of Labor;
 - (i) Complexity of the case;
 - (j) Amount a private attorney charges for similar services;
 - (k) Amount of time an attorney would reasonably spend on the case; and
 - (l) Payment of money bail, other than a property bond of another, whether deposited by the person or another, to secure the person's release from confinement on the present charge of which he or she stands accused or convicted; and
 - (m) Any other circumstances presented to the court relevant to financial status.

Release on bail, or any other method of release provided in KRS Chapter 431, shall not necessarily prevent him **or her** from being a needy person. In each case, the person~~[,]~~ and, if an unemancipated minor under KRS 31.100(5)~~(3)~~(c) and (d), his **or her** custodial parent or guardian, subject to the penalties for perjury, shall certify by affidavit of indigency which shall be compiled by the pretrial release officer, as provided under KRS Chapter 431 and Supreme Court Rules or orders promulgated pursuant thereto, the material factors relating to his **or her** ability to pay in the form the Supreme Court prescribes.

- (3) The affidavit of indigency, to be subscribed and sworn to by the person~~[,]~~ and, in the case of an unemancipated minor under KRS 31.100(5)~~(3)~~(c), by his **or her** custodial parent or guardian, shall be as set out herein and contain, at a minimum, the following information:

"Commonwealth of Kentucky

County of.....

Affiant....., being first duly sworn says that he or she is not now represented by private counsel and that he **or she** does not have the money or assets out of which to employ one; that he or she is indigent and requests the court to appoint counsel.

Affiant states that he or she is presently (fill in the blank with one (1) of the following: unemployed, employed full-time, employed part-time, or employed on a seasonal basis).....

Affiant states that his or her weekly income is; and that he or she receives (circle any of the following which apply and fill in the blank if necessary)

- Welfare
- Food stamps
- Social Security
- Workers' compensation
- Unemployment
- Retirement disability
- Other.....

Affiant states that he or she owns the following property:

Description	Value
.....
.....
.....;

Affiant states that he or she has the following dependents:

Name	Age	Relationship
.....
.....
.....;

Affiant states that he or she has the following obligations:

To whom owed	Amount owing
.....
.....
.....

Affiant understands and has been advised that he or she may be held responsible for the payment of part of the cost of legal representation. Affiant also understands that the cost of payment for legal representation will be determined by the judge after considering affiant's financial condition, what private attorneys charge for similar services, how complicated the affiant's case is, and the amount of time affiant's attorney spends on affiant's case.

Signature of affiant

Subscribed and sworn to before me this , day of, 20....

.....
Signature and title of officer
administering the oath

Perjury Warning: Affiant understands that any person knowingly making false statements in the above affidavit shall be subject to the penalties for perjury under KRS Chapter 523, the maximum penalty for which is five (5) years' imprisonment. Affiant declares under penalty of perjury that he or she has read the above affidavit and that it is true and complete to the best of his or her knowledge."

➔Section 5. KRS 31.185 is amended to read as follows:

- (1) Any defending attorney operating under the provisions of this chapter is entitled to use the same state facilities for the evaluation of evidence as are available to the attorney representing the Commonwealth. If he or she considers their use impractical, the court *of competent jurisdiction in which the case is pending*~~[concerned]~~ may authorize the use of private facilities to be paid for on court order from the special account of the Finance and Administration Cabinet.
- (2) The defending attorney may request to be heard ex parte and on the record with regard to using private facilities under subsection (1) of this section. If the defending attorney so requests, the court shall conduct the hearing ex parte and on the record.
- (3) Any direct expense, including the cost of a transcript or bystander's bill of exceptions or other substitute for a transcript that is necessarily incurred in representing a needy person under this chapter, *are charges*~~[is a charge]~~ against the county, urban-county *government*, charter county *government*, *unified local government*, or consolidated local government on behalf of which the service is performed and shall be paid from the special account established in subsection (4) of this section and in accordance with procedures provided in subsection (5) of this section. However,~~[such]~~ a charge *under this subsection* shall not exceed the established rate charged by the Commonwealth and its agencies.
- (4) The consolidated local government, *charter county government*, *unified local government*, fiscal court of each county, or legislative body of an urban-county government shall annually appropriate twelve and a half cents (\$0.125) per capita of the population of the county, as determined by the Council of Local Governments' most recent population statistics, to a special account to be administered by the Finance and Administration Cabinet to pay court orders entered against counties pursuant to subsection (1) or (3) of this section. The funds in this account shall not lapse and shall remain in the special account.
- (5) The Finance and Administration Cabinet shall pay all court orders entered pursuant to subsection (1) or (3) of this section from the special account until the funds in the account are depleted. If in any given year the special account, including any funds from prior years, is depleted and court orders entered against counties pursuant to subsection (1) or (3) of this section for that year or any prior year remain unpaid, the Finance and Administration Cabinet shall pay those orders from the Treasury in the same manner in which judgments against the Commonwealth and its agencies are paid.
- (6) Expenses incurred in the representation of needy persons confined in a state correctional institution shall be paid from the special account established in subsection (4) of this section and in accordance with the procedures provided in subsection (5) of this section.
- (7) Only court orders entered after July 15, 1994, shall be payable from the special account administered by the Finance and Administration Cabinet or from the Treasury as provided in subsections (4) and (5) of this section.

➔Section 6. KRS 31.219 is amended to read as follows:

- (1) It shall be the duty of the attorney representing a client *at trial* under any public advocacy plan to *file a notice of*~~[perfect an]~~ appeal if his *or her* client requests an appeal.
- (2) After the attorney has filed a notice of appeal as required by the Rules of Criminal Procedure, he *or she* shall forward to the Department of Public Advocacy a copy of the final judgment, the notice of appeal, a statement of any errors committed in the trial of the case which should be raised on appeal, and a designation of that part of the record that is essential to the appeal.
- ~~(3) No attorney participating in any public advocacy plan shall be compensated for his services until he has perfected an appeal for a client who requests an appeal and has filed the information required in subsection (2) of this section.~~
- ~~(4) Any public advocacy attorney who is representing a client on appeal who after a conscientious examination of said appeal believes the appeal to be wholly frivolous after careful examinations of the record may request the court to which the appeal has been taken for permission to withdraw from the case. The attorney must file with that request a brief which sets forth any arguments which might possibly be raised on appeal. A copy of the request for permission to withdraw and the brief must be served upon the client in sufficient time so that the client may raise any argument he *or she* chooses to raise.~~

➔Section 7. KRS 31.220 is amended to read as follows:

This chapter applies only to representation in the courts of this state, except that it does not prohibit a defending attorney from representing a needy person in a federal court of the United States, if:

- (1) The matter *involves a challenge to the validity, timing, or method of implementation of a judgment of a Kentucky state court in a criminal case* ~~[arises out of or is related to an action pending or recently pending in a court of criminal jurisdiction of the state];~~ ~~[or]~~
- (2) *The matter relates to the fact, duration, or conditions of confinement for a juvenile offender represented under subsection (5) of Section 1 of this Act; or*
- (3) Representation is under a plan of the United States District Court as required by the Criminal Justice Act of 1964 ~~[(18 U.S.C. 3006A)]~~.

➔Section 8. KRS 31.211 is amended to read as follows:

- (1) At arraignment, the court shall conduct a nonadversarial hearing to determine whether a person who has requested a public defender is able to pay a partial fee for legal representation, the other necessary services and facilities of representation, and court costs. The court shall order payment in an amount determined by the court and may order that the payment be made in a lump sum or by installment payments to recover money for representation provided under this chapter. This partial fee determination shall be made at each stage of the proceedings.
- (2) If the partial fee, or any portion thereof, is not paid by the due date, the court's order is a civil judgment subject to collection under Civil Rule 69.03 and KRS Chapter 426.
- (3) All moneys received by the public advocate from indigent defendants pursuant to subsection (1) of this section shall be credited to the public advocate fund of the county in which the trial is held if the county has a plan pursuant to KRS 31.060 or 31.065(1) which has been approved by the public advocate pursuant to KRS 31.050. Moneys credited to a county public advocate fund may be used only to support the public advocate program of that county.
- (4) All moneys collected by the public advocate from indigent defendants pursuant to subsection (1) of this section in counties with a local public advocacy system established by the public advocate pursuant to KRS 31.065(2) shall be credited to the Department of Public Advocacy special trust and agency account to be used to support the state public advocacy system.
- (5) If a person receives legal assistance or other benefit under this chapter to which he or she is not entitled or if a person receives legal assistance under this chapter and is financially able to pay for representation on the date the suit is brought, the public advocate, on behalf of the Commonwealth, shall recover, where practical, payment or reimbursement, as the case may be, from the person who received the legal assistance or his or her estate. Suit shall be brought within five (5) years after the date on which the aid was received.
- (6) Any attorney participating in a public advocacy plan shall forward all information which he or she may have which indicates that payment or reimbursement may be obtained pursuant to subsection (5) of this section.
- (7) The duty of recovery contemplated by subsection (5) of this section shall extend against persons who were the custodial parents or guardians of unemancipated minors at the time these minors were deemed needy as defined in KRS 31.100~~(5)~~~~(3)~~(c) or (d).
- (8) All moneys collected under this section shall be placed in a special trust and agency account for the Department of Public Advocacy, and the funds shall not lapse.

Signed by Governor April 10, 2014.