

# A Comprehensive Review of Indigent Defense in Virginia

January 2004

Prepared By The Spangenberg Group

On Behalf of the American Bar Association  
Standing Committee on Legal Aid and Indigent Defendants



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## **EXECUTIVE SUMMARY**

In 2003, The Spangenberg Group spent nine months conducting an in-depth study of the indigent defense system in Virginia. The study was conducted on behalf of the American Bar Association Standing Committee on Legal Aid and Indigent Defendants.

While numerous reports criticizing Virginia's indigent defense system have been produced over the past 30 years, very little has been done over that period to remedy the problems identified. This report is perhaps the most comprehensive review produced to date. The chief conclusion of the review is that Virginia's indigent defense system is deeply flawed and fails to provide indigent defendants the guarantees of effective assistance of counsel required by federal and state law. The report discusses in detail the individual shortcomings of the system that produce this overall failure to assure that the rights of poor people accused of crimes are protected.

Formed in 1985, The Spangenberg Group (TSG) has conducted research in all 50 states and provides consultative services to developing and developed countries that are reforming their legal aid delivery programs. For over 18 years, TSG has been under contract with the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants to provide support and technical assistance to individuals and organizations working to improve their jurisdictions' indigent defense systems. Including Virginia, TSG has conducted comprehensive statewide studies of indigent defense systems in 36 states.

The methodology for this study included: review of reports and data on Virginia's indigent defense system from numerous sources; on-site assessments of the indigent defense systems in 13 Virginia judicial circuits; analysis of the Supreme Court of Virginia Administrative Office database on assigned counsel; analysis of budget, caseload and other data provided by the Virginia Public Defender Commission; and collection and analysis of comparison information from other states' indigent defense systems.

The 13 circuits studied are representative of Virginia's 31 judicial circuits/districts, geography and population, and reflect a diversity of system types (three jurisdictions were served solely by court-appointed counsel while the other 10 used a public defender office and assigned counsel). In each of the 13 circuits/districts visited, we met with people who are involved with indigent defense services, including: circuit court judges, district court judges, juvenile and domestic relations court judges, court clerks, the Commonwealth's attorney and/or staff, Public Defender Commission staff and members, public defender and court-appointed attorneys, and the sheriff or a jailer familiar with indigent defense procedures. In addition to conducting professional interviews, we observed criminal court sessions in most sites and juvenile court sessions in a few sites. Site work was conducted between June and September 2003. In total, we spent 79 days in Virginia, conducting interviews with 370 individuals who work in more than 60 courts, observing sessions in 27 courts and visiting five jails.

## **Findings**

Chapter 9 of this report includes The Spangenberg Group's overall findings of Virginia's indigent defense system. The black letter findings appear below: the full findings with explanation appear in Chapter 9. The findings are based on our review of indigent defense in Virginia and are also based on the perspective and experience The Spangenberg Group has gained studying the indigent defense systems of other states over the years.

### **OVERALL FINDINGS**

- 1. Virginia's indigent defense system fails to adequately protect the rights of poor people who are accused of committing crimes.**
- 2. Two primary factors - inadequate resources and an absence of an oversight structure – form the basis of an indigent defense system that fails to provide lawyers with the tools, time and incentive to provide adequate representation to indigent defendants.**
- 3. In the past 30 years, numerous studies and reports have been conducted on Virginia's indigent defense system, most pointing out similar problems and calling for similar solutions.**
- 4. The deeply flawed system puts lawyers at substantial risk of violating professional rules of conduct when representing indigent defendants.**
- 5. There is no official state entity that effectively advocates for indigent defense needs in Virginia. No governmental entity serves as a voice for indigent defense: not the Public Defender Commission, not the State Bar, not the Supreme Court, not the Executive Branch and not the General Assembly.**
- 6. Because of a lack of response by elected officials, there has proven to be no meaningful way to seek redress for the problems with Virginia's indigent defense system.**
- 7. Court-appointed attorneys and public defenders make very limited use of expert witnesses and court-appointed lawyers make very little use of investigators, services that are essential to proper representation of clients in many cases.**
- 8. Substandard practice has become the accepted norm in Virginia's indigent defense system.**
- 9. Virginia ranks last in average indigent defendant cost per case among a group of 11 states for which such data was collected for FY 2002 (the states are Alabama, Colorado, Georgia, Iowa, Maryland, Massachusetts, Missouri, North Carolina, Ohio, Virginia and West Virginia).**

## **SPECIFIC FINDINGS PERTAINING TO VIRGINIA’S ASSIGNED COUNSEL SYSTEM**

- 10. The unwaivable statutory fee caps for court-appointed counsel in Virginia are the lowest in the country.**
- 11. The unreasonably low statutory fee caps act as a disincentive to many assigned counsel from doing the work necessary to provide meaningful and effective representation to their indigent clients.**
- 12. In addition to the problems stemming from low pay, there are numerous systemic deficiencies with the assigned counsel system in Virginia that result in the failure of court-appointed lawyers to provide adequate representation to indigent defendants.**
- 13. The lack of oversight and administration permits a small number of attorneys to receive a disproportionate number of appointed cases, raising serious concerns over the quality of representation provided to their clients.**
- 14. The disparity in pay for court-appointed counsel representing parents in abuse and neglect cases and GALs who represent the best interests of children in these cases is unfair and illogical.**

## **SPECIFIC FINDINGS PERTAINING TO VIRGINIA’S PUBLIC DEFENDER SYSTEM**

- 15. The Virginia public defender system is greatly over-burdened and substantially under-resourced.**
- 16. The entity that should be the advocate for adequate resources for public defender offices -- the Public Defender Commission -- has been more concerned with assuring the public and elected officials that public defenders can handle cases as cheaply as or cheaper than appointed counsel.**
- 17. There is great disparity in resources afforded to public defenders and Commonwealth’s attorneys.**

### **Recommendations**

Chapter 10 of this report contains several major systemic changes that The Spangenberg Group recommends that Virginia undertake forthwith. These recommendations are as follows:

- (1) The Virginia General Assembly should fund indigent criminal defense services in cases requiring appointment of counsel at a level that assures that all indigent defendants receive effective and meaningful representation.

- (2) The state should establish a professionally independent statewide indigent defense commission to organize, supervise and assume overall responsibility of Virginia's indigent defense system.
- (3) The newly created commission on indigent defense should have broad power and responsibility for the delivery of indigent criminal defense services.
- (4) The indigent defense commission should adopt performance and qualification standards for both private assigned counsel and public defenders. The standards should address workload limits, training requirements, professional independence and other areas to ensure effective and meaningful representation.
- (5) A comprehensive data collection system designed to provide an accurate picture of the provision of indigent criminal services in Virginia should be established and implemented by the statewide commission.

The task ahead to reform the indigent defense system in Virginia is a daunting one. Much needs to be done, and these five recommendations should not be considered an exhaustive road map outlining all areas of needed improvement. However, we believe that the starting point to begin these efforts is creation of a new indigent defense commission and appropriation of substantial additional state funds during the 2004 legislative session of the General Assembly.



## CHAPTER 1

### INTRODUCTION

Virginia's criminal justice system fails to adequately protect the rights of poor people who are accused of committing crimes. Represented by lawyers who have the most meager of resources, indigent defendants in Virginia are denied the fundamental guarantee of due process, or fairness, in legal proceedings against them. In the most extreme situations, innocent individuals are wrongfully convicted. According to the Center on Wrongful Convictions at Northwestern University of Law, 17 individuals have been exonerated of wrongful convictions in Virginia.<sup>1</sup> Findings from a nine-month study suggest that many more indigent defendants in Virginia have likely received little more than assembly line justice.

The Commonwealth's current indigent defense system puts lawyers at substantial risk of violating several of Virginia's Rules of Professional Conduct when handling court-appointed cases. Rule 1.1, Competence, provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." At a bare minimum competent representation of defendants requires lawyers to properly investigate facts, spot legal issues, conduct necessary research, negotiate with the prosecution, and meet with a client. This is all out-of-court work -- case preparation -- and it takes time.

Rule 1.3, Diligence, provides: "(a) A lawyer shall act with reasonable diligence and promptness in representing a client." Commentary to the rule explains that diligence entails working with "commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Rule 1.4, Communication, provides: "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation." Communication entails prompt initial contact with a client and ongoing regular contact as a case progresses. Like competence, diligence and communication are traits that require an investment of adequate time and ability to marshal the necessary tools and resources. The Virginia indigent defense system does not afford lawyers the time or the resources to effectively represent their clients.

These conclusions flow from this study conducted by The Spangenberg Group, a nationally and internationally recognized criminal justice research and consulting firm that specializes in indigent defense services. The purpose of the study was to gauge the degree to which the indigent defense system in Virginia delivers competent, effective legal representation, through on-site data collection and analysis. The study was prepared on behalf of the American Bar Association Standing Committee on Legal Aid and Indigent Defendants.

Virginia has the lowest statutorily imposed compensation caps for court-appointed lawyers in the nation, thus strongly discouraging counsel from spending more than a few hours on circuit court cases and even less on district court cases. The actual figures are shocking—a

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<sup>1</sup> See Northwestern University School of Law, Center on Wrongful Convictions, *The Exonerated: Virginia*, at <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/VirginiaList.htm> (last modified July 18, 2003).

court-appointed attorney cannot receive more than a total of \$112 for a misdemeanor or juvenile delinquency charge punishable by confinement, \$1,096 for a felony charge punishable by more than twenty years of confinement, and \$395 for all other non-capital felony charges. Public defenders, who handled approximately 37% of the criminal indigent defendant caseload in 2002, carry caseloads that far exceed national standards. Public defender offices operate without fundamental tools of legal practice, such as internet access, paralegals or updated computers, and few litigation resources are provided to the offices. Both private, court-appointed lawyers and public defenders struggle with “hide the ball” discovery rules and practices. Experts, which can be necessary to wage an adequate defense in cases involving medical, forensic, and scientific evidence, are rarely available in Virginia’s indigent defendant cases. Assigned counsel rarely employ the use of investigators, for whom payment must be authorized by the court. They perform their own investigation or none at all.

There is no statewide oversight of assigned counsel, and courts often appoint attorneys who lack the requisite experience or training to handle a criminal case. Further, there are no enforceable standards for assigned counsel in Virginia, which means there is no systematic way to prevent the re-appointment of unqualified attorneys to indigent defense cases.

This report documents the current deficiencies of Virginia’s indigent defense system to assist in promotion of reform efforts. Numerous reports on Virginia’s indigent defense system have been produced in the past 30 years, yet little reform has been achieved. Appendix A contains a 13-page summary of reports, studies, and legislative action pertaining to indigent defense in Virginia in the past three decades. Robert Spangenberg, President of The Spangenberg Group, first studied indigent defense in Virginia in 1984 and 1985.<sup>2</sup> Most recently, the Virginia State Crime Commission published House Document No. 32, a report on indigent defense in Virginia,<sup>3</sup> and published another report as requested by the General Assembly in November 2003.<sup>4</sup> This report, which is perhaps the most comprehensive review produced to date, details the extent of the crisis affecting indigent defense in Virginia utilizing a methodology that includes data analysis and extensive professional interviews. Many of the findings in this report echo those found in House Document No. 32.

Formed in 1985, The Spangenberg Group (TSG) has conducted research in all 50 states and provides consultative services to developing and developed countries that are reforming their

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<sup>2</sup> Mr. Spangenberg, while still with Abt Associates, published a study, *Analysis of Costs for Court-Appointed Counsel in Virginia* in April 1985. After forming The Spangenberg Group, in October 1985, Mr. Spangenberg produced *Projecting Costs for Various Indigent Defense Systems in Virginia for FY 1986*, a study that was jointly sponsored by the American Bar Association Bar Information Project and the Virginia General Assembly.

<sup>3</sup> In its 2000 session, the Virginia General Assembly enacted House Joint Resolution 178 directing the Virginia State Crime Commission to study the existing methods for providing indigent defense in Virginia with special focus on three areas: quality of representation, efficiency of service and cost effectiveness.

<sup>4</sup> This study was requested in the 2002 session of the Virginia General Assembly by Senator Kenneth W. Stolle in Senate Joint Resolution 43 (SJ43) and Delegate Terry G. Kilgore in House Joint Resolution 94 (HJ94). The purpose of the study was to examine whether the establishment of a statewide indigent defense commission would improve the quality and efficiency of the Commonwealth's indigent defense services. The resolutions directed the Crime Commission to study various models of statewide indigent defense commissions used by other states and to recommend whether such a commission is appropriate for Virginia. Indeed, the Crime Commission recommended creation of an Indigent Defense Commission to oversee both assigned counsel and public defenders in Virginia.

legal aid delivery programs. For over 18 years, TSG has been under contract with the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants to provide support and technical assistance to individuals and organizations working to improve their jurisdictions' indigent defense systems. Including Virginia, TSG has conducted comprehensive statewide studies of indigent defense systems in 36 states.<sup>5</sup>

## **METHODOLOGY**

The methodology for this study included:

- review of reports and data on Virginia's indigent defense system from numerous sources, including the Virginia State Crime Commission, the Supreme Court of Virginia Administrative Office, the American Bar Association's Juvenile Justice Center, the American Bar Association Bar Information Program, the Virginia Public Defender Commission and The Spangenberg Group;
- on-site assessments of the indigent defense systems in 13 Virginia judicial circuits;
- analysis of the Supreme Court of Virginia Administrative Office database on assigned counsel;
- analysis of budget, caseload and other data provided by the Virginia Public Defender Commission; and
- collection and analysis of comparison information from other states' indigent defense systems.

The 13 circuits studied are representative of Virginia's 31 judicial circuits/districts, geography and population, and reflect a diversity of system types (three jurisdictions were served solely by court-appointed counsel while the other 10 used a public defender office and assigned counsel). A listing of the jurisdictions appears in Table 1-1.<sup>6</sup> In each of the 13 circuits/districts visited, we met with people who are involved with indigent defense services, including:

- Circuit court judges
- District court judges
- Juvenile and domestic relations court judges
- Court clerks
- Commonwealth's attorney and/or staff
- Public Defender Commission staff and members

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<sup>5</sup> TSG has conducted statewide indigent defense studies in Alabama, Alaska, Arkansas, Arizona, Connecticut, Delaware, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin.

<sup>6</sup> Indigent defense systems were studied in the following circuits/districts: 4, 7, 10, 13, 15, 18, 19, 23, 24, 26, 27, 29 and 31. As seen in Table 1-1, in some jurisdictions, we studied the systems in portions of the circuit/district rather than every court and city in the jurisdiction.

- Public defender and court-appointed attorneys
- Sheriff or a jailer familiar with indigent defense procedures.

Interviews were conducted by Spangenberg Group staff, all of whom are lawyers, as well as by several “practitioner consultants,” lawyers who are involved with indigent defense systems in Georgia, Massachusetts, New York, Tennessee and Texas. In addition to conducting professional interviews, we observed criminal court sessions in most sites and juvenile court sessions in a few sites. Site work was conducted between June and September 2003. In total, we spent 79 days in Virginia, conducting interviews with 370 individuals who work in more than 60 courts, observing sessions in 27 courts and visiting five jails. Appendix B includes a breakdown of interviewees by position and judicial circuit.

The combined population in the jurisdictions visited (2,713,242) represents 37% of the state's population (7,293,542). In addition, many of the people interviewed in our sample jurisdictions were able to give us additional information about indigent defense in surrounding areas. Many indigent defense lawyers accept appointments in multiple courts.

The task of scheduling appointments to meet with individuals in 13 sites over a summer was a daunting one. The law firm of Covington & Burling graciously donated the time of three paralegals to conduct the majority of scheduling. In addition, the American Bar Association played an important administrative role mailing out explanatory letters about the project to individuals contacted for interviews. Copies of the letters appear in Appendix C.

We greatly appreciate the time people spent meeting with us to speak about indigent defense in Virginia.

**Table 1-1 Jurisdictions Visited**

<b>District/Circuit</b>	<b>City/County Visited</b>	<b>Courts</b>	<b>Public Defender?</b>
23 <sup>rd</sup> Population: 86,220	Roanoke City Roanoke County	Roanoke City Circuit Court Roanoke County Circuit Court Roanoke City GD Roanoke County GD Roanoke City JDR Roanoke County JDR	Yes; covers the City of Roanoke
24 <sup>th</sup> Population: 51,295	Lynchburg City Campbell County Rustburg, VA	Lynchburg Circuit Court Lynchburg GD Lynchburg JDR Campbell County Circuit Court Campbell GD Campbell JDR	Yes; covers the City of Lynchburg
26 <sup>th</sup> Population: 104,356	Rockingham County, Harrisonburg, VA Shenandoah County, Woodstock, VA	Rockingham Circuit Shenandoah Circuit Harrisonburg/Rockingham GD Harrisonburg/Rockingham JDR Shenandoah GD & JDR	Yes; covers the Counties of Shenandoah, Frederick, Page, and the City of Winchester
27 <sup>th</sup> Population: 118,166	Montgomery County, Christiansburg, VA Pulaski County, Pulaski, VA	Montgomery Circuit Pulaski Circuit Montgomery GD Montgomery JDR Pulaski GD Pulaski JDR	Yes, covers the Counties of Pulaski, Bland, Wythe and the City of Radford
29 <sup>th</sup> Population: 74,273	Tazewell County, Tazewell, VA Russell County, Lebanon, VA	Tazewell Circuit Russell Circuit Tazewell GD Tazewell JDR Russell GD & JDR	No
31 <sup>st</sup> Population: 298,707	Prince William County, Manassas, VA	Prince William Circuit Prince William GD Prince William JDR	No
4 <sup>th</sup> Population: 233,147	Norfolk City	Norfolk Circuit Norfolk GD Norfolk JDR	Yes; covers City of Norfolk

<b>District/Circuit</b>	<b>City/County Visited</b>	<b>Courts</b>	<b>Public Defender?</b>
7 <sup>th</sup>  Population: 180,305	Newport News City	Newport News Circuit Newport News GD – criminal Newport News GD – traffic Newport News JDR	No
10 <sup>th</sup>  Population: 69,399	Halifax County, Halifax, VA Mecklenburg County, Boynton, VA	Halifax Circuit Mecklenburg Circuit Halifax GD Halifax JDR Mecklenburg GD Mecklenburg JDR	Yes; covers the Counties of Halifax, Mecklenburg and Lunenburg
13 <sup>th</sup>  Population: 195,966	Richmond City	Richmond City Circuit Richmond Manchester GD Richmond GD Criminal Richmond JDR	Yes; covers the City of Richmond
15 <sup>th</sup>  Population: 187,474	Spotsylvania County, Spotsylvania, VA Hanover County, Hanover VA	Spotsylvania Circuit Hanover Circuit Spotsylvania GD Spotsylvania JDR Hanover GD Hanover JDR	Yes; covers the Counties of Spotsylvania, King George, Stafford and the City of Fredericksburg
18 <sup>th</sup>  Population: 128,773	Alexandria City	Alexandria Circuit Alexandria GD Alexandria JDR	Yes; covers the City of Alexandria
19 <sup>th</sup>  Population: 985,161	Fairfax, City and County	Fairfax Circuit Court Fairfax City GD Fairfax County GD Fairfax JDR	Yes; covers they City and County of Fairfax

## **CHAPTER 2**

### **HISTORICAL BACKGROUND OF VIRGINIA'S CURRENT INDIGENT DEFENSE SYSTEM**

The deficiencies in Virginia's indigent defense system are notorious and have persisted despite production of numerous reports documenting the problems in the last three decades. Beginning in 1971 and continuing to the present day, at least 33 studies have been conducted to evaluate indigent defense in Virginia. These studies, which are summarized in detail in Appendix A, highlight several common themes. The two most commonly reiterated findings are: 1) that Virginia's compensation rates for court-appointed counsel are the lowest in the nation and should be raised; and 2) that the public defender system should be expanded. The repeated calls for reform to Virginia's indigent defense system have been largely ignored by the legislative, executive and judicial branches of Virginia state government.

In 1971 the Virginia State Bar conducted a study that determined that Virginia's compensation schedules for court-appointed counsel did not meet the essential standard to assure effective assistance of counsel. The study also found that court-appointed attorneys are "overworked, underpaid, inadequately trained, without adequate, if any, investigational resources and thus often unable to provide a full and aggressive defense." This sentiment continued to resonate throughout many of the reports produced over the next 32 years, including the present one.

Findings that Virginia had the lowest compensation for court-appointed counsel in the country and/or that attorney compensation was unreasonably low, were repeated in at least 14 studies between 1971 and 2002. The studies repeatedly called for increases in fees for court-appointed attorneys and/or raising the statutorily imposed caps. During conduct of the current study in 2003, not a single interviewee stated that the current compensation for court-appointed counsel was adequate or fair.

Conducted prior to the opening of Virginia's first public defender office, the State Bar's 1971 study suggested creating an indigent defense commission that would establish and oversee public defender pilot programs. The Public Defender Commission was created in 1972, and five studies conducted between 1981 and 1986, four between 1989 and 1991, and one in 2002 all suggested expansions of, and additions to, the public defender system, including establishing either a statewide appellate defender or capital defender offices. A small appellate defender office was authorized in 1996 and four capital defender offices were authorized in 2002. To date, 21 public defender offices, covering just 48 of 134 localities, have been opened.

While the General Assembly has been put on ample notice of the problems with indigent defense in Virginia, and indeed solicited at least seven reports to be prepared on the subject, legislative response to address the problems identified has been tepid at best. Illustrative actions by the General Assembly include:

- 1972: creates the Public Defender Commission;
- 1982: rejects proposal to establish a public defender office in Alexandria and requests a follow-up study on areas where public defender offices would be most cost-effective;
- 1983: institutes a cap on stacking payments to court-appointed counsel for defense of multiple counts of the same offense; determines information was inadequate to document savings or improved quality and refuses to approve of the establishment of public defender offices in Richmond and Fairfax (offices were eventually created in these cities);
- 1984: adjusts the cap on payment to court-appointed lawyers for defense of multiple counts from one to three counts;
- 1989: expands the public defender system by creating several new offices sought through local initiatives; increases court-appointed counsel case caps by 15 percent;
- 1996: passes House Resolution No. 79, directing the Virginia State Crime Commission to study the cost effectiveness of both the court-appointed and public defender systems. The resolution stated, in part, “although the entire criminal justice system is suffering from a lack of adequate resources, the current level of funding for indigent defense has reached a crisis level;”
- 1998: raises fee caps in Class III to Class VI felonies from \$265 to \$305, and Class II felonies from \$735 to \$845, and in the second year of the biennium the same fees are raised by another 5%, to \$318 and \$882 respectively. During the legislative process, Co-Chair of the Senate Finance Committee comments that this was an issue he knew would need to be addressed in coming years; and
- 1999: enacts a 24 percent increase to caps in all non-capital felony and misdemeanor cases; these caps remain in place today but the General Assembly has not appropriated enough money to fully fund them (see Table 6-1).

State government in Virginia has repeatedly failed to take steps to ensure that federal constitutional and state law requirements for counsel to indigent defendants are fulfilled. Specifically, the state has not ensured that indigent defendants are provided with adequately compensated court-appointed lawyers who have the necessary resources needed to provide an adequate and meaningful defense. It is hoped that this report, through its combination of in-person interviews and in-depth data analysis, provides a new and ultimately persuasive perspective on the need to reform indigent defense in Virginia.



## **CHAPTER 3**

### **VIRGINIA'S COURT SYSTEM**

In order to understand the discussion of Virginia's indigent defense system that appears in the subsequent chapters, it is useful to have an understanding of Virginia's court system.

The Virginia judicial system is comprised of the Supreme Court, a Court of Appeals, circuit courts in 31 judicial circuits, general district and juvenile and domestic relations district courts in 32 districts, and magistrates in offices in 32 districts. Three advisory/administrative bodies have been created by the legislature to aid in the operation of the court system: the Judicial Inquiry and Review Commission, the Judicial Council, and the Committee on District Courts.

Criminal jurisdiction in Virginia is vested in circuit courts, general district courts and juvenile and domestic relations courts. Circuit courts are courts of record with general criminal jurisdiction, while general district courts and juvenile and domestic relations courts are courts not of record and have limited criminal jurisdiction. Appellate level courts in Virginia include the Court of Appeals of Virginia, which provides intermediate review of circuit court decisions in traffic infractions and criminal cases, except where a sentence of death has been imposed,<sup>7</sup> and the Virginia Supreme Court.<sup>8</sup> All direct appeals in cases where a sentence of death has been imposed are heard by the Virginia Supreme Court.

The seven justices of the Supreme Court of Virginia are elected by a majority vote of both houses of the General Assembly for a term of 12 years. To be eligible for election, a candidate must be a resident of Virginia and must have been a member of the Virginia Bar for at least five years. By statute, the Chief Justice is chosen by a majority vote of the seven justices. The Chief Justice has the responsibility of supervising the administration of the entire court system of the Commonwealth.<sup>9</sup>

Article VI, Section 4 of the Constitution of Virginia places upon the Chief Justice of the Supreme Court of Virginia the responsibility of supervising the administration of the entire court system of the Commonwealth.

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<sup>7</sup> VA. CODE ANN. § 17.1-406. Additionally, the Court of Appeals has appellate jurisdiction over administrative agency decisions, Virginia Worker's Compensation Commission decisions, and certain domestic relations appeals. VA. CODE ANN. § 17.1-405

<sup>8</sup> See VA. CODE ANN. §§ 17.1-309-313 for a description of the original and appellate jurisdiction of the Virginia Supreme Court.

<sup>9</sup> VA. CONST. art. VI, §4.

## Courts and Their Criminal Jurisdiction

General district courts (“GDCs”) hear misdemeanors,<sup>10</sup> traffic infractions, and offenses against county or city ordinances.<sup>11</sup> Additionally, a GDC may conduct preliminary hearings in felony cases<sup>12</sup> to determine whether there is enough evidence to justify holding the defendant for a grand jury hearing. There is no jury available in GDC. Any person convicted of an offense in the GDC has a right to appeal de novo the conviction to the circuit court, even if the conviction was upon a guilty plea.<sup>13</sup> A misdemeanor’s right to a jury trial is protected by this automatic appeal and a trial de novo in a court of record, where a jury trial is available.<sup>14</sup>

Circuit court hears felonies where there has been an indictment or a presentment by a grand jury or an information and has jurisdiction over juveniles aged fourteen and older who are charged with felonies and whose cases have been certified by the judge of a juvenile and domestic relations district court for trial in a circuit court.<sup>15</sup> The circuit court also has appellate jurisdiction over all civil and criminal cases originating in GDC and juvenile and domestic relations district court.<sup>16</sup> Appeals from these district courts are heard de novo, that is, the cases are tried anew in circuit court as though they had never been heard in the lower court.<sup>17</sup>

The juvenile and domestic relations district courts (J&DR courts) have original and exclusive jurisdiction over juveniles,<sup>18</sup> defined as persons under the age of 18, accused of acts that would be crimes if committed by an adult (misdemeanors and felonies), traffic violations,<sup>19</sup> as well as status offense jurisdiction over a child who commits an act prohibited by law that would not be a crime if committed by an adult.<sup>20</sup> Once a child is transferred or certified for trial as an adult, and is convicted as an adult in the circuit court, the juvenile court will no longer have jurisdiction to handle the youth as a juvenile for criminal acts that would otherwise constitute delinquency.<sup>21</sup> The juvenile court’s jurisdiction over a “violent juvenile felony” allegedly committed by a juvenile 14 or older is limited to the holding of a preliminary hearing unless the Commonwealth’s attorney elects not to give notice of intent to file in criminal court.<sup>22</sup> Any

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<sup>10</sup> Circuit Courts have concurrent jurisdiction to try misdemeanors where there has been an indictment of a presentment by a grand jury or an information. VA. CODE ANN. § 16.1-126. An indictment is a written accusation of crime, prepared by the attorney for the Commonwealth and returned as a “true bill” by a legally impaneled grand jury. VA. CODE ANN. § 19.2-216. A presentment is a written accusation of a crime prepared and returned by the grand jury from their own knowledge or observation, without any bill of indictment laid before them. *Id.* An information is a written accusation prepared and presented by a competent public official upon his oath of office. *Id.*

<sup>11</sup> VA. CODE ANN. § 16.1-123.1.

<sup>12</sup> VA. CODE ANN. § 16.1-127.

<sup>13</sup> VA. CODE ANN. § 16.1-132. There is also an appeal of right from a GDC order revoking a suspension of sentence. *Id.*

<sup>14</sup> *See Saunders v. Reynolds*, 214 Va. 697, S.E.2d 421, 426 (1974).

<sup>15</sup> VA. CODE ANN. § 16.1-269.1 (outlining a long list of conditions that must be met along with factors the court is expected to consider for transfer of a juvenile).

<sup>16</sup> VA. CODE ANN. § 17.1-513.

<sup>17</sup> VA. CODE ANN. § 16.1-136.

<sup>18</sup> VA. CODE ANN. § 16.1-228(D).

<sup>19</sup> VA. CODE ANN. § 16.1-241 (A)(1).

<sup>20</sup> VA. CODE ANN. § 16.1-228.

<sup>21</sup> VA. CODE ANN. § 16.2-369.6C.

<sup>22</sup> VA. CODE ANN. § 16.2-269.1(B)-(C).

juvenile convicted in circuit court after being transferred or certified will be treated as an adult in all future criminal cases.<sup>23</sup>

The juvenile and domestic relations court also has jurisdiction over adults in abuse and neglect cases, custody and support cases and a number of other matters related to juveniles, family members or household members.<sup>24</sup> Where an adult is charged with committing a felony against children or family members, the juvenile court is limited to conducting a preliminary hearing to determine if there is probable cause. If probable cause is found, the case is transferred to circuit court; otherwise the case is dismissed or reduced to a misdemeanor and disposed of in GDC or J&DR court.<sup>25</sup>

## **Crime Definitions**

A felony is defined in Virginia as “such offenses as are punishable with death or confinement in a state correctional facility”<sup>26</sup> and are punishable for not less than one year.<sup>27</sup> All other offenses are misdemeanors<sup>28</sup> and are punishable by confinement in jail for not more than 12 months and/or a fine.<sup>29</sup> Traffic infractions are violations of public order and are not deemed criminal in nature.<sup>30</sup>

## **Structure of the Courts**

Virginia has 32 judicial districts and 31 judicial circuits; districts and circuits are the same with the exception that the Eastern Shore, composed of Accomack and Northampton counties, is part of the same circuit as the City of Virginia Beach, but has its own district.<sup>31</sup> There is a GDC and a J&DR court in every city and county of the state.<sup>32</sup> However, some localities have combined the functions of the general district court and the juvenile and domestic relations court into a single court called the “combined district court.” There is no longer a system of local municipal courts that operate separately from the state district courts.<sup>33</sup>

## **Court Funding**

Funding for the court system in Virginia is provided by both the Commonwealth, through state appropriations, for salaries of judges and clerks, and by localities, which bear a portion of the financial burden in providing courthouses and accommodations for the courts.

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<sup>23</sup> VA. CODE ANN. § 16.1-271.

<sup>24</sup> See VA. CODE ANN. § 16.1-241 (providing a complete description of the jurisdiction of the juvenile and domestic relations district court).

<sup>25</sup> VA. CODE ANN. § 16.1-241(J).

<sup>26</sup> VA. CODE ANN. § 18.2-8.

<sup>27</sup> VA. CODE ANN. § 18.2-10.

<sup>28</sup> VA. CODE ANN. § 18.2-8.

<sup>29</sup> VA. CODE ANN. § 18.2-11.

<sup>30</sup> VA. CODE ANN. § 18.2-8.

<sup>31</sup> See VA. CODE ANN. §§ 16.1-69.6, 17.1-506. For a complete list of circuit courts and general district courts see <http://www.courts.state.va.us/courts/courts.html>.

<sup>32</sup> VA. CODE ANN. § 16.1-69.7.

<sup>33</sup> VA. CODE ANN. § 16.1-69.8.

Unlike most other states, Virginia judges are initially appointed and subsequently reviewed for retention by the Virginia General Assembly.<sup>34</sup> Salaries of judges for both district courts<sup>35</sup> and circuit courts<sup>36</sup> are set and paid by the state. In addition, the salaries of the court clerks of both district<sup>37</sup> and circuit courts<sup>38</sup> are paid by the state.<sup>39</sup> Localities are required to provide suitable quarters and equipment for the general district court and juvenile courts<sup>40</sup> and courthouses with suitable space and facilities to accommodate the various courts and officials, including the Commonwealth's attorney but not including the public defender's office.<sup>41</sup> In addition, the locality provides assorted supplies and equipment necessary to conduct the business of the courts of record.<sup>42</sup>

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<sup>34</sup> South Carolina is the only other state besides Virginia that uses a legislative judicial selection process without a nominating commission. *See Judicial Selection in the States, Appellate and General Jurisdiction Courts*, AMERICAN JUDICATURE SOCIETY, <http://www.ajs.org/js/JudicialSelectionCharts.pdf> (last visited Dec. 19, 2003).

<sup>35</sup> VA. CODE ANN. § 16.1-69.44.

<sup>36</sup> VA. CODE ANN. § 17.1-523.

<sup>37</sup> VA. CODE ANN. § 16.1-69-45.

<sup>38</sup> VA. CODE ANN. § 17.1-287.

<sup>39</sup> For some unknown reason, however, the clerks of circuit courts in the Cities of Richmond and Newport News are paid by the respective cities rather than the State. VA. CODE ANN. § 17.1-288.

<sup>40</sup> VA. CODE ANN. § 16.2-69.50.

<sup>41</sup> VA. CODE ANN. § 5.2-1638.

<sup>42</sup> VA. CODE ANN. § 15.2-1656.

## CHAPTER 4

### RIGHT TO COUNSEL IN THE UNITED STATES AND VIRGINIA

#### Right to Counsel in the United States

Despite the guarantee of the right to counsel in the Sixth Amendment to the U.S. Constitution,<sup>43</sup> the Supreme Court did not recognize the right to court-appointed counsel in state cases until 1932 in *Powell v. Alabama*.<sup>44</sup> In *Powell*, the Court held that it was a violation of due process for a state court to fail to appoint counsel in a capital case. The Court reasoned:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible....He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.<sup>45</sup>

In a collection of subsequent opinions, the Court expanded and repeatedly stressed the fundamental importance of court-appointed counsel for accused, not just in capital cases, but in all criminal cases involving a possible loss of liberty.

In *Johnson v. Zerbst*,<sup>46</sup> the Supreme Court recognized that “without the assistance of counsel even the intelligent layman usually lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one.”<sup>47</sup> *Johnson* held that the Sixth Amendment requires the federal government to appoint counsel for criminal defendants who are unable to obtain counsel themselves, who have not waived their constitutional right to counsel, and whose life or liberty is in jeopardy.

The seminal case of *Gideon v. Wainwright*<sup>48</sup> built on *Johnson* by holding that an indigent criminal defendant’s Sixth Amendment right to appointed counsel is a fundamental right necessary to ensure the right to a fair trial and the fundamental human rights of life and liberty. *Gideon* further held that the right to appointed counsel applies to the states under the due process clause of the Fourteenth Amendment.

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<sup>43</sup> “In all criminal prosecutions, the accused shall enjoy the right to...have the assistance of counsel for his defense.” U.S. CONST. amend. VI.

<sup>44</sup> 287 U.S. 45 (1932).

<sup>45</sup> *Id.* at 68-69.

<sup>46</sup> 304 U.S. 458, 468 (1938).

<sup>47</sup> *Johnson*, 304 U.S. at 468.

<sup>48</sup> 372 U.S. 335, 344-45 (1963).

While *Gideon* clearly established the right to counsel in felony cases, it was *Argersinger v. Hamlin*<sup>49</sup> that clarified that the right extended to misdemeanor cases. In *Argersinger*, the Court held that an indigent defendant, sentenced to three months imprisonment as a result of a misdemeanor conviction, was denied due process by not being afforded counsel. In Justice Douglas' majority opinion, the Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."<sup>50</sup>

Although *Argersinger* explicitly held that the right to counsel applied to any criminal defendant who is sentenced to incarceration, the question remained whether this right to counsel extended to cases where incarceration is authorized, but not actually imposed. The Supreme Court addressed that question seven years later in *Scott v. Illinois*,<sup>51</sup> a case that represented the state of the right to counsel in misdemeanor cases until *Alabama v. Shelton*. In *Scott*, the issue was whether the right to counsel applied to cases where imprisonment is authorized by statute, but not actually imposed upon a defendant. In the majority opinion written by the then Associate Justice Rehnquist, the Court held that the mere threat of imprisonment does not justify the requirement of counsel. The Court reaffirmed its earlier decision in *Argersinger*, but stated that the central premise of *Argersinger* involved actual imprisonment, and not the mere threat of imprisonment. Based upon this standard of "actual imprisonment," the Court in *Scott v. Illinois* refused to extend the right to counsel to cases where imprisonment is authorized but not actually imposed.

In 2002, the U.S. Supreme Court modified its opinion in *Scott v. Illinois*. In *Alabama v. Shelton*, a divided Court held that "a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged."<sup>52</sup> In essence, the decision extended the right to counsel by holding that a defendant may not serve actual jail time unless the defendant was provided or offered the assistance of counsel in the prosecution which was the original source of the incarceration (i.e., the underlying offense for which a probated or suspended sentence was received).<sup>53</sup>

## Right to Counsel in Virginia

Federal law, including the U.S. Constitution and federal case law, provides the minimal requirements that every state and locality must follow when setting up individual indigent defense systems. States are free to create even broader protections and rights than the federal

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<sup>49</sup> 407 U.S. 25 (1972).

<sup>50</sup> *Id.* at 37.

<sup>51</sup> 440 U.S. 367 (1979).

<sup>52</sup> *Alabama v. Shelton*, 535 U.S. 654 (2002) (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972)).

<sup>53</sup> *Shelton* dealt with cases where the trial judge sentences a defendant to a term of imprisonment and suspends the sentence and/or places that individual on probation. *See id.* If the defendant complies with the terms of the suspended sentence and/or probation, the defendant serves no jail time. However, if the defendant fails to comply with the suspended or probated sentence (e.g., commits a new offense or fails to meet all of the terms of probation), the suspended sentence may be imposed or probation may be revoked up to the maximum term of imprisonment for the underlying offense.

government requires, such as additional types of cases or proceedings in which indigent persons have a right to appointed counsel, but absent stronger state provisions, federal law controls and supercedes state law.

The right to counsel is not explicitly guaranteed in Virginia's Constitution but the Virginia Supreme Court first acknowledged the practice of judges appointing lawyers to represent indigent defendants in 1895<sup>54</sup> and later explicitly held the right of counsel to be fundamental under the Virginia Constitution in 1940.<sup>55</sup> The contours of the right to counsel in criminal cases in Virginia are shaped by federal constitutional law,<sup>56</sup> along with specific provisions of the Virginia Code.

Absent a knowing and intelligent waiver of counsel, no person may be imprisoned for a criminal offense without the assistance of counsel. The general rule applies to felonies as well as to misdemeanor prosecutions.<sup>57</sup> In misdemeanor cases, if, upon motion of the Commonwealth's Attorney, the court states in writing that a jail sentence will not be imposed if the defendant is convicted, the court may try the case without appointing counsel, and in such event, no jail sentence may be imposed.<sup>58</sup> In the absence of the Commonwealth's Attorney's motion, a court may proceed on its own motion.<sup>59</sup>

## **Right to Counsel in Virginia's Juvenile and Domestic Relations District Court**

The right to be represented by a lawyer in juvenile and domestic relations district court extends to:

- juveniles involved in delinquency cases;
- juveniles in need of services;
- juveniles in need of supervision;
- abused and neglected juveniles;
- any juvenile who is the subject of a custody, visitation or support controversy;
- adults before the court on criminal charges;

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<sup>54</sup> Barnes v. Commonwealth, 92 Va. 794, 803 (1895).

<sup>55</sup> Watkins v. Commonwealth, 174 Va. 518 (1940).

<sup>56</sup> To expand upon the discussion in the previous section, the right has been interpreted by the U.S. Supreme Court to apply to the following types of cases: Powell v. Alabama, 287 U.S. 45, (1932) (death penalty); Gideon v. Wainwright, 372 U.S. 335, (1963) (felony trials); Douglas v. California, 372 U.S. 353 (1963) (direct appeals); Miranda v. Arizona, 384 U.S. 436 (1967) (custodial interrogation); *In re Gault*, 387 U.S. 1 (1967) (juvenile proceedings resulting in confinement); U.S. v. Wade, 388 U.S. 218 (1967) (lineups); Gilbert v. California, 388 U.S. 263 (1967) (critical stages of preliminary hearings); Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearings); Argersinger v. Hamlin, 407 U.S. 25 (1972) (misdemeanor and petty offense cases involving imprisonment); Alabama v. Shelton, 535 U.S. 654 (2002) (uncounseled conviction prior to imposition of suspended or probated sentence). There is no federal constitutional right to counsel in post conviction proceedings.

<sup>57</sup> See Gideon v. Wainwright, 372 U.S. 335 (1963) (felonies); Argersinger v. Hamlin, 407 U.S. 25 (1972) (misdemeanors).

<sup>58</sup> See VA. CODE ANN. § 19.2-160.

<sup>59</sup> See *id.*

- adults faced with loss of their parental rights; and
- all other persons whom the court feels require a lawyer's services.<sup>60</sup>

The court appoints a guardian ad litem<sup>61</sup> to represent juveniles alleged to be abandoned, neglected, abused or dependent who are the subject of an entrustment agreement (in which the parents give up their parental rights and transfer care and custody of the juvenile to an agency), a court proceeding to terminate residual parental rights (for all rights and responsibility for a juvenile), or whose parents desire to be relieved of care and custody of the juvenile.<sup>62</sup>

Adults and juveniles who can afford to do so must pay the cost of their own lawyer. Those who cannot afford a lawyer must complete a financial statement showing their indigence in order to receive a court-appointed lawyer. However, a lawyer will be appointed for adults only in criminal cases, abuse and neglect cases, and termination of residual parental rights cases. Parents or guardians of juveniles or other adults receiving a court-appointed lawyer who, upon further investigation, are found able to pay will be charged the cost of a lawyer's services. Use of a lawyer is not required in all cases; the right to a lawyer may be waived by the accused except when the interests of the accused juvenile and his parents are in conflict.<sup>63</sup>

## **Standards, Guidelines and Code of Professional Responsibility Provisions Pertaining to Adequate Representation of Criminal Defendants**

In rendering services to clients, criminal defense lawyers must practice under various constitutional and statutory mandates as well as their particular state's rules of professional responsibility (in Virginia, this is the Virginia Rules of Professional Conduct). In addition, criminal defense attorneys are urged to follow accepted national standards. In the past 15 years, the adoption of standards and guidelines has been one of the most notable developments in the delivery of indigent defense services. Standards and guidelines pertaining to attorney performance, attorney eligibility, caseloads, conflict of interest, indigency screening, and administration of indigent defense systems have been adopted by: state and local legislation; state supreme court rule; national, state and local public defender organizations, indigent defense commissions and other entities.

At the national level, the clear leader in this effort has been the American Bar Association (ABA). The ABA has promulgated standards for criminal justice involving all the components of the justice system including indigent defense. Chapter 4 of those standards addresses the criminal defense function. Chapter 5 addresses the delivery of indigent defense services. The

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<sup>60</sup> VA. CODE ANN. § 16.1-266.

<sup>61</sup> In Virginia, a guardian ad litem must be a lawyer licensed or able to practice in Virginia and must meet other training and experience standards. *See* VA. CODE ANN. § 16.1-266.1.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*



ABA has promulgated standards which address the processing of death penalty,<sup>64</sup> juvenile delinquency<sup>65</sup> and juvenile abuse and neglect cases.<sup>66</sup> Another national leader in promulgating well thought-out, thorough standards has been the National Legal Aid and Defender Association (NLADA), which has published guidelines for awarding contracts to contract defenders,<sup>67</sup> standards for the administration of assigned counsel systems<sup>68</sup> and performance standards that set out minimum requirements of practice for lawyers representing indigent defendants.<sup>69</sup>

National standards and guidelines serve a number of important purposes. While neither the ABA's nor the NLADA's standards are expressly binding on state or local programs, they do serve as a measure to judge the extent to which an individual organization provides quality indigent defense services. Most states that adopted indigent defense standards and guidelines have modeled them after these national documents, tailoring them to local practice. In capital cases, the U.S. Supreme Court has said that the ABA Standards and Guidelines concerning representation in death penalty cases are “well-defined norms”<sup>70</sup> and have “long [been] referred [to] as ‘guides to determining what is reasonable’”<sup>71</sup> when evaluating whether assistance provided by defense counsel was ineffective.

The national standards that set forth the requirements of defense counsel give meaning to the Sixth Amendment right to counsel. The standards include a set of requirements that counsel should follow in *all* cases, plus additional requirements that should be required whenever necessary and appropriate. Just as criminal cases vary endlessly in their details, jurisdictions vary in practice and procedure. To differentiate standards of practice that are absolutely necessary in all cases as opposed to those that are required where appropriate, the introduction to the NLADA Performance Guidelines states:

The language of these *Guidelines* is...general, implying flexibility of action by counsel appropriate to the situation. Use of judgment in deciding upon a particular course of action is reflected by the phrases “should consider” and “where appropriate.” In those instances where

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<sup>64</sup> ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (Rev Ed. Feb. 2003) [hereinafter ABA APPOINTMENT & PERFORMANCE IN DEATH PENALTY CASES].

<sup>65</sup> Robert B. Shepherd, Jr., Editor, *Juvenile Justice Standards Annotated: A Balanced Approach*, ABA INST. OF JUDICIAL ADMIN. (1996).

<sup>66</sup> ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996).

<sup>67</sup> National Legal Aid and Defender Association, *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services* (1984).

<sup>68</sup> National Legal Aid and Defender Association, *Standards for the Administration of Assigned Counsel Systems* (1989).

<sup>69</sup> National Legal Aid and Defender Association, *Performance Guidelines for Criminal Defense Representation* (1995).

<sup>70</sup> See *Wiggins v. Smith*, 000 U.S. 02-311 at \_\_\_ (2003). (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984) and *Williams v. Taylor* 529 U.S. 396, 396 (2000)).

<sup>71</sup> *Wiggins*, 000 U.S. 02-311 at \_\_\_.

NLADA believes a particular action is absolutely essential to providing quality representation, the *Guidelines* use the words “should” or “shall.”<sup>72</sup>

Among the requirements cited as absolutely necessary are:

- Defense counsel is to provide zealous and quality representation to his or her clients at all stages of the criminal process.
- To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction.
- Before agreeing to accept an appointment by the court, counsel has an obligation to make sure that he or she has available sufficient time, resources, knowledge and experience to offer quality representation to each client.
- Counsel has an obligation to attempt to secure the pretrial release of the client under the conditions most favorable and acceptable to the client.
- Counsel has a duty to inform the accused of his or her rights at the earliest opportunity and act promptly to take all necessary procedural steps to protect the defendant’s rights.
- Counsel should conduct a full and complete interview with the client as soon as possible after appointment.
- Counsel must be familiar with the elements of the offense charged and the potential punishment for the charge.
- Counsel should obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by all bail agencies concerning pretrial release, and law enforcement reports that might be available.
- Counsel has a duty to conduct an independent investigation, regardless of the accused’s admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as soon as possible.
- Counsel has the duty to pursue, as soon as practicable, discovery procedures provided by the rules of the jurisdiction and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case.
- Counsel has an obligation to prepare the case and develop a theory of the case.
- Counsel has the obligation to keep the client informed of the progress of the case and all available options.
- Counsel should explore with the client the possibility and desirability of reaching a negotiated plea rather than proceeding to trial. Counsel should fully explain the rights that are waived by entering a plea rather than proceeding to trial.
- The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.

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<sup>72</sup> <sup>72</sup> vi-vii, National Legal Aid and Defender Association, *Performance Guidelines for Criminal Defense Representation* (1995).

- Counsel should be fully prepared for all hearings and for trial.
- Counsel should not accept excessive workloads that will interfere with quality representation.
- Counsel should be alert to all potential and actual conflicts of interest that would impair counsel's ability to properly represent the client.
- Where the client is entitled to a preliminary hearing, counsel should take steps to see that the hearing is conducted in a timely manner unless there are strategic reasons for not doing so.
- Counsel should develop a sentencing plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions and other information pertinent to the sentencing decision.
- Counsel should be familiar with the procedure concerning the preparation, submission and verification of the pre-sentence investigation report or similar documents.
- Counsel should inform the defendant of his or her right to appeal the judgment of the court and the action that must be taken to perfect the appeal.

A measure of an adequately functioning indigent defense system is an evaluation of whether indigent defense counsel are able to follow these requirements in all cases handled. Unfortunately, during the course of our study, it was apparent that many private court-appointed counsel and public defenders in Virginia fell far short of meeting these requirements, placing indigent defendants in the position where neither the courts nor the government could assure their rights required under federal and state law.

The following three chapters set out serious problems with Virginia's indigent defense system. Chapter 5 discusses the Commonwealth's public defender system, Chapter 6 discusses the assigned counsel system, and Chapter 7 addresses factors affecting the practice of both public defenders and assigned counsel in Virginia.

## **CHAPTER 5**

### **INDIGENT DEFENSE IN VIRGINIA: PUBLIC DEFENDER OFFICES**

Our nine-month investigation into Virginia's indigent defense system revealed that public defenders are forced to confront excessive caseloads with woefully inadequate resources. Public defenders throughout Virginia handle caseloads far in excess of nationally recognized annual workload standards, leaving them unable to devote the necessary time and attention to many cases. Underfunding of public defender offices leaves them without the most basic of office equipment, such as functioning computers, fax machines and internet access, and insufficient secretarial, paralegal and investigative staff. While caseloads of public defender offices continue to rise, budgets for the offices remain relatively static, and well below that provided to Commonwealth's attorneys' offices.

#### **Indigent Defense Providers in Virginia**

Indigent defense services in Virginia are provided by a combination of public defender offices, which serve 48 of 134 localities,<sup>73</sup> and assigned counsel, which provide representation in all localities of the Commonwealth. In jurisdictions that have public defender offices, public defenders are expected to represent all indigents within their jurisdiction who are charged with crimes or offenses and are entitled by law to court-appointed counsel unless a conflict exists or they are otherwise relieved by the court.<sup>74</sup> In areas without public defender offices, assigned counsel provide representation in all indigent defendant cases and in areas with public defenders assigned counsel handle any case the public defender office does not handle. Public defenders do not serve as guardians ad litem (GALs) at all; only private, court-appointed attorneys serve as GALs.

Attorneys representing non-capital indigent defendants in Virginia, whether public defenders or assigned counsel, are subject to very few minimum standards or guidelines. The only statewide requirement we are aware of applies to public defenders. According to a Public Defender Commission policy, public defenders are expected to meet with incarcerated clients within 48 hours of appointment. Some districts have developed a similar local rule for court-appointed attorneys. For example, in Fairfax, court-appointed attorneys are expected to meet detained clients within 48 hours of appointment, and in Hanover County, attorneys are expected to meet with detained clients within 72 hours of appointment.

Attorneys accepting GAL appointments are subject to more standards than are attorneys assigned to criminal or juvenile delinquency cases. Since 1995, all attorneys serving as GALs in the courts of Virginia for children in child protection, custody and visitation, juvenile delinquency (some children represented by counsel in delinquency proceedings also have GALs), CHINS, status offense and other appropriate cases, as determined by the court, have been required to undergo initial training to get on the appointment list and are subject to

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<sup>73</sup> Virginia localities consist of 95 counties and 39 independent cities.

<sup>74</sup> VA. CODE ANN. § 19.2-163.4.

minimum qualification standards.<sup>75</sup> Effective September 1, 2003, GALs must also adhere to minimum performance standards.<sup>76</sup>

The balance of this chapter provides information on the operation of public defender offices we visited in Virginia. The following chapter provides similar information on assigned counsel programs that we reviewed.

## **Call for a Public Defender System**

In 1970, the Board of Governors of the Criminal Law Section, Virginia State Bar, conducted a study of the methods of providing counsel for indigents at public expense and whether a public defender system should be considered. Up until this time, all legal representation of indigent defendants had been provided by private court-appointed counsel. In 1971, the Bar report was completed, recommending, among other things, creation of an indigent defense commission to establish pilot public defender programs in several areas of the Commonwealth. The report stated that, “Escalating crime statistics have brought demands to get tough with criminals and at the same time increasing concern for protection and constitutional rights.”<sup>77</sup>

The then Attorney General, who had encouraged the study, remarked: “the representation given to some individuals (under the assigned counsel system) is not as adequate as it should be. . . . At the October (1970) term of the Virginia Supreme Court, three out of seven criminal appeals were affirmed simply because constitutional issues raised at the appellate level were not properly brought forth at the trial court level.” The 1972 General Assembly voiced its approval of the State Bar study by enacting legislation establishing a Public Defender Commission (PDC).

## **The Public Defender System Today**

Twenty-one public defender offices currently operate in Virginia, serving 48 localities. The Public Defender Commission is authorized to recommend to the General Assembly areas in which a public defender office should be established, however, no office will be created without strong support from the locality and an authorizing vote by the General Assembly. Opposition to new public defender offices is common. In 2003, a lawyer in Newport News who takes court appointed cases circulated a letter to fellow panel members urging them to support political candidates who opposed creation of a public defender office, to avoid losing the “meal tickets” of indigent defendants for their local practices.<sup>78</sup>

Public defender offices serve all sizes of jurisdictions, from large (Fairfax, Richmond, Virginia Beach) to very small (Pulaski). In most states with a statewide public defender system,

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<sup>75</sup> Standards to Govern the Appointment of Guardians Ad Litem.

<sup>76</sup> Standards to Govern the Performance of Guardians Ad Litem for Children.

<sup>77</sup> See Overton Pollard, *Providing Defense Services to Indigents in Virginia: The Public Defender Program*, Va. State Bar, Pro Bono/Access to Legal Services (quoting *1971 Report of the Board of Governors*, Criminal Law Section, Virginia State Bar), at [http://www.vsb.org/probono/indigent\\_defense.html](http://www.vsb.org/probono/indigent_defense.html) (last visited Dec. 19, 2003).

<sup>78</sup> See *The Daily Press*, March 26, 2003, Terry Scanlon, “Memo Comes Back to Bite Area Lawyer.”

public defender offices tend to serve the largest metropolitan areas, while smaller areas are served by regional public defender offices or by assigned counsel. In Virginia, there appears to be no pattern to the establishment of public defender offices. Instead, the offices are situated in a hodge podge fashion throughout the state. Six of the offices serve communities of fewer than 10,000 residents.<sup>79</sup> In our site work, we visited 10 public defender offices, ranging in size from five attorneys in Pulaski to 24 attorneys in Richmond.<sup>80</sup>

Expansion of the public defender system occurred primarily between 1986 and 1992. During this period 15 new offices and one satellite office were opened, bringing the number of offices statewide to 19. Since 1992, additional offices were opened in Charlottesville and Norfolk. The General Assembly has been urged to authorize creation of offices in several other areas but it has not acted on the recommendations.

Sec. 19.2-163.4 of the Virginia Code provides: “In counties and cities in which public defender offices are established..., defense services for indigents charged withailable offenses shall be provided by the public defenders unless (i) the public defender is unable to represent the defendant or petitioner by reason of conflict of interest or (ii) the court finds that appointment of other counsel is necessary to attain the ends of justice.” The Public Defender Commission’s goal is that public defender offices serve 75 percent of all indigent cases in the jurisdictions they serve. However, the Commission seems interested in achieving this goal regardless of whether sufficient resources are available to the local offices, bringing into question whether the goal “attains the ends of justice.”

In 1997 the Supreme Court of Virginia Office of the Executive Secretary surveyed courts served by public defender offices to determine what percentage of indigent defendants were represented by public defenders as opposed to assigned counsel.<sup>81</sup> Eighty-nine courts responded to the survey. The following table illustrates the percentage of indigent defendants that courts reported were represented by the public defender offices serving their jurisdiction.

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<sup>79</sup> These small communities include Franklin City (population 8,170), Rappahannock County (population 7,206), Bland (population 6,919), Lexington (population 6,910), Buena Vista (population 6,306), and Bedford City (population 6,257).

<sup>80</sup> Public defender offices were visited in the following cities: Alexandria, Fairfax, Fredericksburg, Halifax, Lynchburg, Norfolk, Pulaski, Richmond and Roanoke. In addition, we visited the Appellate Defender Office and the Central Capital Defender Office in Richmond.

<sup>81</sup> Supreme Court of Virginia Office of the Executive Secretary, Court Appointed Counsel and Public Defenders in Virginia: Study of Procedures for the Appointment and “Fair” Rotation of Counsel in Virginia’s Courts (1998).

## **Responses from 1998 Study of Procedures for the Appointment and “Fair” Rotation of Counsel in Virginia’s Courts**

<b>Percentage of Indigent Cases Handled by Public Defender</b>	<b>Number of Courts</b>
95-100 %	35
90-94%	30
85-89%	9
80-84%	6
<80%	9

Thus, 80 of the 89 reporting courts indicated that public defenders handle in excess of 80 percent of the indigent defendant cases in their courts. These data are consistent with our findings of significant case overload for public defenders in virtually every office in the state.

### **The Public Defender Commission**

The Virginia Public Defender Commission’s nine members are appointed by the Speaker of the House of Delegates in consultation with the Chairmen of the Courts of Justice Committees of the House of Delegates and the Senate. Membership includes three judges - two judges from courts of record and one general district court judge - three lawyers and three laypeople. The Public Defender Commission (PDC) appoints one member as chairperson.

Virginia Code Section 19.2-163.2 sets out the duties of the PDC, which include hiring an Executive Director. Overton Pollard held this position since the PDC was created until he retired in October 2003, when former Deputy Director Richard Goemann assumed the position. The PDC administrative staff consists of 12 people.

The Commission is responsible for hiring a public defender for each of the areas in which a public defender office has been authorized by the General Assembly. Initially, just three offices were authorized: one serving Augusta County and the cities of Staunton and Waynesboro, one serving Virginia Beach, and one serving the City of Roanoke. Following positive review of these pilot offices, additional offices have been gradually authorized.<sup>82</sup> There are currently 21 public defender offices serving 48 localities, which encompass 30% of the state’s population.

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<sup>82</sup> Various reports have supported expansion of the public defender system in Virginia, including the Judicial Council of Virginia’s 1983-1986 Comprehensive Judicial Plan. Goal 1 of the Plan was: “To improve the ability of the courts to provide a prompt and fair resolution in all legal disputes.” Within that Goal, the Counsel included the following Task:

Task 1.3.3 Support legislation to establish that, as a matter of public policy, Virginia will proceed toward a state-wide implementation of a mixed defender system (primary responsibility for handling indigent cases going to salaried public defenders with the private bar handling conflict and overflow cases).

In 1996, the Commission authorized creation of an appellate defender unit, which is housed in the PDC's Richmond offices. The Appellate Defender, who is hired by the Commission, and two staff attorneys assist the public defender offices with petitions, briefs and arguments in the Virginia Court of Appeals and the Supreme Court of Virginia. The PDC is also responsible for hiring four regional capital defenders, positions that were authorized in 2002.<sup>83</sup> Individuals appointed to each of these positions serve at the pleasure of the Commission and must devote themselves full-time to public defender duties and not engage in the private practice of law. (Some offices, however, employ part-time assistant public defenders who are permitted to engage in private practice when not performing public defender duties.) It is up to individual public defenders to employ staff, including assistant public defenders, secretarial and investigative personnel, and to secure office space and supplies, as authorized by the General Assembly.

In addition to supervising and supporting the public defender, appellate public defender and capital defender offices, the Commission is charged with establishing standards for the qualification of counsel appointed in capital cases and maintaining lists of counsel, both public defenders and court-appointed attorneys, for use by the circuit courts. This responsibility is carried out in conjunction with the Supreme Court of Virginia and the Virginia State Bar. The standards were initially effective on July 1, 1992 and have been updated twice, most recently in January 2002. Standards for capital trial, direct appeal and habeas corpus counsel are posted at the Commission's website.

Funds for Virginia's public defender system come from a state appropriation made to the Public Defender Commission. Funds for compensating court-appointed attorneys and for paying any court-ordered expenses in indigent defendant cases, whether for public defenders or court-appointed attorneys, come from the Criminal Fund, which is administered by the Supreme Court. Court-ordered expenses include expert witnesses, investigators, interpreters and other costs.

Thirty-two states, including Virginia, plus the District of Columbia, have some sort of statewide body or commission responsible for developing policy and providing oversight for indigent defense services.<sup>84</sup> The Virginia Public Defender Commission is the only such entity where all of the members are appointed by the legislature. In other states, it is not uncommon for the Senate and the House to provide advice and consent for selection of members who are ultimately appointed by the Governor, or for appointments to be spread among multiple office-holders, such as the Chairs of the Senate and House Judiciary Committees in addition to the

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Further, the Commission on the Future of the Judiciary and the 1989 Virginia Assembly recommended establishing statewide Public Defender offices as primary defense services providers. Most recently, House Document No. 32, a 2002 report by the Virginia State Crime Commission, advocated creation of public defender offices in six areas. The General Assembly, however, only authorized one additional office in Norfolk

<sup>83</sup> See VA. CODE ANN. § 19.2-163.2.

<sup>84</sup> In a few states, the indigent defense commission is only responsible for appellate cases. In some states with statewide public defender programs, the commission is only responsible for public defender offices, while another program or no program oversees assigned counsel programs. See *Statewide Indigent Defense Systems: 2001*, prepared by the American Bar Association Bar Information Program, on the ABA's website for the Standing Committee on Legal Aid and Indigent Defendants <http://www.abanet.org/legalservices/sclaid/defender.html>.



Chief Justice of the Supreme Court and the Governor. Historically, we were told, membership on the Virginia Public Defender Commission has not included individuals who are strong advocates for indigent defense, such as well-respected criminal defense lawyers.

In most states, indigent defense commissions were created to provide independent oversight and accountability for indigent defense services, to develop uniform standards and guidelines for program operation, and to advocate for adequate resources in order to deliver indigent defense services.<sup>85</sup> In contrast, we were told that the Public Defender Commission in Virginia has been timid about advocating for adequate resource needs. Indeed, it seems the Commission has taken pride in the repeated battle cry that it can provide representation to indigent defendants cheaper than court-appointed counsel. With compensation rates for court-appointed counsel that are lower than any other state, and a Public Defender Commission that seems content to ask attorneys to do more with less, the question arises, how effectively can either public defenders or court-appointed attorneys represent their clients? A substantial number of individuals we interviewed concluded that the answer is that they cannot be effective in all cases.

Public defenders in the past have been discouraged from directly contacting the Public Defender Commission to request additional resources. At one point, an assistant public defender we interviewed who had a caseload of about 250 pending cases (felonies, misdemeanors and traffic cases) wrote the Executive Director of the Public Defender Commission about his heavy caseload, noting that it far exceeded national caseload standards and requesting relief (he had read an article about defender caseloads in the National Association of Criminal Defense Lawyers magazine, *The Champion*). He received a polite letter back saying essentially that things were not going to get any better in terms of caseload. A number of chief public defenders reported that the Commission had discouraged them from seeking supplemental funds from cities or counties or seeking relief from serious case overload from their local courts.

### **Public Defender Commission Budget Development**

The annual PDC budget is submitted to the Department of Planning & Budget where it is reviewed. It is usually submitted in two parts: (a) the current PDC budget, which is what is necessary to sustain current levels of services; and (b) a budget for new money the PDC feels is needed to expand and provide improved services. The (a) section is developed by the PDC's Fiscal Director. The (b) section is developed by the Executive Director, in consultation with the Deputy and Fiscal directors. We are told that section (a) usually winds up in the governor's budget and passes through the General Assembly. Section (b) items, at least in recent years, have not made it into the governor's budget and no efforts have been made to find legislative champions to request these increases.

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<sup>85</sup> For a discussion of the role of indigent defense commissions, see Kate Jones, *The Case for Commissions*, THE CHAMPION (June 2001) at <http://www.nacdl.org/public.nsf/ChampionArticles/2001jun01?opendocument>.

Historically, when a new public defender office is to be opened, in order to determine the staffing needed for the new office, Commission staff examine several factors informally, such as the size and staff of the Commonwealth's attorney office for the specific locality or localities to be served, local crime trends and criminal filings, and the size of other public defender offices of comparable size in the state. Also, as previously mentioned, the Commission seeks to ensure that staff provide representation in at least 75 percent of the appointed cases in a given jurisdiction. The Commission's proposed staffing plan is subject to cuts by the executive or legislative branches. Recently, the General Assembly cut four attorney positions from the public defender's office in Norfolk, which was the most recently opened office. Also, in the past, the General Assembly has on occasion granted requests for additional attorneys, but has not included money for additional support staff.

It has not just been the failure of the General Assembly to provide adequate funding for public defenders; the Public Defender Commission itself has failed to aggressively seek adequate funds. It appears that some members of the Commission have been more concerned that public defender offices service 75 percent of all the appointments in their jurisdictions than assuring that clients receive adequate and quality representation.

In the past, not only have individual public defenders been strongly discouraged from contacting Commission members directly about budget needs or other matters, they were also not encouraged to meet with city or county governmental officials to seek local budget supplements. They were also dissuaded from meeting and greeting legislators who represent their jurisdictions. In a change of course, the new executive director is encouraging public defenders to meet their legislators in an effort to educate them regarding what public defenders do and on the need for increased resources for the system as a whole. To avoid competition among the offices, public defenders are not permitted to make resource requests on behalf of their individual offices to the General Assembly.

### **Characteristics of Public Defender Offices**

In most communities we visited, the chief public defender was acknowledged as being a well-respected lawyer. Staff, however, were often described as eager, but young and inexperienced. Given the heavy caseload demands on the offices, new attorneys, even those with no past experience, quickly take on full caseloads. In most offices, most staff attorneys are clearly devoted to their work, although few assistant public defenders remain in their positions for more than a few years. Usually this is because of low pay, but it is also due to high caseloads and inadequate resources. One attorney who worked less than two years as a public defender in Loudon County said 18 months in a public defender office is a long time. At the time he left, four years was the longest any attorneys had stayed with the office. In Richmond, the chief public defender told us that attorneys typically leave the office after about five years. "The problem for the system is too few resources: it grinds good people to dust."

According to the Public Defender Commission, excluding the Norfolk office, which just opened in 2002, 25 percent of the public defender staff attorneys statewide have been with the

offices less than two years, and another 40 percent have been with the offices less than five years.

### **Case Overload**

In every office we visited, public defenders labor under excessive caseloads. In Lynchburg, for example, assistant public defenders average 100 open cases; the chief public defender carries an average of 75 cases. In Roanoke, all attorneys, including the chief public defender, carry full caseloads, averaging between 115 and 180 open cases. A Winchester public defender reported she had 98 cases pending and had closed 372 cases in the first six months of 2003. When we visited Norfolk, the public defender office had been open for less than one year, but the average open caseload among full-time attorneys in the office was 116 (this excludes traffic cases, which the office does not handle). The chief public defender's open caseload was 105 cases. In Norfolk we were told that felony cases turn over approximately every three months. Thus, an attorney carrying an open caseload with 100 felonies would handle 400 felonies a year, two and a half times national caseload standards. In addition, this attorney would also be handling misdemeanors and appeals, as public defenders in Virginia carry caseloads with mixed case types.

Table 5-1 provides data on the total caseload for each of the public defender offices in FY 2002 and the average caseload per attorney. Three offices - Franklin/Suffolk, Halifax and Alexandria - had average annual caseloads of under 400 cases per attorney. Statewide, however, the average number of cases handled by public defenders in FY 2002 was 507. An average annual caseload of 507 cases (appeals, felonies, delinquencies and misdemeanors combined) exceeds that permitted in most other public defender programs in the country. See Table 5-2, below, for annual workload standards developed for other public defender programs in the country.

**Table 5-1**  
**FY 2002 Public Defender Annual Average Caseload by Office**

<b>District</b>	<b>PD Office</b>	<b>Number of Attorneys</b>	<b>Number of Cases</b>	<b>Average Attorney Caseload</b>
26	Winchester	6.5	4,379	673.69
25	Staunton	6.5	3,887	598.00
2	Virginia Beach	21	12,338	587.52
20	Leesburg	8	4,689	586.13
3	Portsmouth	14	7,643	545.93
21	Martinsville	5	2,646	529.20
22	Danville	4	2,097	524.25
11	Petersburg	6	3,118	519.67
23	Roanoke	10	5,153	515.30
27	Pulaski	5	2,573	514.60
15	Fredericksburg	12	6,165	513.75
19	Fairfax	20.5	10,251	500.05
24	Bedford/Lynchburg	10.5	4,997	475.90
13	Richmond	25	11,892	475.68
16	Charlottesville	7	3,161	451.57
5	Franklin/Suffolk	10	3,771	377.10
18	Alexandria	9	3,326	369.56
10	Halifax	6	2,185	364.17
<b>Totals</b>		186	94,271	506.83

\* The Norfolk Public Defender Office, which has 19 attorneys (including the Public Defender), was not included in this chart because the office did not open until Fall 2002 and therefore caseload data for it is not available.

An assistant public defender in Winchester, where attorneys handled an average of 674 cases apiece in FY 2002, said that with this kind of caseload, it is “impossible to focus on the cases that are coming up.” One attorney had closed 372 cases for the first six months of 2003. Jail visits, we were told, were reserved for only the most serious cases. The office investigator spends much of his time doing intake and conducting client interviews. He is often the only person from the public defender’s office who has seen a client before the client’s first court appearance with his public defender.

A public defender in Fairfax said that the caseload is so high (160-170 open cases per attorney) that “it verges on malpractice.” “When attorneys have to ask the court for a continuance because there is no time to work on a case, then that is the breaking point. And that happens all the time.” Another attorney in the office said that because of the caseloads, “we let

things slide. We cannot help it. We don't have time for investigation or research." Investigation, one public defender said, is limited to talking to the client and hoping that he or she is giving the right picture.

A newer public defender in Fairfax who was worried that her workload was preventing her from complying with the Public Defender Commission's rule to meet with incarcerated clients within 48 hours of appointment was told by a more senior attorney to "just ignore it." Another new attorney said she had a bench trial coming up very soon and yet she has "no idea" how to conduct direct and cross examination. She said she felt uneasy that she had abandoned all of the "best practices" she was taught in her law school clinic, including talking to police officers, visiting the crime scene, running checks on records, requesting release of medical records, filing motions, investigating, calling employers, churches and community groups, getting 911 tapes and talking to witnesses. She said the only thing she does now is talk to the client outside the courtroom.

In June 2003, the Norfolk chief public defender circulated an anonymous survey to all attorneys asking them to describe their caseloads as "light, medium, heavy or overwhelming." Among those who responded, 90 percent said that their caseloads were either "heavy" or "overwhelming." Other questions queried how common it was to work evenings and/or weekends, whether attorneys felt they had too many cases to effectively and competently represent their clients, and, if they were struggling, what did they feel was the solution ("I need help getting organized and handling my cases more efficiently;" "cases need to be distributed more evenly;" or, "we have too many cases as a team and we need to ask the court for relief"). The Norfolk office ultimately requested and received relief: the courts agreed to stop making assignments to public defenders on Fridays. All new appointments go to private, court-appointed counsel on Fridays.

The decision to stop appointing cases to public defenders on Fridays provided some temporary relief. However, by the time we visited in August, attorneys were again under serious case pressure. A public defender told us she had a misdemeanor trial set for the afternoon of our visit. The client was out-of-custody and the public defender had not met him; there had been no time to schedule an interview. Because of a prosecutorial charging error, she knew the case could be won if the client showed up in court. The public defender said "this happens a lot" in misdemeanor cases; client interviews are not always set up due to overwhelming caseloads. A juvenile defender who estimated she had, on average, 100 open cases, said public defenders have to struggle to get to the jail or the detention center; she felt it was harder for them than it is for assigned counsel. "We have no time for legal research, calling families, filing motions." "Normally I began preparing for cases one day before the court appearance," by looking at the file, checking on whether she met with the client, reviewing the facts, etc.

The only national source that has attempted to quantify a maximum annual public defender caseload is the National Advisory Commission (NAC), which published its standards in 1973. In that report, standard 13.12 on courts states:

The caseload of a public defender attorney should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.<sup>86</sup>

A number of states and counties have developed public defender caseload standards that are similar to the NAC standards but are specifically tailored to their jurisdiction's practice. The Spangenberg Group has conducted studies to develop weighted caseload standards for public defender and contract attorney programs in five states and three counties.<sup>87</sup> The following table includes caseload standards from 14 states and one city. The standards address the maximum number of cases that a full-time lawyer should handle in a 12-month period. In addition, the standards are disjunctive, thus, if a public defender is assigned cases from more than one category, the percentage of the maximum caseload for each category should be assessed and the combined total should not exceed 100 percent. In order to be reasonable, accordingly, at any one point in the year, a public defender's open caseload must include far fewer cases than the annual numbers set out in the standards.

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<sup>86</sup> National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts* at 186 (Washington, D.C. 1973).

<sup>87</sup> The case-weighting model employed by TSG requires public defenders or contract attorneys to keep detailed time records of their work over a given period of time, typically ranging from ten to thirteen weeks, on specially designed time sheets. The time records provide a means by which caseload (the number of cases handled) can be translated into workload (the amount of effort, measured in units of time, for the lawyer to complete work on the caseload). The ability to weight cases allows thorough consideration of not just the raw number of cases assigned to a criminal justice agency annually, but also the severity of various case types handled by the program. In the broadest context, weights can be given to the total annual caseload of a defender organization to compare to the next year's anticipated volume of cases. Assuming that accurate records are kept of attorney time expended in each case during the study period, the development of workload standards and the determination of staffing needs for the projected caseload can be accomplished with some assurance of precision.

<p><b>Table 5-2</b></p> <p><b>Public Defender Workload Standards</b></p>					
State	Felony	Misdemeanor	Juvenile	Appeals	Author/Authority
Arizona	150	300	200	25	<u>State of Arizona v. Joe U. Smith</u> , 681 P. 2 <sup>nd</sup> 1374 (1984)
Colorado*	33-386 <sup>88</sup>	196-430	249	--	The Spangenberg Group. "Updated Weighted Caseload Study for the Colorado State Public Defender." December 2002.
Florida*	200	400	250	50	Florida Public Defender Association. "Comparison of Caseload Standards." July 1986
Georgia	150	400	200	25	Georgia Indigent Defense Council. "Guidelines of the Georgia Indigent Defense Council for the Operation of Local Indigent Defense Programs." October 1989.
Indiana	120-200 <sup>89</sup>	400	250	25	Indiana Public Defender Commission. "Standards for Indigent Defense Services in Non-Capital Cases: With Commentary." January 1995.
Louisiana	200	450	250	50	Louisiana Indigent Defense Board. "Louisiana Standards on Indigent Defense." 1995.
Massachusetts	200	400	300	--	Committee for Public Counsel Services. "Manual for Counsel Assigned through the Committee for Public Counsel Services: Policies and Procedures." June 1995.
Minnesota*	120	400	175	--	The Spangenberg Group/Minnesota State Public Defender. "Caseload Standards for District Public Defenders in Minnesota." October 1991
Missouri	40-180 <sup>90</sup>	450	280	28	Missouri State Public Defender System. "Caseload Committee Report." September 1992.
Nebraska	50 <sup>91</sup>	--	--	40	Nebraska Commission on Public Advocacy. "Standards for Indigent Defense Services in Capital and Non-Capital Cases." May 1996.
New York* (City)	150	400	--	25	Indigent Defense Organization Oversight Committee. "General Requirements for All Organized Providers of Defense Services to Indigent Defendants." July 1996.
Oregon	240	400	480	--	Oregon State Bar. "Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases." September 1996.
Vermont	150	400	200	25	Office of the Defender General. "Policy of the Defender General Concerning Excessive Workloads for Public Defenders." October 1987.

<sup>88</sup> Colorado's caseload standards vary by severity of case handled. Specific statewide felony caseload standards are 32.6 Class 2 & Felony Sex Assault, 105.5 Class 3, 200.2 Class 4-5 and 386.2 Class 6 cases per year per attorney. Specific misdemeanor caseload standards are 196.4 Class 1 Misdemeanor and Sex Assault and 429.8 Class 2-3 Misdemeanor and Traffic/Other cases per year per attorney.

<sup>89</sup> Indiana's felony caseload standards vary by severity of case handled. The specific standards are: 150 non-capital murder and all felonies; 120 non-capital murder, Class A, B, C felonies only; 200 Class D felonies only; and 300 Class D felonies and misdemeanors.

<sup>90</sup> Missouri's felony caseload standards vary based on the severity of the felony charge. For Felony A and B cases, the public defender caseload standard is 40 cases per year. For Felony C and D cases, the public defender caseload standard is 180.

<sup>91</sup> The Nebraska Commission on Public Advocacy has established a felony caseload standard for only the most serious category of felonies. The standard represents the number of violent crime cases (rape, manslaughter, 2<sup>nd</sup> degree murder, sexual assault) that a single attorney could handle during a year if those cases were the only case she handled during the year.

Washington	150	300	250	25	Washington Defender Association. "Standards for Public Defender Services: Objectives and minimum Requirements for Providing Legal Representation to Poor Persons Accused of Crime in Washington State." October 1989.
Wisconsin*	145	323	207	--	The Spangenberg Group. "Caseload/Workload Study for the State Public Defender of Wisconsin." September 1990.
* = Jurisdictions where caseload standards were developed through case-weighting studies.					

Interviews with dedicated but hopelessly overburdened public defenders in Virginia made it clear that caseload pressures were leaving potential legal issues unlitigated. Many Commonwealth's attorneys and judges also commented that public defender workloads were excessive. The following quotes from assistant public defenders throughout the state sum up the pressures on these attorneys: "I feel as though they ask me to handle these cases but then won't give me the tools I need to do my job." "I'm in court all the time. Clients get sick of hearing that I am unavailable to speak with them because I am in court." "We provide assembly-line justice." "If I had less cases, I could do more investigation."

Consequences of case overload include: lack of client and family member contact, inability to do legal research, little or no motion practice, insufficient investigation in cases where investigators are not used, insufficient case and trial preparation, failure to prepare a pre-sentence plan and, eventually, burnout. All of these factors affect an attorney's ability to effectively litigate the case, whether going to trial or negotiating a plea bargain.

Although most public defenders we met work hard, they labor under a public perception that public defenders are not "real attorneys," a sentiment that is common (and frequently incorrect) around the country. However, the perception that public defenders are not "real attorneys" is difficult to dispel when overburdened attorneys arrive at court with a stack of files and can't recall client names. One juvenile public defender said she shows up at court and recognizes faces but can't remember names, "Clients get offended. That's difficult to deal with."

Working under such conditions on a day to day basis can affect morale. Morale was low in some offices visited. Most public defender attorneys believe that conditions are unlikely to improve in the future.

## Training and Supervision

A major weakness of the public defense system in Virginia is that there is little initial training provided to new attorneys. Unlike many other public defender systems, Virginia has no formal introductory training program for brand new public defenders. It is up to individual offices to provide initial training and the offices tend to be too busy with pending caseloads to do much. Supervisors carry full caseloads; many supervisors carry more cases than less experienced attorneys, thus there is little or no time for actual supervision of less experienced attorneys. A senior assistant public defender in charge of training in Fairfax was forthright when she said, "I don't do any training. I carry my own caseload of misdemeanors, which sometimes amounts to 300 open cases."



The experience of attorneys working with the new Norfolk Public Defender office (which opened in 2002) was telling. The first division to become operational was the juvenile court division, which has five attorneys and started accepting cases in October 2002. The attorneys who were hired did not have any juvenile court experience. They spent the month of September going to a PDC training session in Richmond, doing court observation in Norfolk, and reading up on juvenile practice. There was no formal training, and one told us they were all overwhelmed when they began.

A public defender in Fredericksburg joined the office with some but not much criminal case experience. When he started, he was given a criminal law and motor vehicle handbook. Within his first week he had 20 cases and was trying a bench trial. He said he would have preferred to receive initial training, and even now that he has more experience, he felt it would be helpful to have someone who could give pointers.

The Public Defender Commission sponsors several statewide, annual training programs. The programs are valuable, but are no replacement for initial training of new attorneys. There is an annual public defender conference that includes a half-day management meeting for chief public defenders and commission members and a full day (6 hours) of CLE for all public defender lawyers. The training is mandatory, although exceptions are made for unavoidable court conflicts. The 2002 conference was cancelled due to the state's budget crises. Other than that, it has been held every year since 1988.

The Commission also sponsors a yearly combined training for investigators and sentencing advocates. Due to a lack of funds, this conference was cancelled in 2001 and 2002, but was held in 2003. In addition, the PDC co-sponsors a yearly Juvenile Law & Education Conference with the University of Richmond School of Law. The training lasts one day, and is open to public defenders as well as the private bar. The PDC also helps organize and staff an annual Capital Defense Workshop, which is officially sponsored by the Virginia Bar Association. The workshop is a day and a half and is also open to public defenders and the private bar. Finally, the PDC holds a yearly management conference for all Public Defender-Managers (the head of each office) and commission members.

The Public Defender Commission's Appellate Public Defender Office (APD) in Richmond has a staff of three attorneys and one secretary. There is no paralegal or law intern to help with legal research. The intent in creating the office was to allow it to do appeals from public defender offices that could not handle them, either because they were very small, rural offices or were urban offices that have a large number of appeals. Local public defender offices can opt to handle their own appeals or send them to the APD. The Richmond, Alexandria, Virginia Beach and Fairfax offices do their own appeals. Many other state public defender systems have created statewide appellate offices to handle all appeals in order for appellate counsel to take as objective an eye as possible of the trial record, something that may entail raising a claim of ineffective assistance of trial counsel. In Virginia, unlike most other states, a claim of ineffective assistance of counsel is not permitted in the direct appeal. It may only be raised in state habeas, or post-conviction, proceedings. Virginia has no right to counsel in non-capital state habeas proceedings, and the Appellate Public Defender does not handle them.

Appellate defenders carry a high caseload: seven months into 2003 the APD attorneys had opened 157 cases. At the Richmond public defender office, two attorneys were pulled out of trial rotation to create an appellate “unit.” The two attorneys both file 50 briefs apiece per year. They also prepare case summaries and hold monthly training sessions for staff in the office. Richmond is the only trial office with a designated appellate unit.

A striking gap in the Virginia public defender system is its absence of a mechanism to pursue systemic claims of deficiencies in the state’s criminal justice system. Other states with public defender programs often rely on appellate offices or special litigation units to raise test case litigation and class action claims on behalf of their clients.

### **Disparity in Resources Between Commonwealth’s Attorneys and Public Defenders**

Although they are both state-created and funded positions, and although both work on the same cases, Commonwealth’s attorneys and public defenders are not paid on par with one another. Across the board, from entry level to the most senior positions, attorneys working as Commonwealth’s attorneys earn more - sometimes significantly more - than public defenders in like jobs. One private attorney panel member we interviewed in Richmond wanted to work as a public defender as soon as he graduated from law school. However, with student loans and a new family, the Commonwealth attorney’s office’s starting salary offer of \$8,000 more than the public defender office could pay was impossible to refuse. He stayed with the Commonwealth’s attorney’s office for four years before starting a private defense practice.

In Lynchburg, salary disparities between Commonwealth’s attorneys and public defenders ranged from \$1,000 for entry-level pay to \$27,000 at the top level. In Virginia Beach, there is a \$15,000 disparity in starting pay for assistant Commonwealth’s attorneys and assistant public defenders. Further, there are 57 assistant commonwealth attorneys, compared to 34 assistant public defenders. In Norfolk, there is a \$6,837 difference in starting pay between assistant public defenders and assistant Commonwealth’s attorneys and a \$42,000 difference in pay for the chief public defender and the elected Commonwealth’s Attorney. Average pay in the offices is \$64,000 for assistant Commonwealth’s attorneys and \$46,000 for assistant public defenders.

The salaries for elected Commonwealth’s Attorneys are established by the General Assembly and vary according to population of the locality served. Salaries listed in the following table are the minimum amounts that must be paid. The salaries listed may not be the actual salary of a specific Commonwealth’s Attorney, as many local governments have authorized a salary supplement, paid from local funds, for the elected Commonwealth’s Attorney, as well as for other staff in the offices.

### Minimum Commonwealth's Attorney Salaries July 1, 2002 to June 30, 2003<sup>92</sup>

Population	Minimum Salary
Less than 10,000	\$43,478
10,000 -19,999	\$48,315
20,000 - 34,999	\$53,145
35,000 - 44,999	\$95,659
45,000 - 99,999	\$106,286
100,000 - 249,999	\$110,271
250,000 and above	\$114,260

Many Commonwealth's attorney offices receive supplemental funds from local governments for purposes other than supplementing salaries. For example, we were told the City of Richmond provides approximately \$400,000 to the Richmond Commonwealth's attorney's office to use as it pleases. In addition to these direct contributions, Commonwealth's attorneys have access to critical case preparation resources that fall outside of their budgets, including access to local, state and federal law enforcement personnel, state and federal crime labs and state psychiatric personnel.

Some assistant commonwealth's attorneys' positions are entirely funded by grants and/or localities. In Fairfax, the average salary of assistant Commonwealth's attorneys is \$13,000 more than that paid to assistant public defenders. The disparity is due in large part to local supplements paid to the prosecution. No local supplements are made for the Fairfax public defender office. In Norfolk, the City provides fringe benefits and free parking for all Commonwealth's attorney personnel. The Public Defender sought supplemental funding but was denied.

We were told that just two public defender offices in the state receive local support. The Alexandria public defender office receives office space, phone service and computer hardware and support from the city. The City of Richmond provides office space for six public defender attorneys working in the Juvenile & Domestic Relations Court. No public defender office receives money to supplement salaries or to hire support staff, paralegals or additional attorneys. According to the State Compensation Board, 56 of 120 Commonwealth's attorney's offices reported receiving supplemental local funds to boost staff salaries in FY 2004, totaling \$7,484,391.<sup>93</sup> Many Commonwealth's attorneys also receive office space, parking facilities, and other in-kind services that the Compensation Board does not track and that would not appear on any Commonwealth's attorney's budget. For example, the Norfolk Commonwealth's attorney has three police officers assigned to it as full-time investigators. That is in addition to the \$724,731 it received from the City of Norfolk in salary supplements for staff in FY 2004, almost half of the entire budget for the Norfolk public defender office.

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<sup>92</sup> Compensation Board, Commonwealth of Virginia, *Constitutional Officers Budgets and Salaries: Commonwealth's Attorneys*, (2002) at <http://scb.state.va.us/salary1.html#commatty>.

<sup>93</sup> The Compensation Board has no way of validating the accuracy of the figures reported, or ensuring that all commonwealth attorney offices that receive salary supplements report on them.

Low salaries clearly make it difficult for public defender offices in Virginia to recruit and retain experienced attorneys. When an attorney position opened up at the Winchester public defender office, only one resume was received in response to the job posting. The chief public defender in Richmond explained that whenever he has an attorney vacancy, he starts the new hire at the entry level pay of \$38,163, even if they are very experienced. Due to the low pay, he feels it is important to promote from within.

It is not the purpose of this study to review the appropriate staffing and resources, both monetary and in-kind, of Commonwealth's attorneys' offices. We provide comparative information solely to show the enormous disparity between prosecutors and public defenders in Virginia. The American Bar Association suggests that the appropriate measure of health within a criminal justice is whether each agency in the system - courts, prosecution, defender - receives adequate and balanced resources. Applying this goal, Virginia's criminal justice system, and the public defense function in particular, fall far behind what is adequate and balanced.

### **Inadequate Support Staff**

All public defender offices have investigators and secretaries on staff, however the number of support positions is very few compared to those in Commonwealth's attorney offices. For example, the Richmond Commonwealth's Attorney's office has 37 attorneys and 35 support staff compared to the Public Defender Office's 20 attorneys and 10 support staff. Public defender investigators (which are discussed in greater detail below) are required to prioritize their work, helping attorneys with the most serious cases. Secretaries are often unable to assist attorneys with even basic correspondence, such as sending out letters to clients, as they are fully occupied keeping up with filing, receptionist, scheduling, and other administrative duties. There are no paralegals, but eight of the public defender offices have a sentencing advocate. Sentencing advocates perform mitigation, which entails, among other things, compiling critical social history background information on clients and serving as a liaison with mental health professionals to assist attorneys in sentencing.

The Indiana Public Defender Commission's<sup>94</sup> workload standards listed in Table 5-3 were designed for use by indigent defense practitioners who have access to adequate support staff, in recognition of the important role support staff play in providing quality indigent defense. The Indiana workload standards in Table 5-2 represent the caseload standards for offices that maintain an adequate level of support staff consistent with the guidelines set-out in Table 5-3 below. County public defender

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<sup>94</sup> Indiana's 92 counties have the primary responsibility for funding the indigent defense programs within their jurisdictions. Each county may choose between a county public defender, contract defender program or an assigned counsel system. The Indiana Public Defender Commission (IPDC) allocates state funds to offset county indigent defense expenditures in those counties that comply with the commission's standards for indigent defense services in capital and non-capital cases. Counties that enforce these standards are reimbursed by the IPDC for 40% of the cost of representing indigent defendants in non-capital felony cases and 50% of the cost of attorneys' fees, as well as expert, investigative and support services, in capital cases. Currently, 54 of Indiana's 92 counties comply with IPDC standards and receive funds from the Commission.

offices that do not maintain the required support staff to attorney ratios are held to more stringent annual caseload standards (100-150 felonies; 300 misdemeanors; 200 juvenile cases; and, 20 appeals).

<b>Table 5-3</b> <b>Indiana Public Defender Commission's</b> <b>Adequate Support Staff Guidelines</b>	
<u>Support Staff Position</u>	<u>Ratio of Support Staff to Attorneys</u>
Paralegal - Felony	1:4
Paralegal - Misdemeanor	1:5
Paralegal - Juvenile	1:4
Paralegal - Mental Health	1:2
Investigator - Felony	1:4
Investigator - Misdemeanor	1:6
Investigator - Juvenile	1:6
Law Clerk - Appeal	1:2
Secretary - Felony	1:4
Secretary - Misdemeanor	1:6
Secretary - Juvenile	1:5

Like any places of employment, Virginia's public defender offices experience periodic turnover and vacancies. However, since the offices operate close to the bone even when fully staffed, vacancies exert a serious hardship on the offices.<sup>95</sup>

### **Other Important Resources**

Besides a shortage of staffing to effectively handle the workload, Virginia's public defender offices lack the most basic equipment necessary to run a modern law office. Investigators, in particular, lack the tools necessary to conduct and document investigations and prepare for presentations in court. Further, public defender offices receive no funds for basic litigation expenses, such as having photocopies made of crime records.

The resources of the Richmond Public Defender's office typify those of other offices. The office uses Windows 95, has old computers and very slow internet access. Until recently, the office had just two printers for the entire office, which spans the floor of a downtown office building. Now the office has three printers. There is no IT person on staff; the Public Defender Commission has two IT staff members for the 21 public defender offices. When they get "new" equipment, it is typically left-over castoffs the Public Defender Commission has accumulated: a "new computer" can be four years old. Unlike the Commonwealth Attorney's office, the Public

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<sup>95</sup> As of June, 2003, the Public Defender Commission reported the following vacancies statewide: 1 Deputy PD, 1 Senior Assistant PD, 5 Assistant PD-Is, 1 Assistant PD-II, 1 Investigator, 1 Sentencing Advocate, 1 Secretary.

Defender staff lacks the capacity to view digital photos from the Medical Examiner's office. In an age where digital photographic equipment is the standard, the office has two Polaroid cameras and an old video camera. They have no access to any criminal history information of their clients. Investigators are not provided with state cars (but are reimbursed for mileage): one investigator had put 200,000 miles on her car in four years. The Richmond Circuit Court has digital projection machines permitting PowerPoint and accident reconstruction presentations. The public defender office has no laptops so it can't make use of the circuit court equipment. This places the public defender office at a disadvantage; it can't keep up with the Commonwealth's attorney's office's technology. Most public defender offices have very limited access to the internet; usually just one or two computers in the office are equipped with access.

In Halifax, the public defender office has one computer with internet access (the investigator's), the printers are broken, there are not enough phone lines and there is no free fax line. One attorney explained, "we are stunted when it comes to [legal and general] research," and "there is not a piece of machinery here that should be kept." Others told us operating without e-mail is a huge hindrance, and phone calls made from personal cell phones are not reimbursed, which impacts attorneys who are frequently on the road going to different courts. One attorney said that she pays for her own training. When she has an appeal, she travels to Richmond and has to pay for a hotel with her own money (because Richmond is less than 3 hours away). "The Commonwealth has everything. We are the bastard child of the criminal justice system."

The Public Defender Commission reported that there are only 26 full-time investigators for 216 staff attorneys statewide, a ratio of 1 investigator for 8.5 attorneys. Staffing in individual offices includes, Richmond: two investigators for 25 attorneys, Virginia Beach: two investigators for 21 attorneys, Fairfax: two investigators for 22 attorneys, and Norfolk: two investigators for 20 full-time attorneys. The investigators are reserved for only the most serious cases, thus the vast majority of cases receive no investigative work.

By statute, the localities have to provide Commonwealth's attorneys with office space. Public defenders must pay for rent. There has not been any new money for rent increases for public defender offices for 10 years, so securing and maintaining inexpensive office space that is near the courts is challenging for most offices.

### **Discretion to Prosecute Misdemeanors**

Commonwealth's attorneys in Virginia are required to prosecute felonies while prosecution of misdemeanors is discretionary. Typically the decision to prosecute misdemeanors is based on budget and personnel, an option public defenders do not have. Unless local judges agree to reduce assignments due to case overload, public defenders do not get to pick and choose the types of cases they will handle. In rural areas, Commonwealth's attorneys tend to prosecute more misdemeanors than in urban or high volume crime areas. If a misdemeanor is appealed to Circuit Court, the Commonwealth's attorney is required to represent the Commonwealth.

In Norfolk, we were told, the Commonwealth's Attorney has decided for public policy and political reasons to prosecute certain misdemeanors. Approximately six years ago, when the office received federal grant funding, it began prosecuting domestic violence cases in J&DR court. Also, within the last few years, the office began prosecuting misdemeanors committed in high crime areas as part of a community enforcement project. In those cases where the Commonwealth's attorney is not involved, whoever initiated the charge - either the complaining witness or the arresting officer - must present evidence. In localities with public defender offices, a Commonwealth's attorney's decision to not prosecute misdemeanors creates an even greater disparity in resources between the two offices.

## **CHAPTER 6**

### **INDIGENT DEFENSE IN VIRGINIA: ASSIGNED COUNSEL**

Like public defenders, court-appointed counsel in Virginia suffer from a lack of adequate resources. Our nine-month investigation revealed that Virginia has the lowest unwaivable fee caps in the nation. As a result of these low caps, assigned counsel have little incentive to devote the necessary time and effort to properly represent indigent defendants, as they will not be compensated for such work. Rather, most cases are processed quickly through the system with little or no investigation, research or preparation.

The previous chapter set out many of the weaknesses of the public defender system in Virginia, most of them related to inadequate resources but some due to or exacerbated by poor leadership by the Public Defender Commission. Assigned counsel in Virginia face their own set of problems. As with public defenders, most of these problems relate to inadequate resources, but inadequate oversight is also a factor.

#### **Standards and Guidelines**

There are no statewide, minimum experience, training or performance requirements for attorneys to be permitted to accept non-capital adult criminal and juvenile delinquency cases in Virginia. The sole statewide requirement for attorneys to accept court-appointments is that they volunteer for the panel and be members in good standing with the Virginia State Bar.

In addition to the national standards and guidelines discussed previously, a number of states and localities have developed standards and guidelines for assigned counsel programs. In 2000, the U.S. Department of Justice Bureau of Justice Assistance published its *Compendium of Standards for Indigent Defense Systems*, which includes a collection of national, state and local standards governing Administration of Defense Systems, Attorney Performance, Capital Case Representation, Appellate Representation, and Juvenile Justice Defense.<sup>96</sup> The Compendium is not exhaustive; a number of states and counties that have developed standards are not included in the document, but it is a useful starting point for comparison purposes.

#### **Process of Getting on the Panels**

The process for getting on court-appointed panels is typically informal: attorneys tell court clerks they would like to be on the panel, or ask a judge for permission. However, a few of the jurisdictions we visited imposed additional requirements to be eligible for court appointments. In Fairfax, attorneys must watch a video about the responsibilities of being a court-appointed lawyer, meet with the director of the court services program, and fill out basic paperwork. All attorneys, no matter how experienced, are initially only appointed to misdemeanor and traffic cases. To be able to accept appointments in felony cases, they must

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<sup>96</sup> See U.S. Dept. of Justice, Bureau of Justice Assistance, *Compendium of Standards for Indigent Defense Systems*, (Dec. 2000), available at <http://www.ojp.usdoj.gov/indigentdefense/compendium/pdfxt/vol3.pdf>. The Compendium is intended to be useful for persons dealing with funding sources; for agencies or organizations that are developing criminal defense standards; and for academics and courts that need a reference point.



send a written request to the director, who circulates it among the general district and circuit court judges. If a single judge provides any negative feedback, the attorney will not be certified for felony cases.

In nearby Prince William County, attorneys must join the local bar to be on the court-appointed list. To join the bar, two members must write letters on your behalf. Attorneys who do not have a Prince William address can only get appointments to detained clients and out-of-custody clients whose home address is not in Prince William County. If you have a Prince William County address you can get non-jail Prince William County resident clients. In rural Russell County, all new attorneys are expected to take cases because the area has few new attorneys.

We did not come across any panels requiring even minimal training or CLE requirements. In Montgomery County, where private attorneys provide representation in all indigent cases, a group of lawyers from the criminal bar got together in 2002 and proposed recommendations for judges regarding requirements for court-appointed attorneys. The recommended requirements included that attorneys: complete at least 6 CLE requirements in criminal law every other year; contact an incarcerated client within four days of receiving notice of appointment; have at least one year of criminal law experience before being appointed on a charge carrying a sentence of 20 years or more; and seek co-counsel for a first felony jury trial. The local bar twice refused to put the proposal to a vote.

Because there are no minimum experience qualifications in most Virginia jurisdictions, attorneys can get appointed to felonies immediately upon passing the bar, although rarely are they appointed to the most serious or violent felonies. One newer attorney practicing in Tazewell County said that other than not getting a complicated rape or homicide case, they can get whatever comes in. In Tazewell County, attorneys reported that, as a “rite of passage,” the youngest attorney in town gets all the child molester cases. One new attorney in Buchanan County was appointed to a distribution case before he was even sworn in to the Bar; the client was facing 120 years imprisonment.

### **Exceptions: Guardians ad Litem and Counsel in Capital Cases**

In contrast to non-capital criminal cases, attorneys who wish to receive appointments as GALs are subject to standards governing appointment and performance. Since 1995, attorneys have been subject to Standards to Govern the Appointment of Guardians Ad Litem, promulgated pursuant to sec. 16.1-266 of the Code of Virginia. The goal of the standards “is to foster vigorous, effective and competent representation of children’s interest and welfare.” The standards were developed by the Judicial Council of Virginia in conjunction with the Virginia State Bar and the Virginia Bar Association and require seven hours initial training and six years continuing education biennially on topics related to representation of children as a GAL. In addition, attorneys must demonstrate that they have previous experience in juvenile and domestic relations court cases involving children and get a certificate demonstrating proficiency in such work from a judge before whom they have appeared or from an attorney already qualified as a GAL who the applicant has assisted.

As of September 1, 2003, GALs are also subject to Standards to Govern the Performance of Guardians Ad Litem for Children. Among other things, the standards require the GALs to meet face-to-face and interview their child clients (it is recognized that in-person meetings with infants and children who are pre-verbal will rely primarily on observation of the child's surroundings and interactions with the child's caretaker), conduct an independent investigation of the case and provide the court with sufficient information including specific recommendations for court action based upon the findings of interviews and investigation.

Unlike non-capital criminal cases, attorneys who wish to represent indigent defendants facing a sentence of death must meet minimal experience standards. Pursuant to §19.2-163.8(E) of the Code of Virginia of 1950, as amended, the Supreme Court and Public Defender Commission, in conjunction with the Virginia State Bar, set forth standards required for appointment of counsel in capital cases. The Virginia Code strongly urges but does not mandate that circuit courts appoint two attorneys for trial, appellate, and habeas proceedings. Accordingly, standards are set out for both "lead counsel" and for "co-counsel." If a public defender is appointed (from one of the four capital defender offices or from one of the 20 trial offices) and is either "lead" or "co-counsel", the other attorney should be appointed from the private bar. All have to meet the standards.<sup>97</sup>

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<sup>97</sup> **TRIAL COUNSEL:**

*Lead Counsel* must:

- a. Be an active member in good standing of the Virginia State Bar or admitted to practice pro hac vice;
- b. Have at least five years of criminal litigation practice (defense or prosecution) within the past seven years including experience as defense counsel in at least five jury trials, tried to verdict, involving violent crimes with maximum penalties of at least 20 years or more.
- c. Have had, within the past two years, at least six hours of specialized training in capital litigation, plus at least four hours of specialized training required by §19.2-163.8(A)(vii) of the Code of Virginia of 1950, as amended;
- d. Have had at least one of the following:  
experience as "lead counsel" in the defense of at least one capital case within the past five years (FOR THE PURPOSE OF THIS SUBPARAGRAPH, WHENEVER THE TERM "CAPITAL CASE" IS USED, IT SHALL MEAN A CASE IN WHICH THE DEATH PENALTY WAS SOUGHT AND WHICH WAS CONCLUDED AFTER THE JURY WAS IMPANELED), or experience as co-counsel in the defense of at least two capital cases within the past seven years;
- e. Be thoroughly familiar with the appropriate court systems, including specifically the procedural rules regarding timeliness of filings and procedural default;
- f. Have demonstrated proficiency and commitment to quality representation.

**Co-counsel** must meet all of the requirements of "lead counsel" except A.1(d).

**APPELLATE COUNSEL:**

*Appellate counsel* must meet the following requirements:

1. Be an active member in good standing of the Virginia State Bar or admitted to practice pro hac vice.
2. Have, within the past five years, briefed and argued the merits, after writs have been granted, in:
  - a. At least three felony cases in an appellate court; or
  - b. The appeal of a case in which the death penalty was imposed by the trial court.
3. Have had, within the past two years, at least six hours of specialized training in capital litigation, plus at least four hours of specialized training required by §19.2-163.8(A)(vii) of the Code of Virginia of 1950, as amended.
4. Be thoroughly familiar with the rules and procedures of appellate practice.

**HABEAS CORPUS COUNSEL:**

*Habeas Corpus counsel* must satisfy one of the following requirements:

The Administrative Office of the Courts monitors GAL qualifications to ensure that those attorneys who qualify as GALs have the requisite training, but it does not have the capacity to monitor performance. Likewise, the Public Defender Commission monitors CLE compliance but not performance for capital case counsel.

## **Appointment System**

The Virginia Code provides that court-appointed counsel must be selected by a fair system of rotation among bar members who volunteer to take these cases and whose practice before the court regularly includes representation of persons in criminal cases.<sup>98</sup> Contrary to recommendations of national standards, in most Virginia circuits, appointment of assigned counsel in indigent defendant and juvenile cases is done in an ad hoc fashion. One of the primary criticisms of ad hoc systems is that they fail to appoint counsel in a systematic fashion that ensures equitable distribution of cases among qualified attorneys.<sup>99</sup> Indeed, our site work and review of data from the AOC's office confirmed that appointments are not consistently made in an equitable fashion throughout Virginia.

Data obtained from the Office of the Executive Secretary of the Supreme Court of Virginia for FY 2002 shows that there were 215,640 private bar court appointments at a total cost of \$56,243,295.04 statewide. There were 2,931 private attorneys appointed to the 215,640 cases.

A summary of the data shows that 352 attorneys, or only 12 percent of the 2,931 attorneys accepting appointed cases, were appointed to 100,963 cases, or 47 percent of the cases statewide. These 352 attorneys accounted for \$28,652,464.43, or 51 percent of the total dollars paid to court-appointed counsel in 2002. The average earnings among the 352 attorneys was \$81,456, and the average payment per case was \$283.99.

In contrast, this same data shows that 1,363 or 47 percent of the total 2,931 court-appointed lawyers receiving cases in 2002 handled only 8,463 of the cases, or 4 percent of the

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a. Possess experience as counsel of record in Virginia or federal post conviction proceedings involving attacks on the validity of one or more felony convictions, as well as a working knowledge of state and federal habeas corpus practice through specialized training in the representation of persons with death sentences, including the training required by §19.2.163.8(A)(vii) of the Code of Virginia of 1950, as amended;

b. Have served as counsel in at least one capital habeas corpus proceeding in Virginia and/or federal courts during the past three years; or

c. Have at least seven years civil trial and appellate litigation experience in the Courts of Record of the Commonwealth and/or federal courts.

<sup>98</sup> VA. CODE ANN. § 19.2-159.

<sup>99</sup> Commentary to Standard 5-2.1 of the ABA Standards for Criminal Justice, Providing Defense Services reads:

At its worst, the ad hoc system for assigning counsel is typified by the practice of appointing lawyers only because they happen to be present in the courtroom at the time a defendant is brought before the judge. This method of assignment obviously is unlikely to achieve an equitable distribution of assignments among the qualified members of the bar, and in some jurisdictions the practice has given rise to a cadre of mediocre lawyers who wait in the courtroom in hopes of receiving an appointment.

total 215,640 cases. These lawyers received a total of \$1,900,630.27, or an average of \$1,394 apiece. The average payment per case was \$224.58. Almost half of the 1,363 attorneys (592, or 22% of the 2,931 total attorneys) were appointed to fewer than five cases apiece in 2002.

Most indigent defendant criminal cases are appointed counsel by the general district courts, where all misdemeanor and most felony cases (unless there is a direct indictment) are first heard, but there is a variety of ways in which appointments are managed. Some courts, such as the general district court in Tazewell County, appoint attorneys based on who is scheduled to be in court on the arraignment date, and the distribution of appointments among attorneys is not tracked. In a couple of smaller counties, attorneys told us that lawyers perceived by judges as being overly zealous on behalf of their clients are no longer given appointments.

Every judge we interviewed told us they feel that compensation for court-appointed lawyers is unreasonably low. Attorneys and clerks in Newport News acknowledged that the system used to appoint counsel is designed to maximize a private attorney's time and earnings on court-appointed cases by assigning multiple clients for court appearances set for the same day. When an attorney's name comes up on the district court clerk's rotation, the clerk calls a couple of months in advance to schedule her for a three-week block of time during which she will be available to spend three or four days each week doing court appearances. After these block dates are set, attorneys get a monthly schedule saying what days they are scheduled for trials. As the blocked dates approach, they start getting appointments for cases with court appearances (preliminary hearing or trial dates) set during the block of time scheduled for them. The point of this procedure is to allow attorneys to cluster a lot of court appearances on the same day. One attorney told us, "You have to take multiple cases the same day, to earn adequate money. It forces you to pile up cases."

If an attorney is meeting multiple clients at court for purposes of disposition or preliminary hearing, there is a high likelihood that the attorney is not spending adequate time on each case talking to and preparing clients and witnesses. Even more worrisome is the fact that many court-appointed attorneys reportedly only meet with their clients at court moments before the court appearance. The system of clustering cases, or maximizing attorney time with multiple appointments set for the same day, encourages lawyers to spend very little time on individual cases. A premium is placed on quickly processing cases and moving as many as possible to guilty pleas on the same day. Although intending to help accommodate lawyers who work in a flawed system, courts, through their appointment practices, are complicit in perpetuating the lowest level of representation possible.

Several courts we visited have the clerks assign duty days to attorneys in advance, sometimes annually. Attorneys normally get appointed to whatever cases come in on their duty days. Exceptions may be made for very serious cases where experienced practitioners are appointed out of rotation. In Norfolk, cases are docketed according to days that the arresting officers' have set aside to appear in court, thus attorneys will be appointed to cases if their schedules accommodate those of the officers.

There is similar variety in the way appointments are made in J&DR court cases. In Prince William County, the lawyers themselves instituted a rotating calendar schedule for covering J&DR court cases. Several lawyers interviewed praised their “one day a month” system and hoped that it would be extended to the general district court. In Richmond, we were told judges are “fast and loose with the lists.” Some judges give attorneys cases if they spot them in the hallways; likewise deputies go out and “round up” attorneys for appointments.

In circuit court, there is less structure to the way in which appointments are made. In a number of circuit courts visited, judges will assign cases from the bench. In the circuit court in Newport News, for example, cases on direct indictment are normally assigned to attorneys who are present in the courtroom at the time the assignment is needed. Other circuit court judges will appoint attorneys they think can handle particular cases.

We learned that in some counties, judges are not appointing counsel for parents in custody and child support cases. Although these are civil matters, parents can be detained up to 12 months in jail in contempt of court, with no right to a jury trial, for failure to pay child support. One family law practitioner told us that child support issues vary from county to county: most, but not all, counties do provide counsel. Caroline County does not appoint counsel in civil show cause cases, including those where a parent is allegedly not paying child support. Parents in such cases are sentenced to the full 12 months in jail with no offer of counsel. A judge in Harrisonburg County says that he does not appoint attorneys for parents in custody and child support cases, even when there is a chance of jail time. He said he relies on an unreported court of appeals case as dispositive in this area, but we were told there is an attorney general opinion saying there is a right to counsel in these cases.

Another related problem is that a parent cannot appeal a child support order if he or she cannot post the arrearage. Poor individuals are unlikely to be able to come up with this, thus are not able to appeal.

### **Compensation for Court-Appointed Attorneys**

Both the General Assembly and the Supreme Court are involved in determining the compensation scheme for court-appointed attorneys in Virginia. Hourly compensation rates are promulgated by the Virginia Supreme Court while the General Assembly develops statutorily binding per-case maximums. The hourly compensation rate approved for court-appointed attorneys in non-capital criminal cases and juvenile cases is \$90, a rate that is higher than what is paid in most other states. However, this hourly rate is all but meaningless, as Virginia has the lowest statutory caps in non-capital cases of any state in the nation and the caps, unlike those in most states, are non-waiveable.

Virginia and Mississippi are the only states in the country with non-waiveable maximum fees for court-appointed counsel. (In Mississippi, however, attorneys are entitled to an hourly rate on top of their attorney fees to pay for overhead expenses, and there is no limit on this overhead compensation. The presumptive rate for such expenses is \$25 an hour.)

There are 27 states that use assigned counsel systems with no maximum caps for non-capital felony cases. In each of these states, trial judges are responsible for establishing individual compensation rates by case.<sup>100</sup>

In 21 states, a presumptive maximum compensation amount for non-capital felony cases has been established, subject to a waiver of the maximum presumptive amount by each trial judge. Such per-case maximums are waiveable upon a showing by counsel that a particular case involved extraordinary time and effort. The presumptive non-capital felony caps in the 21 states are as follows:

<b>State</b>	<b>Presumptive Non-Capital Felony Caps</b>
Vermont	\$25,000
Colorado	\$15,000
Iowa	\$15,000
Nebraska	\$12,000
Ohio	\$10,000
Rhode Island	\$5,000
Kansas	\$5,000
New York	\$4,400
Alaska	\$4,000
Alabama	\$3,500
Oklahoma	\$3,500
South Carolina	\$3,500
Florida	\$3,000
Hawaii	\$3,000
Kentucky	\$3,000
New Hampshire	\$3,000
Tennessee	\$3,000
West Virginia	\$3,000
Maine	\$2,500
Nevada	\$2,500
Illinois	\$1,250
Virginia	\$395 and \$1,096

Virginia ranks 50<sup>th</sup> in the nation in per-case caps for non-capital felonies with charges carrying sentences of fewer than 20 years and 49<sup>th</sup> (ahead of only Mississippi) in per-case caps for non-capital charges with a possible sentence of over 20 years.

Court-appointed attorneys in Virginia are currently paid up to \$112 for each misdemeanor charge, up to \$395 in a felony charge with a penalty of up to 20 years

<sup>100</sup> See Appendix D: “Rates of Compensation for Court Appointed Counsel in Non-Capital Felony Cases,” The Spangenberg Group, American Bar Association, Bar Information Program, 2003.

imprisonment, and up to \$1,096 for a felony charge carrying a sentence of more than 20 years imprisonment. These per-case caps are actually somewhat lower than what has been statutorily authorized by the General Assembly. The state has failed to appropriate enough money for the Criminal Fund to pay the full per-case caps, which are \$120 for a misdemeanor charge, \$445 for a felony charge with a sentence of up to 20 years and \$1,235 for a felony charge with a sentence of more than 20 years. There is no statutory cap in appellate cases; payment is set by the court “in an amount not less than \$300.”<sup>101</sup> Typically appellate counsel receive \$400.

The following table displays the per-case cap amounts that are statutorily authorized and the amounts that are actually paid. Appendix D contains a table with information from other states on what court-appointed counsel are paid in non-capital felony cases.

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<sup>101</sup> VA. CODE ANN. § 19.2-326.

**Table 6-1**  
**Court Appointed Attorney Fees in Virginia**

<b>Court</b>	<b>Type of Charge/Case</b>	<b>Statutory Amount<sup>102</sup></b>	<b>Actual Amount Paid</b>	<b>Hourly Amount Recommended by the Supreme Court of Virginia</b>
Supreme Court	Appeals	Set by Court, not less than \$300	Varies	N/A
Court of Appeals	Appeals	Set by Court; not less than \$300	Varies, usually \$400	N/A
Circuit Court	Misdemeanor appeal (de novo)	\$158	\$148	Not to exceed \$90 an hour for in and out-of-court work
	Carries up to 20 years <sup>103</sup>	\$445	\$395	Not to exceed \$90 an hour for in and out-of-court work
	Carries more than 20 years	\$1,235	\$1,096	Not to exceed \$90 an hour for in and out-of-court work
	Capital Cases	Reasonable fees- No Cap Set	Reasonable fees- No Cap Set	Up to \$125 an hour for in and out-of-court work
General District Court	Adult Misdemeanors, Preliminary Hearings	\$120	\$112	Not to exceed \$90 an hour for in and out-of-court work
Juvenile and Domestic Relations Court	Delinquency	\$120	\$112	Not to exceed \$90 an hour for in and out-of-court work
	Guardian Ad Litem	No Cap	No Cap	\$55 for out-of-court, \$75 for in-court services
	Counsel for parent <sup>104</sup>	\$120	\$112	Not to exceed \$90 an hour for in and out-of-court work

<sup>102</sup> The statutory amount is per charge, not per case. However, if an indigent defendant is charged with repeated violations of the same section of the Code of Virginia and each violation arises out of the same incident, occurrence, or transaction, counsel will only be compensated in an amount not to exceed the fee prescribed for the defense of a single charge.

<sup>103</sup> For revocation of probation hearings, payment is allowed on the basis of only one charge. For instance, if a defendant who is on probation for five charges is subject to a probation revocation proceeding, the court appointed attorney would be reimbursed for only one charge – the probation revocation. The fee cap would be that for the top charge of the original five charges.

<sup>104</sup> In abuse and neglect cases and termination of parental rights cases, counsel for parents receive \$112 per child, per charge. A Guardian Ad Litem, whose represents the best interests of the child in these cases, receives \$55/hour for out-of-court work and \$75/hour for in-court work with no cap.



Compensation rates for court-appointed counsel in Virginia have changed very little in the past two decades. In 1985, when The Spangenberg Group conducted a study for the joint subcommittees of the Virginia General Assembly studying methods of providing legal defense services for the indigent and Virginia's public defender system, the maximum fee allowed in circuit court for Class II cases was \$400, for Class III-VI cases \$200, and for misdemeanors and juvenile cases \$75.<sup>105</sup> The following table compares the rates paid in 1985 with those in 2002.

**Table 6-2**  
**Court Appointed Attorney Fees in Virginia, 1985 and 2002**

Type of Court/Case	Maximum Fee Allowed	
	1985	2002
<b>Circuit Court</b>		
<b>Felony</b>		
<b>Class I - Capital</b>	Set by the court	Set by the court
<b>Class II</b>	\$400	\$1,096
<b>Class III-VI</b>	\$200	\$395
<b>Unclassified</b>	Varies	Varies
<b>Misdemeanor</b>	\$100	\$148
<b>Juvenile</b>	\$100	\$100
<b>Appeal</b>	Set by the court, not less than \$100	Set by the court, not less than \$300
<b>General District Courts</b>		
<b>Felony (Preliminary Hearing)</b>	\$75	\$112*
<b>Misdemeanor</b>	\$75	\$112
<b>Juvenile</b>	\$75	\$112
<b>J&amp;DR Court</b>		
<b>Felony (Preliminary Hearing)</b>	\$75	\$112*
<b>Misdemeanor</b>	\$75	\$112
<b>Juvenile</b>	\$75	\$112

\*Compensation is capped at \$112 for preliminary hearings in the district court that are certified to the circuit court. However, representation of a defendant charged with a felony at preliminary hearing in either juvenile and domestic relations court or general district court that reaches final disposition at that preliminary hearing (i.e., is reduced to misdemeanor, dismissed, nolle prossed, etc.) will result in compensation up to the appropriate felony rate. See 2001 Va. Acts ch. 509.

<sup>105</sup> The Spangenberg Group, *Projecting Costs for Various Indigent Defense Systems in Virginia for FY 1986*.

The compensation caps listed in Table 6-1 are paid per charge, not per case. Individual defendants may face more than one charge. For multiple violations of the same offense tried in the same proceeding, a single fee is allowed. However, in charges involving more than one offense, counsel may receive more than one per-charge fee. Thus, if a defendant is charged with more than one offense, a court-appointed attorney stands to earn more than if the compensation scheme applied to one case rather than one charge. As discussed in Chapter 8, data from the Administrative Office of the Courts show that the average number of charges per court-appointed felony case is 1.7, the average number of charges per misdemeanor case is 1.4 and the average number of charges per case for all juvenile matters (there is no distinction made for felony and misdemeanors) is 1.66. One panel attorney told us that he has instructed the court not to call him for appointment to a case unless it involves at least five charges.

Attorneys submit completed payment vouchers to their local clerks of court. Court staff review the vouchers for accuracy, sign them, and have a judge sign authorization for payment. The vouchers are then sent to the state Administrative Office of the Courts, which issues payment.<sup>106</sup>

With pay caps as low as \$1,096 to defend a client in a murder trial, one has to wonder how, practically and ethically, court-appointed attorneys can provide adequate representation to their clients. When asked if he treated cases of retained clients differently from cases of appointed clients, one lawyer replied he “does a legally sufficient job” on court-appointed cases. He said he “can’t spend a whole lot of time on them” and that he would spend a lot more time with the client that “plunks down more money.” Some attorneys answered the question by saying that they do not treat retained clients differently from appointed clients, but they suspect many others do. A Newport News attorney was more candid, admitting that with a retained client, he spends substantially more time looking for an issue that will benefit the client, while in a court-appointed case he spends as little time as possible looking for an issue that will dispose of the case. “If we want to make a living we have to get rid of the case as quickly as possible.”

In Richmond, a court-appointed attorney who took over 300 appointments in one year told us that they constituted 20% of his income, as he had a largely successful retained criminal practice. We asked how he could provide quality service to both his appointed and retained clients, he said he can’t. “In retained felony cases I work hard to investigate the case, look for witnesses, consider discovery and the use of an outside expert.” In felony cases for court-appointed clients, “I tell them to investigate the case themselves, look for witnesses and if they find them bring them to the office or to court. Frequently I interview the witnesses just before trial and hope they will help the case. Sometimes they screw up the case and I have to scratch around for a plea.”

A Tazewell County attorney told us there are times when compensation has affected his practice. “On a rape trial I had, I’d rather have met with witnesses face-to-face before calling them on the day of trial, but I couldn’t afford to drive to West Virginia and Tennessee to meet

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<sup>106</sup> A 73-page *Court-Appointed Counsel-Public Defender Procedures and Guidelines Manual* published by the Office of the Executive Secretary collects statutory provisions governing indigent defense in Virginia and sets out in great detail how to bill for court-appointed and GAL work.

with them. One of the witnesses I know I wouldn't have called if I'd met beforehand because of her appearance." Another Tazewell County attorney explained to be efficient she assigns a legal assistant to her court-appointed cases. "Even on cases where all the evidence is there and the defendant is pleading, I still go over \$112. We try to spend as little time as possible." A Roanoke lawyer said, "while you do the best you can, you cannot put in the amount of time you should... You certainly have no time to go out and do investigations." Another lawyer said, "Raising constitutional issues in a court-appointed case is almost unheard of. I can't afford to waste all my time on cases I'm not going to be compensated on."

Over and over, private attorneys explained to us that in order to make court-appointed work worthwhile, you have to do a volume practice. As one attorney told us, "To make taking appointed cases work, you have to hustle and hope there's economy of motion....go to the jail and see 10 people at once...get judges to set your cases 2-8 per day. It's not worth it to have one case for \$112 and have to go to court two or three times." One court-appointed attorney in Newport News said he will wait three to four weeks after appointment to visit in-custody clients so he can visit six or seven in the same trip to the jail.

There is no question that attorneys who are juggling four, five, eight defendants in one morning, and hoping to plead them out that day, are doing virtually nothing for their individual clients.

A circuit court clerk who felt that assigned counsel are not paid enough ran through bare minimum tasks that have to be done in a criminal case - set up a file, copy the warrant for the file, determine if the case needs discovery, send a letter to defendant, subpoena witnesses, meet the client at jail, go to court for one or more appearances - and concluded, "there's no way to physically do it all in less than four hours." He said he figures attorneys "wing it" in court.

One private attorney told us that attorneys have an incentive to steer defendants into guilty pleas in one appearance. According to this attorney, "There is a special disincentive to advise the client to go to a jury trial. You will almost always lose money on a jury trial. Bench trials, on the other hand, don't take any more time than a guilty plea."

The per-charge statutory caps sparked strong complaints, separate and apart from the problem of their inadequacy. A recurring issue stems from payment for multiple charges, which, if resolved on the same date, may (or may not) be treated as "one case" for payment purposes, even when the charges arise from separate incidents. One Manassas attorney we interviewed wrote to the chief judge in Prince William County requesting that her name be taken off the list after her bill for \$1,185 for three felony pleas was reduced by the trial judge to \$395. The attorney felt that her bill had been erroneously and arbitrarily reduced.

Another attorney was appointed to represent a defendant on a charge of distribution of cocaine, which as a life felony carries a cap of \$1,096. However, since the case pleaded out to a reduced charge of simple possession, counsel was paid only \$395, the cap applicable to felony cases with a sentence of 20 years or less.

Although these disputes center on the proper interpretation of Code §19.2-163, the real problem arises because lawyers feel "shortchanged" when bills believed to be inadequate to begin with are reduced by the judge. The problem seems exacerbated by the fact that there does not appear to be any reliable mechanism in place by which bills can be challenged. By virtue of the Virginia Supreme Court's "21-day" rule, the trial court loses jurisdiction to do much of anything on a case more than 21 days after sentencing, but counsel will typically not know that a bill has been reduced until it is paid, long after the 21 days have expired.<sup>107</sup>

We also heard of some inventive end-runs around the statutory caps. For instance, counsel appointed to represent a parent in a termination of parental rights proceeding is entitled to a fee for every child who might be removed. Such proceedings typically occur in two stages: first adoption by the foster care provider, and then termination of rights. So, in a case involving two children, counsel might end up receiving four fees.

### **Low Fee Caps Lead to Attrition**

The low compensation for court-appointed lawyers has resulted in some experienced attorneys taking fewer court-appointed cases. One judge, noting his worry that he would not be able to find enough private attorneys willing to take appointments, tries to avoid appointing counsel in certain cases by pressing the Commonwealth's attorneys to state that jail time will not be requested. Some more experienced attorneys interviewed said they were taking fewer and fewer court-appointed cases in state court and were taking more and more federal appointed cases because of the better compensation in federal court (\$90 an hour with a waiveable fee cap of \$5,200 in felony cases). One attorney, who had been practicing for 11 years, said, "No attorney with any self respect will do these cases any longer than he has to." He accepted court-appointed cases when he was just getting started, and then stopped as soon as possible.

While experienced lawyers remain on panels in a number of jurisdictions, they often sharply limit the number of appointed cases once they have a solid private practice. "Experience" does not always equate with "quality" and a number of lawyers with years of criminal law experience rely on court-appointed work for the majority of their income. Many of the lawyers who take the highest number of court-appointed cases are sole practitioners who have "essentially no staff," most commonly, just a secretary. One attorney who stopped taking court-appointed cases called the level of representation provided by those who stay active on the panels "laughable." Another experienced lawyer, who does capital cases, explained that attorneys get onto panels when "nothing else is working for them." Critical of the quality of representation provided by such lawyers, he said they will plead a client guilty "in a heartbeat. Worse, they don't even know when to plead." An experienced panel attorney from Prince William County explained there is no oversight of the work done by panel attorneys and said, "There will always be bottom feeders willing to do the work for virtually nothing."

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<sup>107</sup> Under Rule 1:1, "all final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." VA. SUP. CT. R. 1:1. *See, e.g.,* Patterson v. Commonwealth, 39 Va. App. 610, 575 S.E.2d 583 (2003).

A Fredericksburg attorney summed up the situation as: “The legislature has been a slap-in-the-face insult to the defense bar,” and pointed out that it is not just a matter that they are underpaid but also that the practice of criminal defense in Virginia has gotten substantially more difficult in recent years as the stakes for criminal defendants have gotten higher. For example, parole was abolished, the time required for convicted felons to serve was changed from one-third of their sentence to 85 percent of their sentence, harsh sentencing measures were enacted, and courts have whittled down constitutional protections. These changes make it more difficult and time consuming to properly represent a defendant.

### **Courts Have Discouraged Attorney Complaints About the Assigned Counsel System**

In *Webb v. Commonwealth*,<sup>108</sup> the Court of Appeals addressed the issue of whether the statute prescribing unwaivable caps on court-appointed attorney fees, as applied to a defendant’s court-appointed attorney, deprived the defendant of his constitutional right to effective counsel and due process. The crux of the argument put forth by Webb, an indigent defendant charged with multiple serious charges in Henrico County, was that the low and inflexible case caps for court-appointed cases created a conflict of interest by pitting his court-appointed lawyer’s personal financial interest against his duty to effectively represent his indigent client.

The Court of Appeals rejected Webb’s assertion as it applied to his lawyer’s performance. At the time of Webb’s objection, however, a Henrico County judge who had read a newspaper article about the *Webb* case announced that any court-appointed lawyer appearing before him who felt similarly conflicted would be removed from his or her case and removed from the county’s list off of which judges made appointments. While this was the reaction of just one judge in one county to the *Webb* case, we were told that no other court-appointed lawyer has attempted to raise concerns about the indigent defense system in individual cases anywhere else in Virginia.

Individual defendants are also effectively precluded from challenging the deficiencies in the indigent defense system following their conviction. In Virginia, unlike many other states, a claim of ineffective assistance of counsel is not permitted on direct appeal. It may only be raised in state habeas, or post-conviction, proceedings. However, Virginia does not provide a right to counsel for indigent defendants in state habeas proceedings in non-capital cases, thus the only way such a claim of ineffective assistance of counsel can be raised is by a pro se application. In other words, a person who has been convicted and believes the representation provided by his appointed lawyer was legally deficient would have to prepare and file a claim himself. This is an entirely unrealistic burden to place on a layperson.<sup>109</sup>

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<sup>108</sup> 32 Va. Ct. App. 337, 528 S.E.2d 138 (2000).

<sup>109</sup> The legal standard for a successful ineffectiveness claim is extremely strict. A defendant must show, first, that his “attorney’s conduct fell below an objective standard of reasonableness,” *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and second, that “there is a reasonable probability that, but for this deficient conduct the result of the trial would have been different.” *Id.* at 694. Dissatisfied defendants, even those with new counsel assisting them, very rarely convince courts of this two-prong standard.

## **Disparity in Pay for Court-Appointed Counsel and GALs in Cases Involving Children**

GALs appointed to represent children in abuse and neglect, termination of parental rights or child support cases are paid \$55 an hour for work performed out of court and \$75 an hour for in-court work with no cap. Court-appointed attorneys representing parents in abuse and neglect or termination of parental rights cases may receive a maximum of \$112. One court-appointed attorney told us she spent 100 hours working on a termination of parental rights case. Another attorney who was appealing a case in Circuit Court was in court from 11 a.m. to 9 p.m., and earned the \$148 maximum. This attorney said she suspects that lots of parents' cases don't get appealed because of the poor pay. A number of attorneys candidly admitted that there is disincentive to do all that could be done when representing a parent in abuse and neglect cases because of the fee ceiling. Specifically, one attorney noted that there is a temptation to not follow up on leads that may or may not produce a good outcome. If you know something has merit, "every lawyer is going to do it" but for other investigation and effort on something that may be a stretch, it's not worth it for \$112.

### **J&DR Court**

A common refrain from numerous court-appointed attorneys was that they refused to accept cases in juvenile and domestic relations court, as the structure of the J&DR court made it difficult to do volume work and thus make a reasonable living. Juvenile delinquency cases in J&DR court cases typically require more court appearances than do cases in general district court, as sentencing is commonly done at a separate hearing from the adjudication. Misdemeanor cases being resolved by plea in general district court are frequently resolved in one court appearance combining adjudication and sentencing. Many attorneys interviewed felt it was not worthwhile to make two appearances for a \$112 case, especially when there may be an hour or more of waiting time before each hearing.

We received a number of reports from private attorneys that lengthy waiting times pose a disincentive to accept court-appointed cases in J&DR courts. Because of their wide-ranging jurisdiction, J&DR courts must hear many different matters and scheduling can be burdensome. We received a report in one county that in a felony case, it can take between four and five months from arraignment to preliminary hearing in J&DR court. In another county, an attorney who no longer takes any juvenile cases said that it could take all day in court before being heard on a case. She stopped taking juvenile cases because she "[couldn't] even break even taking cases in [J&DR] court." We were told that in Buchanan, Russell and Dickinson counties, the J&DR court has to call attorneys and plead with them to take cases. An attorney in Roanoke tried to take only GAL appointments because the other cases in J&DR court paid too little, but the judge refused to let him take just the "gravy cases."

Data from the AOC on average payments in GAL cases refutes the notion that GAL appointments are "gravy" cases. Even though there is no per-case cap for GAL cases, the average payment per case is low, just \$289. Such a low average fee suggests that GALs do not

spend a great deal of time on individual cases; less than five hours per case in cases that can stay in the court system for years.

A private attorney in Fairfax who takes GAL cases described the juvenile court system as “a wreck. GALs never talk to their clients before the five-day hearing. They don’t do any investigation. They seldom talk to the lawyer for the Department of Human Services. They just shuffle papers and go on to the next case.” The lawyer, who tries to strictly limit the number of new cases she accepts in order to adequately work them, said that if lawyers refuse to accept every case for which they are asked to serve as GAL, they are threatened with being taken off the list. She was seriously considering removing her name from the list. A Richmond attorney who does GAL work said she does not bill for all of the hours she works as she fears she will not get more appointments if she bills for all the time she puts in.

## **Appeals**

The right to counsel for indigent defendants on first appeal was mandated by the United States Supreme Court in *Douglas v. California*, 372 U.S. 353 (1963). The type of systems to be employed providing representation to indigents on appeal and the method of funding, however, were left to the states to decide. In Virginia, appeals are handled both by court-appointed lawyers and public defenders and the state pays all of the costs of the representation.

There is no established hourly rate for court-appointed lawyers handling appellate cases in Virginia; it is up to the appellate courts to set pay on a case by case basis in an amount not less than \$300. Frequently in non-capital cases lawyers are paid a flat fee of \$400. If a court-appointed attorney were to bill \$90 an hour for work on an appeal, as for trial cases, that would cover 4.4 hours of work. Statewide, the average amount paid per appointed non-capital appellate case in FY 2002 was \$578. If lawyers were charging \$90 an hour, that would amount to 6.4 hours of work.

Direct appeals in non-capital cases proceed in a two-step process in Virginia: an initial petition is filed and, if the Court of Appeals grants review on the merits of any issues raised, a second brief is prepared on those issues. Small amounts of additional pay are granted if an initial brief is granted review on the merits, if oral argument is heard, and if a case is prepared for appeal in the Virginia Supreme Court. Direct appeals in capital cases are heard by the Supreme Court.

A court-appointed lawyer is expected to pursue any appeal arising from an appointed case he or she handles in the trial courts. Vigorous appellate advocacy is essential to effective criminal defense work. In some cases, effective appellate advocacy can entail making numerous applications to appellate courts. For example, following denial of a petition to review by a single judge of the Court of Appeals, counsel may ask that a three-judge panel review the case. If the Court refuses to hear the petition en banc, counsel can apply to the Virginia Supreme Court. In addition to seeking review of the petition, if an appeal is accepted for review on the merits, counsel may and should request that oral argument be heard.

Virginia's compensation system for court-appointed counsel makes it extremely unlikely that counsel will be able to vigorously pursue the full panoply of appellate review available to their clients. Despite the merit of the case, there would be no additional compensation for a lawyer to seek rehearing by the Court of Appeals or the Supreme Court. Further, appellate work is very time consuming and is governed by strict time deadlines for filing the notice of appeal, perfecting the record, submitting the initial petition for appeal, submitting any petitions for rehearing, etc. To help illustrate the lack of effort court-appointed counsel put into their cases, the lawyer who represented the defendant in *Webb v. Commonwealth*<sup>110</sup> included a section in his legal brief discussing the high incidence of procedural defaults by court-appointed counsel that resulted in dismissal of their appeals. The information was obtained by reviewing the orders of the Court of Appeals issued in the three months prior to filing his brief. The summary of his review read:

During the past three months (April, May and June, 1999), 55 indigent defendants were denied their right to appeal in this Court solely because their court-appointed attorneys were incapable of accomplishing the timely filing of a Notice of Appeal, a transcript, or a Petition for Appeal....Not one of these instances involved the exercise of judgment or strategy; the attorney in each instance simply failed to understand and apply a Rule in a timely fashion. These are the attorneys who represent indigent defendants in Virginia.

There are no caseload or performance standards or requirements for indigent defense attorneys handling non-capital appeals in Virginia. In the February 22, 2002 Virginia Crime Commission report submitted to respond to House Joint Resolution 178, there is a recommendation to "create a special task force to examine the feasibility of implementing a system of quality review for those attorneys who do court appointed work in Virginia." The commentary to the recommendation states that "the literature review and survey analysis revealed problems with attorneys failing to maintain minimal standards of quality in their representation of indigent defense." This statement clearly applies to the court-appointed system for appeals in Virginia, based upon the above data that suggests the average amount of time that a lawyer spends on appeals is less than 10 hours per case.

At a minimum, work on an appellate case entails a review of the transcript and record, issue spotting, research, and care in drafting. Putting fewer than 10 hours of work into an appellate case is an extremely small amount of effort. To understand how far this is off national norms we once again reference national standards developed for both trial and appellate cases: American Bar Association Standards for Criminal Justice, Standard 5-5.3 on workload of assigned counsel and public defenders; National Legal Aid and Defender Association, Standards for Appellate Defender Offices, 1982, and the National Advisory Commission on Criminal Justice, Standard 13.12. As mentioned previously, the National Advisory Commission on Criminal Justice recommended that a full-time public defender working exclusively on appeals handle no more than 25 appeals per attorney per year. Commentary to the ABA and NLADA standards endorse this figure as reasonable.

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<sup>110</sup> 32 Va. Ct. App. 337, 528 S.E.2d 138 (2000).



Another informative source is a Florida Supreme Court opinion, *In Re: Amendment to Florida Rules of Criminal Procedure*,<sup>111</sup> where the Court cited a Special Commissioner's report that looked at the productivity and workload of Florida's Second District Court of Appeals following a motion by the district's Public Defender based upon assigned excessive caseloads in that court. The Commissioner held a number of days of hearings and reviewed considerable expert evidence and documentary evidence on the standards which have been adopted by state and national groups. During the hearing, evidence contained in a survey of a number of states showed that "in the majority of states, attorneys filed between 20-30 initial briefs per year. None of the surveyed states did more than 50 cases per year."

In the last decade, quantitative workload studies have been conducted in several states for indigent defense attorneys, prosecutors and judges. The studies were designed to establish workload measures that reflected the time needed for each of these criminal justice agencies to dispose of criminal cases during the course of a year. In these studies, caseload standards and measures were developed from detailed, quantitative time sheets kept by public defenders over a period of time. Such indigent defense studies have been conducted by The Spangenberg Group for indigent defense programs in Colorado, Tennessee, Minnesota, Wisconsin, King County, Washington, New York City and Maricopa and Pima County, Arizona (see Table 5-2).

In each of these studies, a number of billable hours is calculated based upon full-time work, less vacation, sick time, training, administrative time, etc. The average yearly billable time among all of the studies averaged 1,730 hours per attorney per year. Assuming that the annual number of appellate cases handled exclusively by a full-time lawyer (one working 1,730 billable hours) was 25 (the NAC standard), the average hours per appellate case would be 69. At 35 cases per year, the average number of hours per case would be 49.

Numerous Virginia panel attorneys interviewed commented that they do not like to handle appellate cases due to the low compensation. Time requirements for filing are unforgiving. Oral argument is a burden for court-appointed attorneys who do not live in Richmond; no compensation is provided for the time to drive to and from Richmond. Low pay is a major deterrent to take the time necessary to review a transcript, conduct legal research and write a compelling petition.

### **Assigned Counsel Caseload**

Certainly it is not just public defenders who have high caseloads in Virginia. One court-appointed attorney said that he handled over 300 appointed cases in 2002, including five jury trials. Another lawyer, a former public defender, said in her first nine months in private practice, she opened 400 appointed cases. That figure dropped over subsequent years to 330, 275, and now she opens 200 appointed cases "tops." Court-appointed cases make up one-quarter to one-third of her workload. With this level of caseload, she is able to talk to clients' family members and loved ones. "Public defenders don't have time for this, but that's what really helps your private practice." She said she can't see how attorneys with only court-appointed practices can do well for their clients, as in order to make a living as a court-appointed attorney, you must do a

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<sup>111</sup> Case No. 92,026 and Case No. 82,332, Supreme Court of Florida, March 18, 1998

very high volume of cases. “Just the perception by their clients of someone who’s juggling a bunch of files and doesn’t recognize them in court is bad.”

As previously discussed, one of the salient deficiencies of the court-appointed system in Virginia is that there is no oversight provided and no minimum standards and guidelines. One way in which the lack of oversight manifests is that a disproportionate number of cases are assigned to a small group of attorneys. Such a practice is inconsistent with Virginia Code Sec. 19-2-159, which provides that, “court-appointed counsel must be selected by a fair system of rotation among bar members who volunteer to take these cases and whose practice before the court regularly includes representation of persons in criminal cases.” There is no attempt to monitor the number of case appointments made to court-appointed attorneys, many of whom have private practices in addition to their court-appointed work. In fiscal year 2002, data obtained from the Administrative Office of the Supreme Court of Virginia showed that there were 80 court-appointed attorneys who received and were paid for more than 400 individual cases during the year.

**Table (6-3): Court-Appointed Attorneys  
Receiving More Than 400 Cases in FY 2002**

<b>Number of Cases</b>	<b>Number of Attorneys</b>
400-450	25
451-500	22
501-525	7
526-550	7
551-575	2
576-650	9
651-750	4
751-917	4
Total	80

The 80 court-appointed attorneys who handled more than 400 cases in FY 2002 represent only 2.7 percent of the 2,931 lawyers who handled one or more court-appointed cases that year. However, collectively, they received more than 17 percent of the \$56 million spent on appointed counsel. Also, collectively, the 80 lawyers handled over 22 percent of the total 215,640 cases.

A caseload in excess of 400 cases, in addition to a private practice, is extreme by any measure. One panel attorney we interviewed handled over 400 cases in FY 2002 evenly split between GAL appointments and cases as appointed counsel in J&DR court. The attorney admitted he does very little on any of his court-appointed case. He says he had no incentive to do “the kinds of things that are necessary” on the cases. He seldom interviews clients before court and does virtually no investigation.

## CHAPTER 7

### FACTORS AFFECTING THE PRACTICE OF BOTH PUBLIC DEFENDERS AND APPOINTED COUNSEL IN VIRGINIA

The previous two chapters document the problems affecting public defender and assigned counsel systems in Virginia, problems stemming from inadequate resources and lack of proper oversight that induce the lawyers to do as little as possible for their clients. In addition, there are a number of characteristics of Virginia's criminal justice system that complicate the job of a criminal defense attorney - whether court-appointed or retained by a paying client. However, because of the low expectations of indigent defense lawyers, and the incentives to do little as quickly as possible, these factors affect indigent defendants disproportionately compared to defendants who can afford to hire lawyers.

#### **Inadequate Access to Experts and Investigators**

One of the most striking discoveries of our site work in Virginia is the complete inadequacy of access by public defenders and court-appointed counsel to court-approved experts and a similar inadequacy of access of court-appointed counsel to court-approved investigators. ABA Standard 5-1.4 states:

[A jurisdiction's] legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process....<sup>112</sup>

Guideline 4.1 of the NLADA Performance Guidelines for Criminal Defense Representation states, "Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as quickly as possible."

Public defenders and court-appointed counsel have a professional responsibility to zealously represent their clients and to analyze both the factual and legal issues in the case. Appropriate requests for and use of expert services and investigators are implicit in meeting ethical obligations lawyers have to their clients.<sup>113</sup>

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<sup>112</sup> ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES (3d ed. 1992) [hereinafter ABA PROVIDING DEFENSE SERVICES].

<sup>113</sup> See VA. R. OF PROF'L CONDUCT, *Preamble* ("As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); R. 1.3 *Diligence*, cmt. 1 ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client."); R. 1.1 *Competence*, cmt. 5 ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.").

## Experts

Availability of necessary expert services is essential to effective representation in many cases. Commentary to ABA Standard 5-1.4 states:

Quality legal representation cannot be rendered either by defenders or by assigned counsel unless lawyers have available other supporting services in addition to secretaries and investigators. Among these are access to necessary expert witnesses, as well as personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and sentencing. The quality of representation at trial, for example, may be excellent and yet unhelpful to the defendant if the defense requires the assistance of a psychiatrist or handwriting expert and no such services are authorized or available.<sup>114</sup>

The lack of access to expert services for indigent defense counsel in Virginia is a pervasive and long-standing problem in each circuit we visited. In a criminal case, the prosecution has at its disposal a number of state experts, including crime investigation and laboratory experts, psychiatrists, scientists, and medical experts. In order to confront the witnesses against him, including a state expert witness, a defendant often needs an expert to conduct the same analysis and provide another, independent opinion. In addition to confronting the state's evidence or expert, a defendant may need an expert in order to present a defense, such as insanity or battered woman's syndrome, to test forensic evidence, such as DNA evidence, or to evaluate fingerprint, handwriting, ballistics or crime scene evidence.

A private defendant with resources can hire an expert of his or his attorney's choosing either to challenge the state's expert or to perform an independent investigation or analysis, and may do so without informing the prosecution. Public defenders and court-appointed counsel must seek approval for funds to hire an expert. In Virginia, the standard showing required in order to receive an expert other than one reviewing the defendant's mental health is very high. *Husske v. Commonwealth* is the leading authority in Virginia for the proposition that once an indigent defendant in a case makes a proper showing of the need for expert assistance, the trial judge deprives the defendant of due process of law in refusing to provide such an expert.<sup>115</sup> To be granted, however, an indigent's request for an expert must demonstrate that the subject that necessitates the assistance of the expert is likely to be a significant factor in his or her defense and that he or she will be prejudiced by the lack of expert assistance. The accused must demonstrate a particularized need for the requested services and that prejudice will result if they are not provided.<sup>116</sup>

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<sup>114</sup> Providing Defense Services, *supra* note 113.

<sup>115</sup> 19 Va. App. 30, 448 S.E.2d at 332 (1996) (relying on *Ake v. Oklahoma*, 470 U.S. 68 (1985)).

<sup>116</sup> See *Husske v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (1996); *Barnebei v. Commonwealth*, 252 Va. 161 (1996); *Steward v. Commonwealth*, 245 Va. 222, 437 S.E.2d 394 (1993); *O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491 (1988); *Downing v. Commonwealth*, 26 Va. App. 717, 496 S.E.2d 164 (1998); *Hodges v. Commonwealth*, 26 Va. App. 43, 492 S.E.2d 846 (1997); *Hoverter v. Commonwealth*, 23 Va. App. 454, 477 S.E.2d 771 (1996); *Singleton v. Commonwealth*, 16 Va. App. 841, 433 S.E.2d 507 (1993). This request or showing must

Essentially, Virginia statutes permit defense counsel to apply to the court for two types of expert witness services: 1) experts who evaluate the mental health of defendants and 2) experts who assist with all other types of inquiry.

Under §19.2-168.1 of the Code of Virginia, if a defendant in a non-capital case plans to raise an issue about his sanity at the time of the offense, he may seek a court-appointed mental health expert to evaluate his sanity and possibly help prepare a defense on his behalf. Section 19.2-169.1 permits appointment of an evaluation to determine whether a defendant is competent to stand trial. Section 16.1-356 permits appointment of an expert to evaluate a juvenile for competency to stand trial. And under §19.2-264.3:1, defendants being tried or sentenced in capital cases are entitled to expert assistance to evaluate the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law and to assess whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense.

Generally in Virginia, indigent defendants are not permitted to select their own mental health experts; typically one will be selected by the court and these are usually individuals at state mental health facilities who work for both prosecution and defense counsel. Use of a state expert raises serious problems of independence of the evaluation.

Section 19.2-175 of the Code of Virginia governs pay of psychiatrists, psychologists and other expert witnesses who are not regularly employed by the Commonwealth of Virginia in regard to questions of competency to stand trial and determination of insanity. Under this code section, experts who are employees of state facilities, with the exception of the University of Virginia School of Medicine or the Medical College of Virginia, do not receive any compensation from the court for their evaluation. On occasion, the mental health expert used is not an employee of a state facility, and such an individual must be paid a “reasonable fee” capped by § 19.2-175 at \$400, except in capital murder cases. In addition, such expert witnesses required to be present at a hearing will receive a fee of \$100 per day. Section 16.1-361 sets out similar provisions for experts regarding competency issues of juveniles.

In FY 2002, experts other than those employed at state facilities were paid for evaluating mental health issues in 2,012 circuit, GDC and J&DR court cases and were paid \$748,279 from the Criminal Fund, or an average of \$372 per case. No data is available on the number of cases in which evaluations were made by employees of state facilities and thus were not paid.

Section 17.1-612 authorizes payment for all other types of experts (i.e., in all areas besides mental health) used by indigent defense counsel. Data from the Supreme Court of Virginia disclose that payments for expert witnesses in this category were made in just 231 cases in FY 2002 (191 in circuit court, three in general district court, 33 in J&DR court and 4 in combined district courts), including cases for both public defenders and court-appointed counsel.

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occur in open court, with the Commonwealth’s Attorney being given an opportunity to hear the evidence and argue against the request. There is no right to an ex-parte proceeding. *Ramdass v. Commonwealth*, 246 Va. 413 (1993).

The average claim approved for the 231 experts was \$3,056.60. In circuit court, the 191 claims paid averaged \$3,550.25.

As Table 7-1 shows, in FY 2002, Virginia spent a total of \$1,454,354 on experts (mental health and all other types) in 2,243 cases in all courts in the Commonwealth, for an average of \$648.40 per claim. Expenditures on experts accounted for less than one percent of the total amount spent (\$77,565,518) on indigent defense in FY 2002 and were made in less than one percent of all indigent defendant cases handled (309,911). Of particular significance is that fact that just 191 §17.1-612 expert witness payments (experts in areas other than mental health) were made in felony cases in circuit court. In other words, such experts were used in less than one percent of all felony cases disposed of in the circuit courts for FY 2002 (42,641).

**Table 7-1**  
**Expenditures for Experts in FY 2002 by Criminal Court Fund, by Court, by Number of Claims and Average Cost per Claim**

<b>Code Section and Court</b>	<b>Number of Claims</b>	<b>Total Expenditures</b>	<b>Average Cost Per Claim</b>
<b>§ 19.2-175: Compensation of Experts</b>			
Circuit Court	755	\$353,476.00	\$468.18
General District Court	594	\$188,121.00	\$316.70
Juvenile and Domestic Relations	228	\$70,319.00	\$308.42
Combined District Courts	164	\$57,138.00	\$348.40
<i>Totals</i>	1,741	\$669,054.00	\$384.29
<b>§ 17.1-612 Expert Witnesses</b>			
Circuit Court	191	\$678,098.00	\$3,550.25
General District Court	3	\$1,121.00	\$373.67
Juvenile and Domestic Relations	33	\$23,530.00	\$713.03
Combined District Courts	4	\$3,325.00	\$831.25
<i>Totals</i>	231	\$706,075.00	\$3,056.60
<b>§ 16.1-361 Compensation of Experts, J&amp;DR Court, Juvenile Cases</b>			
Juvenile and Domestic Relations	259	\$76,165.00	\$294.07
Combined District Courts	11	\$3,000.00	\$272.73
Court Unknown	1	\$60.00	\$60.00
<i>Totals</i>	271	\$79,225.00	\$292.34
<b>Grand Totals</b>	<b>2,243</b>	<b>\$1,454,354.00</b>	<b>\$648.40</b>

Information supplied by the Supreme Court of Virginia Administrative Office.

There is no provision in Virginia permitting defense counsel to make ex parte requests for experts other than for a scientific investigation relevant to a criminal charge that is performed by

the Division of Forensic Science or the Division of Consolidated Laboratory Services.<sup>117</sup> Otherwise, defense counsel must show the need for their requests and reveal their need, which is often their theory of defense, to the prosecution. Too often, indigent defense attorneys in Virginia are confronted with deciding which is the lesser of two evils: revealing their defense to the prosecution well in advance of trial in order to have the chance of obtaining the assistance of an expert; or not revealing their defense but not receiving expert assistance, and further not preserving the issue for appeal. Some attorneys in Roanoke and Lynchburg told us that they balance the colliding interests and frequently decide not to reveal the theory of their case to the prosecution.

Prosecutors often come to court to argue against defense attorneys' requests for experts. Even if the prosecution does not oppose the motion, by attending the hearing they are able to learn the defendant's reasons for the request, the trial strategy, the name of the expert and the requested amount of the fee.

In our experience in studying indigent defense systems across the country, we have never encountered such a persistent problem of indigent defendants' right to seek expert funds being extinguished by a widespread practice of the courts of not allowing the requests to be filed *ex parte*. Many jurisdictions not only routinely allow such motions to be filed *ex parte*, but also have court rules that affirmatively create the authority for *ex parte* requests.<sup>118</sup>

Under the Virginia Code, the trial judge has discretion to reimburse appointed counsel for any "reasonable expense" incurred in connection with representing an indigent on criminal charges.<sup>119</sup> In addition to authority conferred on Virginia judges by state statute, the United States Supreme Court has held that due process requires that an indigent defendant be given the "basic tools" needed to present his or her defense.<sup>120</sup> However, like compensation for court-appointed counsel, a number of expert expenses are limited by statute. In J&DR court, competency evaluations are capped at \$300 and court appearances by experts doing the evaluations are capped at \$100. Competency experts in other courts are capped at \$200, mental status exams at \$300 (\$400 for competency and mental status), \$300 for pre-sentence evaluation, and a total cap of \$200 for court appearances (\$100 a day). Alcohol and drug content analysis (by private lab) are capped at \$50 and \$75 (for drug class).<sup>121</sup>

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<sup>117</sup> VA. CODE ANN. § 9.1-121

<sup>118</sup> See, e.g., N.C. LOCAL R. OF CRIM. P. FOR SUPERIOR CTS. 22(c) (stating that an indigent defendant is entitled to an *ex parte* hearing on a request for a psychologist or psychiatrist and, within the court's discretion, for other types of experts); W. VA. TRIAL CT. R. 35.04 (allowing a court to approve an *ex parte* motion upon a showing of good cause); R. OF THE SUP. CT. OF TENN. §5(a) (providing that in indigent cases, the court in an *ex parte* hearing may determine investigative or expert services are necessary); N.D. SUP. CT. R. 44(b) (permitting indigent defendants to apply *ex parte* for financial assistance to obtain investigative, expert, or other services); Criminal Justice Act of 1964, 18 U.S.C. § 3006A (e)(1) ("Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application.").

<sup>119</sup> VA. CODE ANN. § 19.2-163

<sup>120</sup> Ake. v. Oklahoma, 470 U.S. 68, 77 (1985).

<sup>121</sup> Supreme Court of Virginia Chart of Allowances (July 1, 2002).

Despite the authority of Virginia courts to grant reasonable expenses for the defense, site work revealed a near-unanimous experience by Virginia court-appointed attorneys and public defenders that courts rarely approve funds for experts. Requests for court-approved experts are frequently denied in non-capital cases and even sometimes in capital cases. We were also told that when funds are granted for an expert, the fee is sometimes so low that attorneys either cannot find an expert willing to perform the work or are unwilling to appear in court for the \$100 allowed per day.

A public defender in Richmond said of the difficulty in getting experts, “It’s as if judges are taking out their wallets themselves. They just say no.”

In Halifax, Norfolk, Richmond and Roanoke, we were told that the courts refer public defenders to the state’s witnesses when they want an expert; they are not granted funds to retain an independent expert. A Halifax public defender described the state lab’s experts as “cops with lab coats. They are openly hostile to us. Many of them think that their function is to support the prosecution.” Public defenders are not referred to the state’s experts strictly for psychiatric or psychological evaluations; others mentioned being told to use the state’s experts for handwriting, DUI blood-alcohol level and even DNA analysis.

Several attorneys remarked that independence of state experts can be especially problematic in evaluations of competency to stand trial. One attorney said that the judges allow experts who “merely rubber stamp competency.” Another attorney said he had a client who claimed to be seeing people and animals in his jail cell, but the resident psychologist at the local community services center specified by the court to perform the competency evaluation said that the client was competent as long as his hallucinations were visual and not audio hallucinations. This attorney felt that if he’d had the money to hire a psychologist of his own choosing, his client would have been found incompetent. Another attorney said that sometimes he looks at the difficulties involved in seeking a competency evaluation and simply decides not to ask for one.

Many court-appointed attorneys no longer bother requesting funds for experts, as experience has proven to them that they will not be approved. It is easy to see how in a jurisdiction where indigent defense resources are low and counsel is routinely denied requested services, that the practice of not requesting services becomes acceptable and a culture of complacency is created. As an attorney in Montgomery County said, “We don’t get experts on anything unless it’s a capital case. The culture is – don’t even ask anymore.” However discouraging it is to have requests repeatedly turned down, the failure to seek expert services raises serious ethical problems for court-appointed lawyers and public defenders.

Still, the fact that courts routinely deny requests is not the sole reason for the infrequent involvement of experts in indigent defendant cases. Because of the low statutory caps on compensation, many court-appointed attorneys are motivated to resolve their cases spending as little time as possible. Utilization of an expert requires time and effort: research must be done in order to determine that an expert will be useful, a motion for an expert must be prepared and argued, and if approved, an expert must be located and time will be spent working with the expert. Many court-appointed lawyers in Virginia never put this sort of effort into their cases. A



private attorney in Roanoke who has been taking court-appointed cases for 24 years said he has never requested an expert in a court-appointed case.

In the general district courts, requests for both experts and investigations are rare. One general district court judge who has been on the bench for 20 years said he has never received a request for an expert or an investigator from a court-appointed attorney. Data from the FY 2002 Criminal Fund expenditures show that, other than for evaluation of competency or insanity, experts were allowed in only three general district court cases.

In capital cases, defense counsel shoulders a heavy burden to provide effective assistance of counsel. As Virginia Rules of Professional Conduct commentary state regarding the attorney's duty of thoroughness and preparation, "The required attention and preparation are determined in part by what is at stake...."<sup>122</sup> The stakes do not get any higher than a capital case, and defense counsel has an especially large responsibility to ensure that a capital defendant is afforded due process, including seeking expert services when necessary. The United States Supreme Court has held that where an indigent defendant is on trial for his life, due process requires the State to fund such expert assistance for the defense as may be reasonably necessary in the unique circumstances of the case.<sup>123</sup>

Part of the duty of defense counsel in a capital case is to conduct a wide-ranging inquiry into the defendant's history and where an expert is involved, to ensure that a complete and reliable expert evaluation of the defendant's history is performed.<sup>124</sup> The duty to ensure that there is a full investigation for mitigation purposes is one which the courts have recognized as properly being a defense counsel duty. In its most recent decision on the subject, the Supreme Court has held that counsel's limited investigation of a capital defendant's presentence investigation and social services records and failure to present mitigation evidence to the jury at the sentencing hearing constituted deficient performance which resulted in prejudice to the client.<sup>125</sup>

During our site work in Virginia, some attorneys said they barely get an expert in a capital case for DNA. One Richmond public defender told us a judge denied her request for a DNA expert in a 7-year old homicide case from Norfolk where DNA was the only remaining evidence. As in most cases in Virginia, the public defender's request for a DNA expert in this case was not heard ex parte, and the commonwealth attorney successfully argued that the expert was too much of an expense to the state.

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<sup>122</sup> VA. R. OF PROF'L CONDUCT R. 1.1 *Competence*, cmt. 5.

<sup>123</sup> *Ake*, 470 U.S. at 82. In Virginia, as in many states, *Ake* has been extended to non-capital cases and to all sorts of experts, not just psychiatric experts. See *Husske v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (1996).

<sup>124</sup> Douglas S. Liebert, Ph.D., & David V. Foster, M.D., *The Mental Health Evaluation in Capital Cases: Standards of Practice*, 15 AM. J. OF FORENSIC PSYCHIATRY 4, 47 n.77 (1994) (In order to ensure the reliability of information upon which the expert's opinion will be based, the defense must gather facts from a wide range of sources, including documentary evidence (e.g., school records, medical records, psychological records, etc.) and interviews with relevant persons such as "family members, neighbors, classmates, teachers, employers, friends, acquaintances, probation officers, and previous attorneys").

<sup>125</sup> *Wiggins v. Smith*, 539 U.S. \_\_\_\_ (2003), *relying on* *Strickland v. Washington*, 466 U.S. 668 (1984).

A circuit court clerk said that experts are only approved in “high profile” cases (e.g., rape or murder). However, a circuit court judge said that he would likely never approve a DNA expert; in a recent non-capital first degree murder case he denied a request for a ballistics and medical expert but approved an investigator. He said that after he approved the investigator he had to justify the approval to a representative of the Supreme Court. Circuit court clerks in another county said, “Our judges don’t run a Judge Ito court here... We don’t allow attorneys to raise a voodoo defense here.” Although they acknowledged that retained counsel make more frequent use of experts than court-appointed counsel, according to the clerks, “the judges are busy; they just want to hear the facts.”

Judges acknowledged that requests for experts and investigators can be denied. A general district court judge in Fredericksburg said there is no funding for experts in general district court; attorneys have to request experts in circuit court. At a group meeting of circuit, district and juvenile and domestic relations court judges in one circuit, the judges agreed that, for the most part, defendants get experts, investigators, and voir dire in capital cases only.

When we asked judges whether they are under any pressure from the General Assembly or the Supreme Court to watch expenditures on experts and investigators, a number responded that they were not. However, one judge confirmed that cost has some consideration as to whether or not he appoints an expert. He acknowledged there is indirect pressure from the state to not “waste” taxpayer money on less serious crimes.

A J&DR court judge was more forthcoming about the tension between the courts and legislature on costs for indigent parties. This judge told us that judges definitely get pressure from the legislature over capping costs. When J&DR court judges are coming up for review, a committee reviews how successful they have been in ordering recoupment in GAL cases. The judge recalled that when one judge was up for review, he was asked by the legislative committee if he had been scrutinizing attorney vouchers. Also, he said that J&DR court judges had recently been informed that funds for psychiatric evaluations had been cut and were instructed, in light of budget restraints, to scrupulously screen for indigency and be certain there is no other way to get the information sought without having to approve funds for an evaluation.

## **Investigators**

Adequate investigation of a case is the most basic of criminal defense requirements. Standard 4-4.1, *Duty to Investigate*, of the *ABA Standards for Criminal Justice Prosecution Function and Defense Function* states:

- (a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law

enforcement authorities. The duty to investigate exists regardless of facts constituting guilt or the accused's stated desire to plead guilty.<sup>126</sup>

The outcome of a criminal case can hinge on a good defense investigation. Evidence and witnesses are often necessary or helpful to support a defense theory, but evidence and witnesses must be located, photographed, interviewed, and/or subpoenaed to court. A good investigation can also give the defense leverage during plea negotiations.

It is frequently not appropriate for a defense lawyer to conduct his or her own investigation. For example, it is not proper for attorneys to interview witnesses who they suspect they may later need to impeach in court, because the lawyer may have to testify against the witness.<sup>127</sup> Further, attorneys are trained and responsible for providing legal representation and often do not have the time or ability to track down witnesses, travel to far or unknown locations, interview difficult witnesses, or survey crime scenes.

Assigned counsel reported that just as with experts, although clear authority exists for appointment of investigators when appropriate, judges rarely approve funds for investigators in indigent cases and as a result, few are ever requested. Even in capital cases, requests for investigators are sometimes denied. Many court-appointed attorneys we met with admitted that, except for capital cases, they have never requested the services of an investigator in an indigent case.

A private attorney in Roanoke who rarely got investigators approved remarked that "in many, many cases, three to four hours of investigation could make a difference." Some attorneys reported that they simply do not perform investigations as they do not have the time or resources. One attorney admitted that this "could border on ineffective assistance." A private attorney who had been taking appointed cases for 12 years said she doesn't use investigators because the state will not reimburse for them. Public defender attorneys and investigators also told us that the private attorneys do little investigation or tracking down of witnesses.

Given the reluctance of courts to approve court-appointed attorneys' requests for investigators, one of the apparent advantages of a public defender office over assigned counsel in Virginia is that public defenders have investigators on staff. For the most part, the investigators we met were dedicated to their work and attorneys felt that they were doing good work. However, as previously stated in this report, in FY 2002, there were only 26 full-time investigators for over 94,000 cases handled by public defender attorneys statewide. Because of this, frequently investigators can only devote time to the most serious of cases. Also, public

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<sup>126</sup> ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1992) [hereinafter ABA STANDARDS FOR PROSECUTION AND DEFENSE FUNCTION]; *see also* VA. R. OF PROF'L CONDUCT 1.1 *Competence*, cmt. 5 ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem....").

<sup>127</sup> Commentary to ABA Standard 5-1.4 notes: "[W]hen an attorney personally interviews witnesses, the attorney may be placed in the untenable position of either taking the stand to challenge the witnesses' credibility if their testimony conflicts with statements previously given or withdrawing from the case." ABA STANDARDS FOR PROSECUTION AND DEFENSE FUNCTION, *supra* note 126; *see also* VA. R. OF PROF'L CONDUCT 3.7 (a) ("A lawyer shall not act as an advocate in an adversarial proceeding in which the lawyer is likely to be a necessary witness....").

defender investigators have inadequate resources compared to their counterparts in Commonwealth's attorney's offices. They lack basic equipment, such as digital still and video cameras and crime scene reproduction software, and access to criminal histories.

### **Juvenile Justice System Practices**

In September 2002, the American Bar Association Juvenile Justice Center issued a report entitled, *An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*. The report sought to identify systemic and institutional barriers that impede the development of an improved legal delivery system, highlight innovative practices and offer recommendations for change. The report, like this one, noted that representation of juveniles in Virginia had been studied and criticized two decades ago, yet little had been done since then to make improvements to the system.

Our study of indigent defense services in Virginia did not look at juvenile representation practices with the level of scrutiny provided in the 2002 ABA report. However, many of the serious concerns identified by the ABA report were also brought to our attention during field work, including the following:

- Delay in appointment of counsel to juveniles prosecuted as delinquents;
- A high incidence of children waiving the right to counsel without prior consultation with a lawyer;
- Inadequate juvenile-training and experience for both assigned counsel and public defenders;
- A need to expand the public defender system. Despite the criticism of their lack of proper training, many juvenile court professionals felt that public defenders provided better representation for juvenile clients, yet public defenders only serve half the population of Virginia;
- Inadequate access to ancillary services (support staff, investigators, paralegals, social workers and sentencing advocates);
- Inappropriate referrals to the juvenile justice system of mental health- and school-related cases;
- Inadequate mental health services for children;
- A widespread perception that juvenile court is "kiddy court," which serves merely as a training ground for lawyers handling adult criminal cases;
- Overrepresentation and disparate treatment of minority youths in the juvenile justice system; and
- Inadequate compensation for court-appointed counsel.

### **Discovery**

The failure to seek and to obtain experts and investigators in court-appointed cases in Virginia is particularly problematic because of the difficulty defense lawyers face obtaining discovery materials. In a criminal case, discovery refers to evidence necessary to prepare a

defendant's case. It can be any material relating to the defendant's case, including police reports, witness statements, defendant's statements, physical evidence, and lab and other test results. Discovery is usually in the hands of the prosecution, yet is essential to a defense attorney in fulfilling her obligation to provide competent representation, which requires legal and factual knowledge and analysis.<sup>128</sup> A defense lawyer must obtain discovery to adequately prepare for trial, confront witnesses against the defendant, and advise the client on the strength of the prosecution's case and on the acceptability of a plea offer. Further, it can be helpful or even necessary for conducting investigation, finding a theory of a case, and knowing whether a request for an expert should be filed.

In Virginia, it is extremely difficult for defense counsel to obtain discovery materials. The Commonwealth's discovery practices affect clients of both retained and appointed counsel, but the impact on indigent clients is particularly severe. Matched against prosecutors who are not forthcoming with discovery materials, retained lawyers can devote additional resources to tracking down materials, such as by using support staff or investigators. Devoting these additional resources, e.g., to locating documents or interviewing police officers or witnesses, is impossible for most public defender offices and unlikely for most court-appointed counsel.

The rationale for defense discovery is grounded on fairness, and avoiding "trial by surprise" by giving the defense advance notice of the evidence that the prosecution intends to use at trial. The Supreme Court has noted that while it may be the "better practice" to grant the defendant pretrial discovery of his confession where the prosecution intends to use it at trial, the failure to follow that practice does not violate due process.<sup>129</sup>

The Supreme Court, in a series of cases starting with *Brady v. Maryland*,<sup>130</sup> has established a constitutional obligation of the prosecution to disclose exculpatory evidence within its possession when that evidence might be material to the outcome of the case. The ultimate issue under *Brady*, where the exculpatory evidence is produced at trial, is whether delay in production resulted in a violation of the *Brady* "materiality standard," that is, whether there is a reasonable probability that, had the evidence been disclosed to the defense pretrial (assuming it was then within the prosecution's possession or control) the result of the proceeding would have been different.

Although there is no general constitutional right to discovery in a criminal case, state courts, including Virginia's, have found due process violated where the prosecution's failure to disclose certain critical portions of its evidence before trial deprived the defendant of an adequate opportunity to prepare to meet the prosecution's case.<sup>131</sup> The Virginia Rules of Professional Conduct also require a prosecutor to provide defense counsel with exculpatory material.<sup>132</sup>

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<sup>128</sup> See VA. R. OF PROF'L CONDUCT 1.1, *Competence*, cmt. 5.

<sup>129</sup> See *Cicenia v. La Gay*, 357 U.S. 504 (1958).

<sup>130</sup> 373 U.S. 83 (1963).

<sup>131</sup> See *Gilchrist v. Commonwealth*, 227 Va. 540, 317 S.E.2d 784 (1984) (failure to furnish key autopsy report until chief medical examiner testified at trial); *Moore v. State*, 740 P.2d 731 (Okla. Crim. App. 1987) (failure to disclose scientific reports and sample of drug); *Wynne v. State*, 676 S.W.2d 650 (Tex. App. 1984) (defense was furnished with report of one of state's experts on the insanity issue only shortly before that expert was prepared to testify and never received the report of the other expert); see also *Clark v. Commonwealth*, 262 Va. 517, 551 S.E.2d 642 (2001)

Beyond any exculpatory evidence, however, the discovery that must be provided to defense counsel by the Commonwealth is very limited. With limited discovery material, Virginia defense counsel are often extremely handicapped in their ability to adequately represent a client and prepare a defense. The material that the Commonwealth is required to turn over to defense counsel differs in the various levels of court. In district court, the defense is entitled to the defendant's statements and criminal record.<sup>133</sup> In circuit court, defense counsel are entitled to statements of the defendant, forensic evidence including reports of any physical or mental examination of the defendant or alleged victim, and, upon a showing that such evidence is material to the preparation of the defense, access to physical and documentary evidence.<sup>134</sup> However, the Virginia Supreme Court rules specifically do not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses or of Commonwealth reports or "internal documents" relating to the investigation or prosecution of the case."<sup>135</sup> Further, there is no automatic right to any allowable discovery unless a motion is filed by defense counsel, and the Commonwealth is not subject to a specific time limit for producing the discoverable material under the rules, although may be by court order.

We were told that in many cases, defense counsel do not even get the police report, which provides the very basis for the criminal accusation against the defendant. Because many cases do not involve any exculpatory material, the defense may get no discovery unless the defendant made statements or physical evidence exists. In such cases, defense counsel must rely solely on the client for information in order to prepare the case. Relying only on the client for information is completely inadequate, as a lay client is not trained to know what is legally relevant and sometimes does not see what is factually relevant. Some clients are mentally or emotionally impaired, or were under the influence of alcohol or drugs at the time of the incident, and are simply not good sources of reliable information from which counsel can prepare a case. In fact, many defense attorneys will not even meet with an out-of-custody client until they receive discovery so that they may be fully prepared to interview the client and evaluate the case.

While some prosecutors reported to have open discovery policies (e.g., defense counsel can come to their office to view all discovery material), attorneys in a number of counties said that what discovery defense counsel receives is dependent upon their relationship with the Commonwealth's attorney. One attorney said that the prosecutor will refuse when something is requested and tends to make things personal. Another attorney said that the defense will receive more discovery informally than by filing a formal motion for it. In one county, we were told that a few attorneys made the prosecutor mad by filing "unnecessary" discovery requests instead of

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(discussing limited constitutional right to pretrial discovery under constitutional right of defendant "to call evidence in his favor").

<sup>132</sup> VA. R. OF PROF'L CONDUCT 3.8(d) ("A lawyer engaged in a prosecutorial function shall make timely disclosure to counsel for the defendant...of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court.").

<sup>133</sup> VA. SUP. CT. R. 7C:5(c)(1)-(2).

<sup>134</sup> VA. SUP. CT. R. 3A:11(b)(1)-(2).

<sup>135</sup> *Id.* at 3A:11(b)(2).

relying on an open file policy. One attorney said that even when the Commonwealth's attorney has an open file policy, "odds are the whole case isn't there." Some attorneys expressed concern over the prosecutors deciding what evidence is exculpatory and therefore discoverable. We were told that the prosecutors in one county often do not sign and return agreed-upon discovery orders, and although they will provide discovery eventually, they avoid being bound to a timeline.

Another issue regarding discovery is the point at which it is provided to the defense. In Russell County, we were told that although discovery is provided, it is not uncommon to receive it at 5 p.m. the day before the trial in district court. An attorney in another district court said he often tries the case the same day he gets discovery. In one circuit court, an attorney said he often gets discovery on "plea day," which is the day the defense is to decide whether to plead or go to trial. Since this decision cannot properly be made without discovery, it has to be postponed. In Pulaski, we were told that the defense may not get discovery until two or three weeks before a scheduled trial in circuit court, which is not enough time to prepare the case and is cause for a continuance. Further, the discovery of a conflict is often dependent on reviewing discovery material. Delays in the case and late changes in counsel can be not only costly financially, but can also cause undue hardship on in-custody clients.

The discovery limitations in Virginia were described as creating a "trial by ambush" situation for the defense in some counties.

### **The Preliminary Hearing and Lack of a Record at General District Court**

The preliminary hearing, by which a General District Court certifies whether there is probable cause for the prosecution of a felony in Circuit Court, is the most important discovery mechanism available to criminal defendants facing potential imprisonment for felonies in Virginia. In order to establish probable cause, the Commonwealth's attorney's office will often lay out its theory of the case and identify potential witnesses it plans to call at the preliminary hearing, giving the defense counsel valuable insight in the strength of the case and possible information with which it can later impeach the government's witnesses. However, we were made aware of several systemic problems that effectively nullify the value of this critical proceeding in many cases.

First, a lawyer appointed to represent an indigent defendant charged with a felony will be paid \$395 if the case is resolved as a misdemeanor in General District Court. Prior to a legislative change in 2001,<sup>136</sup> attorneys who disposed of felonies in general district court as misdemeanors would only be paid up to the \$112 maximum allowed for misdemeanors. In many instances, the change properly rewards attorneys who work hard to negotiate favorable outcomes for their clients. However, it could also act as disincentive for attorneys to take felonies past the preliminary hearing and into circuit court, something that may be more appropriate in certain cases. One judge said the system provides a "small bonanza" for defense counsel who plead a felony to a misdemeanor in District Court.

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<sup>136</sup> See 2001 Va. Acts ch. 509.

Second, and more significantly, the General District Court, where the preliminary hearing occurs, is not a court of record. Accordingly, a transcript of the preliminary hearing will not be created unless counsel moves for the appointment of a court reporter. (Attorneys who are denied a court reporter by a district court judge may request one from a circuit court judge, but there is no guarantee of success in either court.) The need to bring such a motion (even in places where court reporters are generally allowed) tends to discourage defense counsel from effectively using the preliminary hearing to test the adequacy of the Commonwealth's case. An assistant public defender in Fairfax said he waives all preliminary hearings because a) he does not have time to prepare and b) requests for funds for a court reporter are never approved. Because Virginia does not record grand jury proceedings, the preliminary hearing is the best opportunity for a defendant charged with a felony to obtain discovery prior to indictment.

General district court judges willingly admitted that they seldom approve requests for court reporters. Some district court judge permit lawyers to tape record preliminary hearings. In order for material from a tape recording to be admissible in circuit court or useful on appeal, a lawyer would have to hire a court-reporter to professionally transcribe the audio recording. Even circuit court judges refuse requests for court-reporters. One circuit court judge said that in 11 years on the bench, he's rarely approved a court reporter request. In Prince William County we were told, unless a defendant faces a sentence of 40 years or more (basically, murder, rape and serious robbery cases), transcripts are not approved.

In Winchester District Court, cases were resolved at the preliminary hearing stage without a plea colloquy. Although the lack of a colloquy leaves the conviction theoretically vulnerable to collateral attack, the lack of any record in General District Court makes it difficult for any such attack to succeed as a practical matter.<sup>137</sup>

### **Ineffective Assistance of Counsel**

As previously discussed, litigants may not pursue a claim of ineffective assistance of counsel on direct appeal in Virginia; it is only permitted in a habeas petition after the direct appeal is exhausted. Habeas petitions are usually done pro se because there is no right to counsel in non-capital state habeas cases. Occasionally judges appoint an attorney to help a pro se appellant. Alternately, we were told by one attorney that a writ could be filed directly in the Virginia Supreme Court and upon court order, the case could be sent back to the trial court for a further proceeding. This, approach, too, would typically be pursued pro se and is very seldom utilized. An attorney who handles court-appointed appeals told us he would be able to do a lot more if he could raise ineffectiveness on direct appeal.

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<sup>137</sup> See *Parke v. Raley*, 506 U.S. 20 (1992) (noting that absence of contemporaneous record of plea colloquy does not automatically invalidate conviction; "presumption of regularity" places burden on defendant to show that colloquy was defective).



## **Trial Issues**

Data from the AOC show that Virginia has a very low number of cases resolved by jury trial. Attorneys in every judicial circuit we visited confirmed that there are relatively few jury trials in Virginia. Less than two percent of the circuit court dispositions in FY 2002 were reached by jury trial (1,257 of 80,999 cases). A major reason cited for this low rate is that Virginia uses juror sentencing, rather than judge sentencing, and jurors, unlike judges, lack the ability to issue sentences outside of Virginia's sentencing guidelines. Juror sentencing is perceived as much harsher than judge sentencing, as judges can and do depart from rigid sentencing guidelines. Commonwealth's attorneys have the right to demand a jury trial and, we were told, will do so in "nasty" cases so they have the benefit of the jury's recommended sentence or can more easily leverage a guilty plea.

Another reason for relatively few jury trials among court-appointed attorneys is that jury trials typically take longer than bench trials, and the low compensation discourages attorneys from putting extra time into trial. Noting that a jury trial typically takes two days while a bench trial takes one day, one lawyer said: "court-appointed attorneys can't afford to do jury trials and don't."

An additional factor stacked against defendants seeking jury trials in Virginia is the fact that defendants who request a jury trial may be assessed the expense of the jury if they are convicted.<sup>138</sup> Jurors are entitled to \$30 apiece for each day of service, a cost that could clearly stack up in a multi-day trial. Other states expressly forbid assessment of jury expense on an indigent criminal defendant for fear that the defendant will opt to not exercise his right to a jury trial because he does not want to incur the possible burden of paying for that right.<sup>139</sup>

## **Substandard Practice**

Indigent defense counsel in Virginia work in a system that, more so than most other jurisdictions across the country, is stacked heavily against them. Prosecutors have the charging power, discovery materials, help from police and investigators, and access to scientific laboratories and experts. Juries are known as tough sentencers. Judges rarely grant experts or investigators for the defense. Compensation is low for appointed counsel and caseloads are high for public defenders and many court-appointed lawyers. Yet, for many indigent defense lawyers, Virginia is the only jurisdiction they know, thus it is the only indigent defense culture and practice they know. The culture is one where substandard practice occurs and, even worse, is enabled and tolerated. As an example of how substandard practice has become the accepted norm, a judge in Lynchburg told us he was unsympathetic to the workload problems of the public defender office. While in private practice, the judge said he had represented a client in a court-appointed murder case a couple of months after becoming a lawyer. We were told that now

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<sup>138</sup> VA. CODE ANN. § 17.1-275.5.

<sup>139</sup> See N.D. R. CRIM. P. 23.1 *Jury Expenses* ("The expense of a jury may not be assessed as costs in a criminal case."). The explanatory note to the rule reads: "This rule is intended to assure a defendant in a criminal case that the assessment of jury expense need not be a factor in deciding whether a trial by jury should be demanded. The assessment of jury expense in a criminal case may tend to 'chill' the constitutional right to a jury trial." *Id.*

he tells the public defender that she does not need more time to prepare her cases, but that she “just say [her] peace.”

The substandard conditions that court-appointed lawyers and public defenders work under in Virginia have become the accepted norm. This norm breeds a culture of substandard practice that fails to provide adequate and meaningful representation to indigent defendants. Public defenders are overwhelmed with handling crushing caseloads and providing representation with little or no training or resources. Public defenders and assigned counsel simply do not have the time or energy to spend to try to change the status quo, nor do many even realize just how low the status quo is in Virginia. The result is a culture of acquiescence: attorneys do the bare minimum, and often less than the bare minimum, necessary to represent their clients.

The series of reports on indigent defense conducted and the lack of meaningful response by the Executive Branch and General Assembly to address the problems identified demonstrate that for almost 30 years, Virginia state government has implicitly approved of substandard indigent defense practice.

A former public defender told us that public defenders are taught right from the start to prioritize and to get by with the bare minimum, which often means jeopardizing the client’s interests. “You keep lowering the bar till you cannot go any lower.” She said that only when she was in private practice did she realize that there are certain practices like the “intoxication letter” that can be sent to get more information about a client’s drunk driving charges, because this was not done in the public defender’s office.

Public defenders in the Fairfax office were aware their performance was not optimal due to their heavy caseload demands. Several noted their practice fell short of Virginia State Bar Rules of Professional Conduct 1.3(a) (a lawyer shall act with reasonable diligence and promptness in representing a client) and 1.4 (a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.) They themselves admitted that clients suffer because: they spend too little time conducting independent investigation of the facts of their cases, they have inadequate client contact and case preparation time, they have too little time to familiarize themselves with sentencing alternatives and engage in sentencing advocacy, requests for experts are often denied, and Commonwealth’s attorneys frequently fail to turn over exculpatory evidence.

We heard speculation from a few interviewees that court-appointed lawyers in Virginia put in significant pro bono time for which they can not be compensated due to the low pay caps. Data on the exact amount of time put into each case is not tracked by the AOC. However, some data is available on how much court-appointed attorneys earn per type of case and this data runs counter to the prevailing notion that court-appointed attorneys put in numerous hours of unpaid work into their cases.

## No Governmental Entity Serves as a Voice for Indigent Defense in Virginia

Despite numerous reports documenting the problems with indigent defense in Virginia, no governmental entity advocates to improve the system: not the Public Defender Commission, not the State Bar, not the Supreme Court, not the Executive Branch, and not the General Assembly. Attempts by the Virginia Criminal Defense Lawyers Association's to reform the system over the years have been unsuccessful. Likewise, the Virginia Trial Lawyers Association's attempts to increase compensation for court-appointed attorneys over the years have been unsuccessful. The Virginia Indigent Defense Coalition was formed two years ago, and has been working to educate the public and others about indigent defense issues. However, the organization is grant-funded, thus, unlike these other institutional entities, does not have the stability to ensure it will continue to be a voice for indigent defense in the future. And, unlike a number of other states, Virginia has no statewide association for public defenders.

Elected officials and other governmental entities in Virginia have persistently failed to act to ensure that indigent defendants' rights are protected, and that they receive effective legal representation.

### Determination of Indigence

The Virginia Code provides that whenever a person charged with a criminal offense, the penalty for which may be death or incarceration, appears before any court without being represented by counsel, the court must inform the accused of his or her right to counsel.<sup>140</sup> If the accused claims that he or she is without funds to employ counsel, the court must ascertain by oral examination of the accused and other competent evidence whether or not the accused is indigent.<sup>141</sup> The defendant must also fill out a form requesting counsel and a financial statement and submit it to the court. The court then determines whether or not the defendant is eligible for indigent defense services. Additionally, upon request, the commonwealth's attorney must make an investigation to determine whether the accused is indigent,<sup>142</sup> although this rarely occurs. If the court determines that the accused is indigent and is entitled to the appointment of counsel, the court must provide the accused with a statement to be executed under oath, requesting the appointment of counsel.<sup>143</sup> The Virginia Code provides penalties for false swearing.<sup>144</sup> The accused is required to notify the court of any change in circumstances that would render him or her no longer eligible for appointed counsel.<sup>145</sup> The accused, of course, may waive the right to counsel at state expense, and, in misdemeanor cases that do not involve jail time, counsel need not be appointed.

Appointment of counsel in cases involving children is handled differently according to the type of case. In abuse, neglect, termination of parental rights and entrustment agreement

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<sup>140</sup> VA. CODE ANN. § 19.2-157.

<sup>141</sup> *Id.* § 19.2-159.

<sup>142</sup> *Id.* § 19.2-159.1.

<sup>143</sup> *Id.* § 19.2-159.

<sup>144</sup> *Id.* § 19.2-161.

<sup>145</sup> *Id.* § 19.1-159.1.

proceedings, a lawyer who serves as a guardian ad litem (GAL) must be appointed.<sup>146</sup> The parents of the child are liable to pay the costs of the GAL if they are deemed financially able to do so.<sup>147</sup> In cases involving children alleged to be delinquent or in need of services or supervision, an attorney is appointed if the child is determined to be indigent and his or her parent or guardian does not retain counsel for the child. In practice, children are found to be indigent almost without exception. If the court finds parents to be financially able to pay for the cost of counsel and they refuse to do so, the parents can be ordered by the court to pay. One court clerk noted that the guidelines are unclear for 18-21 year olds as to whether it should be the defendants themselves or their household's income that should be evaluated. Different judges take different approaches. In custody cases where each parent is represented by counsel, the court will appoint an attorney for the child if it finds his or her interests are not being adequately represented, and the parents will be liable for the costs.

The criteria used to determine indigency are uniform statewide. Indigence is determined according to the following standards:

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<sup>146</sup> VA. CODE ANN. § 16.1-266.

<sup>147</sup> *Id.* § 16.1-267.

(1) if the accused is a current recipient of a state or federally-funded public assistance program, he or she is presumed (subject to rebuttal) eligible for appointment of counsel;

(2) if the accused is not presumptively eligible, the court must make a thorough examination of financial resources with consideration to: (a) the net income of the accused; (b) assets convertible into cash within a reasonable time; and (c) exceptional expenses of the accused and him or her family. For purposes of determining eligibility, the income, assets, and expenses of a spouse who is a member of the accused's household must be considered unless the spouse was the victim of the offenses allegedly committed.<sup>148</sup>

In most of the jurisdictions we visited, indigence is determined solely by the judge. Two exceptions were found in Fairfax and Fredericksburg, which have pretrial services offices responsible for doing the initial screening, leaving the final decision up to the judge.

Fairfax County General District Court uses a county-run program called Court Services to screen defendants for indigency. The Court Services program began in 1974 with a federal LEAA grant in response to a League of Women Voters study that recommended Fairfax increase the number of pre-trial defendants who are released on the own recognizance. Over time, Court Services expanded to include Supervised Release Pre-Trial for District and Circuit Courts, arrange for interpreters, and run misdemeanor probation. The benefit to the county is that Court Services can get some defendants out of jail pre-trial and relieve over-crowding. Savings can be significant, as the daily cost for pre-trial detainees at the jail, we were told, is \$115.09.

There is no statewide data on the percentage of criminal defendants who apply for and receive appointed counsel, as opposed to defendants who hire their own counsel or proceed pro se. The scrupulousness of screening for indigence varies from jurisdiction to jurisdiction. A number of attorneys interviewed felt that counsel was appointed with too little investigation into resources. For example, in Pulaski County, it was said that 98 percent of all defendants who request counsel in General District Court are found indigent. In circuit court, "unless it is obvious they can afford counsel," the judge assigns one.

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<sup>148</sup> VA. CODE ANN. § 19.2-159.

## CHAPTER 8

### ANALYSIS OF INDIGENT DEFENSE EXPENDITURE AND CASELOAD DATA

#### Expenditure

In Fiscal Year 2002, Virginia spent \$77,565,518 providing indigent defense services. This figure includes the amounts spent on court-appointed counsel, guardians ad litem and public defenders as well as the services of court-appointed experts.

Data on indigent defense expenditure is reported in the annual publication of the Administrative Office of the Courts, the Judiciary's Year in Review.<sup>149</sup> In the 2002 report, Table 61, Criminal Fund Expenditures by Activity, provides a line item breakdown of all Criminal Fund expenditures, many of which clearly apply to indigent defense, but some which may or may not apply to indigent defendants.<sup>150</sup> Table 8-1 below incorporates the primary Criminal Fund expenditures on indigent defense, as well as the total spent on public defenders in FY 2002.

**Table 8-1**  
**FY 2002 Indigent Defense Expenditure By Activity**

Court Appointed Attorneys	\$56,243,295
Public Defender Commission Administrative Office	\$ 1,143,081
Public Defender Offices	\$18,553,172
Appellate Public Defender	\$ 171,616
Expert Witnesses	\$ 1,454,354
<b>TOTAL</b>	<b>\$77,565,518</b>

#### Caseload, Expenditures and Average Cost Per Case

Table 8-2 provides data from the AOC and the Public Defender Commission setting out total caseload and the amount spent on assigned counsel and public defender offices for FY 2002. (The expenditure figures do not include expert witness funds, appellate defender services or the cost of the Public Defender Commission Administrative Office.) Table 8-2 shows that the average combined cost per case for assigned counsel and public defenders in FY 2002 was \$245.03.

<sup>149</sup> See Virginia's Judicial System, Strategic Plans and Virginia State of the Judiciary Reports, *available at* <http://www.courts.state.va.us/reports> (last modified July 7, 2003).

<sup>150</sup> Sup. Ct. of Virginia, Administrative Office of the Courts, *Judiciary's Year in Review 2002*, pg. A-149 (2002), <http://www.courts.state.va.us/reports/2002/SECTIONa.pdf> pg. 150.

**Table 8-2**  
**Indigent Defense Caseload<sup>151</sup> and Expenditure in Virginia FY 2002**

Type	Assigned Counsel	Public Defender	Total
Expenditure	\$56,243,295	\$18,561,937	\$74,805,232
Caseload	215,640	94,271	309,911
Average Cost Per Case	\$260.82	\$208.93	\$245.03

Repeatedly over the past 20-30 years, information from various reports and studies in Virginia contained in Appendix A have disclosed that “Virginia has the lowest fee schedule for court appointed counsel in the nation” and that “Virginia ranks near the bottom of the 50 states based upon average cost per case.” The United States Department of Justice, Bureau of Justice Statistics (BJS), published the report *National Criminal Defense Systems Study* in the 1986. This was the first 50-state study ever produced in this country setting forth indigent defense cost and caseload data for all 50 states. The report sets out 1982 data in which it is disclosed that Virginia ranked 48<sup>th</sup> in the country, with an average cost per case of \$111.26.

A follow-up study was published by BJS for the year 1986. This study was conducted by The Spangenberg Group and showed that Virginia once again ranked 48<sup>th</sup> of the 50 states, with an average cost per case of \$116.00.<sup>152</sup>

While no further follow-up study has been done since 1986, based upon available research and data, we believe that Virginia would rank near or at the bottom of all 50 states in average cost per case of \$245.03 (the current combined appointed counsel and public defender figure).

### **Comparison of Indigent Defense Cost Per Case of Virginia and Other States**

As just started, the most recent indigent defense expenditure data for all 50 states is data from 1986. Seeking to provide more up-to-date comparison information for Virginia, we were able to collect accurate information or provide reliable estimates on

<sup>151</sup> It is complicated to make comparisons between the caseload of court-appointed attorneys and public defenders in Virginia because the two systems count cases differently, making it impossible to conduct cost analysis without converting the data into a uniform system. In order to compare assigned counsel and public defender average costs per case, we asked the Administrative Office of the Courts and the Public Defender Commission what were the average number of charges per case. For assigned counsel, the average number of charges per felony case was 1.7, the average number of charges per misdemeanor case was 1.4 and the average number of charges per case for all juvenile matters (there is no distinction made for felony and misdemeanors) was 1.66. For public defender cases, the average number of charges per case for all case types combined was 1.8. All case data in this report - for both assigned counsel and public defenders - reflects counts of individuals represented (defendants), not charges.

<sup>152</sup> U.S. Department of Justice Bureau of Justice Statistics Bulletin, *Criminal Defense for the Poor*, 1986 (1988).

indigent defense cost per case from 10 other states for FY 2002. The information, which appears in Table 8-3 below, does not include indigent defense expenditure data from municipalities.

One factor to keep in mind when comparing indigent defense expenditure data from different states is that the types of cases included under the umbrella of indigent defense vary from state to state. In Colorado, for example, the expenditure figure in Table 8-3 covers representation in adult and juvenile criminal cases and appeals only; the costs for counsel in various civil cases where the right to counsel applies are not part of the state's indigent defense expenditure. Still, Virginia, which does include civil cases (such as GAL appointments) in its indigent defense expenditures, ranks last among the states for which comparison information is provided on cost per indigent defendant case. Virginia's average cost per case was \$245.03. The average cost per case among the 11 states was \$430.

<b>Table 8-3</b>			
<b>Statewide Cost Per Case Comparison, FY 2002</b>			
<b>State</b>	<b>Case Totals</b>	<b>Expenditure</b>	<b>Cost Per Case</b>
Colorado	45,675	\$40,629,765	\$889.54
Ohio	130,482	\$93,837,502	\$719.16
Alabama	62,451	\$37,698,403	\$603.65 <sup>153</sup>
Iowa	67,957	\$38,743,352	\$570.12
West Virginia	48,168	\$24,730,658	\$513.43
Massachusetts	201,569	\$94,427,468	\$468.46
North Carolina	169,590 <sup>154</sup>	\$73,859,355	\$435.52
Missouri	82,206	\$31,601,168	\$384.41
Georgia	178,655	\$55,419,847	\$310.21
Maryland	191,232	\$58,528,208 <sup>155</sup>	\$306.06
Virginia	309,911	\$77,565,518	\$245.03 <sup>156</sup>

This FY 2002 ranking is consistent with data on all 50 states' indigent defense expenditures from the U.S. Department of Justice Bureau of Justice Statistics dating back to 1986, when Virginia ranked 48<sup>th</sup> in indigent defense cost per case.<sup>157</sup>

## Recoupment

<sup>153</sup> Based on the hourly rates of \$70 per hour for out-of-court work and \$90 for in-court work.

<sup>154</sup> Data assumes reporting from 98 of 100 counties.

<sup>155</sup> The Governor and state legislature increased the budget by 9% for 2003 bringing the total expenditures to \$63,795,746.72. Based upon previous year's caseload, the average cost per case would be \$330.60.

<sup>156</sup> Combined cost per case of assigned counsel and public defenders; see Table 8-2).

<sup>157</sup> U.S. Department of Justice Bureau of Justice Statistics Bulletin, *Criminal Defense for the Poor*, 1986 (1988).



Our final section on data concerns recoupment. Indigent defendants who are convicted of any charges in Virginia are assessed the cost of court-appointed counsel for each charge. For example, conviction of two misdemeanor charges but dismissal of two others would result in a maximum assessment of \$224 to the defendant. Court-appointed attorney's fees are added to the fees at the conclusion of the case as part of the standard court costs. People cannot be jailed for failing to pay fines and costs in Virginia. If defendants do not pay their fines and fees, their driver's license may be suspended and the court reports the defendant to the Department of Taxation. Any wages earned can be garnished to satisfy the fines and costs. We were told that the Commonwealth's attorneys are, in theory, responsible for collecting unpaid fines, but not all do so. Many fines go uncollected because defendants don't have jobs, thus cannot afford to pay, or are unreachable because they do not have reliable addresses. The canteen funds of imprisoned defendants can also be garnished to satisfy the costs.

For the 2002 fiscal year, the Virginia circuit courts collected \$4,530,538 in costs for court-appointed attorneys, while the district courts recouped \$4,455,943. The combined figure, \$8,986,481, represents approximately 11% of the overall expenditures on indigent defense in Virginia in FY 2002. No information is available on the administrative costs incurred in collecting payments for the cost of counsel. The state's general fund is the recipient entity for money recouped from indigent defendants.

In addition to being charged for the cost of counsel, indigent defendants in Virginia are required to pay juror fees if they request a jury trial in circuit court and are found guilty. A traffic court judge in Fairfax announced to defendants appearing in court that the cost of a jury trial would run between \$360 and \$600. Such a requirement could chill a defendant's exercise of a right to a jury trial.

## CHAPTER 9

### FINDINGS

#### OVERALL FINDINGS

The findings below reflect The Spangenberg Group's overall assessment of Virginia's indigent defense system. These findings are based on an extensive study that featured interviews with hundreds of individuals who participate in or are involved with indigent defense services in Virginia; review of reports and data on Virginia's indigent defense system from numerous sources; analysis of the Supreme Court of Virginia Administrative Office database on assigned counsel; analysis of budget, caseload and other data provided by the Virginia Public Defender Commission; and collection and analysis of comparison information from other states' indigent defense systems. The findings are also based on the perspective and experience The Spangenberg Group has gained studying the indigent defense systems in Virginia and other states over the years.

1. **Virginia's indigent defense system fails to adequately protect the rights of poor people who are accused of committing crimes.** The system fails to deliver on federal and state guarantees of effective assistance of counsel for indigent defendants.

2. **Two primary factors - inadequate resources and an absence of an oversight structure – form the basis of an indigent defense system that fails to provide lawyers with the tools, time and incentive to provide adequate representation to indigent defendants.**

Compensation for court-appointed lawyers in Virginia is the lowest in the nation, thus strongly discouraging counsel from spending more than a few hours on appellate and circuit court cases and even less on district court cases. There is no statewide oversight of court-appointed counsel, and virtually no minimum standards or guidelines governing who should accept court-appointed cases.

Public defender offices are overburdened with excessive caseloads that far exceed national guidelines. In addition to laboring under excessive caseloads, public defender offices operate without fundamental tools of legal practice, such as internet access, paralegals or updated computers, and have few litigation resources.

3. **In the past 30 years, numerous studies and reports have been conducted on Virginia's indigent defense system, most pointing out similar problems and calling for similar solutions.** Virtually every report has commented on the low fee schedule for court-appointed lawyers and the need to increase fees. Frequent suggestion has been made to move toward a statewide public defender system. While the General Assembly has been put on ample notice of the problems with indigent defense in Virginia, legislative response to address the problems identified has been completely inadequate. Despite the fact all three branches of government and the bar have called for substantial improvement in the system

over the past three decades, the Virginia government has failed in its responsibility to insure adequate funding for and representation in indigent criminal cases. Federal and state requirements mandate that states provide effective indigent defense services. The inaction of the General Assembly demonstrates that it fails to understand that effective indigent defense is a constitutionally mandated government service - not merely a budget category that can be funded at whatever level legislators feel inclined to provide.

4. **The deeply flawed system puts lawyers at substantial risk of violating professional rules of conduct when representing indigent defendants.** The Commonwealth's current indigent defense system may well force lawyers to violate several Virginia Rules of Professional Conduct when handling court-appointed cases, including Rule 1.1, Competence, Rule 1.3, Diligence, and Rule 1.4, Communication.
5. **There is no official state entity that effectively advocates for indigent defense needs in Virginia. No governmental entity serves as a voice for indigent defense: not the Public Defender Commission, not the State Bar, not the Supreme Court, not the Executive Branch and not the General Assembly.**
  - The Virginia Criminal Defense Lawyers Association's attempts to reform the system over the years have been unsuccessful.
  - The Virginia Trial Lawyers Association's attempts to increase compensation for court-appointed attorneys over the years have been unsuccessful.
  - The Virginia Indigent Defense Coalition was formed two years ago, and has been working to educate the public and others about indigent defense issues. However, the organization is grant-funded, thus, unlike these other institutional entities, does not have the stability to ensure it will continue be a voice for indigent defense in the future.
  - There is no statewide association for public defenders.
6. **Because of a lack of response by elected officials, there has proven to be no meaningful way to seek redress for the problems with Virginia's indigent defense system.**
  - The General Assembly and Executive Branch have failed to heed the dozens of reports prepared about the problems with Virginia's indigent defense system.
  - The Court of Appeals rejected an attempt to litigate a deprivation of constitutional guarantees in an individual defendant's case (*Webb v. Commonwealth*, 528 S.E.2d 138, 32 Va. App. 337 (2000)). No other court-appointed lawyers have since attempted to raise similar claims.
  - Individual defendants who believe they have received ineffective assistance of counsel can bring it up on a case by case basis, following their conviction. However, in Virginia, unlike most other states, a claim of ineffective assistance of counsel is not permitted on direct appeal. It may only be raised in state habeas, or post-conviction, proceedings. Virginia

does not provide a right to counsel for indigent defendants at state habeas in non-capital cases, thus the only way such a claim of ineffective assistance of counsel can be raised is by a pro se application. In other words, a person who has been convicted and believes the representation provided by his appointed lawyer was legally deficient would have to prepare and file a claim himself. This is an entirely unrealistic burden to place on a layperson. Alternately, we were told that a writ could be filed directly in the Virginia Supreme Court and upon court order, the case could be sent back to the trial court for a further proceeding. This, approach, too, would typically be pursued pro se and is very seldom utilized.

7. **Court-appointed attorneys and public defenders make very limited use of expert witnesses and court-appointed lawyers make very little use of investigators, services that are essential to proper representation of clients in many cases.** In part this is because judges routinely deny requests that court-appointed attorneys make for experts and investigators and that public defenders make for experts (public defenders can use in-house investigators). In part this is because many underpaid court-appointed lawyers and overwhelmed public defenders never even bother to request these services. Payments for experts were made in less than one percent of all indigent defendant cases handled in FY 2002.
8. **Substandard practice has become the accepted norm in Virginia's indigent defense system.** Indigent defense counsel in Virginia work in a system that, more so than most other jurisdictions across the country, is stacked heavily against them. Prosecutors have the charging power, discovery materials, help from police and investigators, and access to scientific laboratories and experts. Juries are known as tough sentencers. Judges rarely grant experts or investigators for the defense. Compensation is low for appointed counsel and caseloads are high for public defenders. Yet, for many indigent defense lawyers, Virginia is the only jurisdiction they know, thus it is the only indigent defense culture and practice they know. The culture is one where substandard practice occurs and, even worse, is enabled and tolerated.
9. **Virginia ranks last in average indigent defendant cost per case among a group of 11 states<sup>158</sup> for which such data was collected for FY 2002.** Virginia's average cost per case was \$245.03. The highest cost per case among the 11 states was \$889.54 and the average cost was \$430. This ranking is consistent with data on all 50 states' indigent defense expenditures from the U.S. Department of Justice Bureau of Justice Statistics dating back to 1986, when Virginia ranked 48<sup>th</sup> in indigent defense cost per case.<sup>159</sup>

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<sup>158</sup> The 11 states are: Alabama, Colorado, Georgia, Iowa, Maryland, Massachusetts, Missouri, North Carolina, Ohio, Virginia and West Virginia.

<sup>159</sup> U.S. Department of Justice Bureau of Justice Statistics Bulletin, *Criminal Defense for the Poor*, 1986 (1988).

## SPECIFIC FINDINGS PERTAINING TO VIRGINIA’S ASSIGNED COUNSEL SYSTEM

### 10. The unwaiveable statutory fee caps for court-appointed counsel in Virginia are the lowest in the country.

- Only one other state - Mississippi - has an unwaiveable fee cap but it allows attorneys to be compensated for overhead for all hours worked at a rebuttable rate of \$25 per hour.
- Despite the fact Virginia’s statutory caps rank at the bottom nationally, the legislature does not even appropriate enough money to pay the full rates of \$120, \$158, \$445 and \$1,235, but, since 1999, has only allocated enough funds to pay \$112, \$148, \$395 and \$1,096 respectively.
- Compensation rates for court-appointed counsel in Virginia have changed very little in the past two decades, as seen in the table below.

Type of Court/Case	Maximum Fee Allowed	
	1985	2002
<b>Circuit Court</b>		
<b>Felony</b>		
<b>Class I - Capital</b>	Set by the court	Set by the court
<b>Class II</b>	\$400	\$1,096
<b>Class III-VI</b>	\$200	\$395
<b>Unclassified</b>	Varies	Varies
<b>Misdemeanor</b>	\$100	\$148
<b>Juvenile</b>	\$100	\$100
<b>Appeal</b>	Set by the court, not less than \$100	Set by the court, not less than \$300
<b>General District Courts</b>		
<b>Felony (Preliminary Hearing)</b>	\$75	\$112*
<b>Misdemeanor</b>	\$75	\$112
<b>Juvenile</b>	\$75	\$112
<b>J&amp;DR Court</b>		
<b>Felony (Preliminary Hearing)</b>	\$75	\$112*
<b>Misdemeanor</b>	\$75	\$112
<b>Juvenile</b>	\$75	\$112

\*Compensation is capped at \$112 for preliminary hearings in the district court that are certified to the circuit court. However, representation of a defendant charged with a felony at preliminary hearing in either juvenile and domestic relations court or general district court that reaches final

disposition at that preliminary hearing (i.e., is reduced to misdemeanor, dismissed, nolle prossed, etc.) will result in compensation up to the appropriate felony rate. *See* Chapter 509 of the 2001 Acts of the General Assembly.

11. **The unreasonably low statutory fee caps acts as a disincentive to many assigned counsel from doing the work necessary to provide meaningful and effective representation to their indigent clients.**
  - The low compensation encourages assigned counsel to put in as little effort as possible on individual appointed cases.
  - The low compensation discourages many qualified, competent criminal defense lawyers from handling court-appointed cases.
  - In appellate cases, the low compensation is a clear deterrent to vigorously pursuing the full panoply of appellate review avenues available to petitioners.
12. **In addition to the problems stemming from low pay, there are numerous systemic deficiencies with the assigned counsel system in Virginia that result in the failure of court-appointed lawyers to provide adequate representation to indigent defendants.**
  - There is no statewide oversight of and no uniform standards and guidelines for court-appointed attorneys.
  - There are no minimum qualification or performance standards or training requirements (exception: GAL and capital cases). Typically attorneys simply ask the court to include their name on the court-appointed list; there is no need to demonstrate experience or competency in handling criminal cases.
  - Ad hoc appointment systems prevail, allowing courts to appoint cases in a way that places a premium on attorneys receiving multiple cases that are set for resolution on the same day. The system maximizes attorney time at court, but discourages adequate attention to individual clients.
13. **The lack of oversight and administration permits a small number of attorneys to receive a disproportionate number of appointed cases, raising serious concerns over the quality of representation provided to their clients.**

In FY 2002, 80 court-appointed lawyers (2.7 percent of the 2,691 lawyers who handled at least one court-appointed case that year) handled more than 400 court-appointed cases apiece. These 80 lawyers collectively handled more than 22 percent of all assigned counsel cases and were paid more than 17 percent of all money spent on assigned counsel; an average of \$138,055 apiece. These lawyers also maintained private practices.
14. **The disparity in pay for court-appointed counsel representing parents in abuse and neglect cases and GALs who represent the best interests of children in these cases is unfair and illogical.** GALs are paid by the hour for all time worked (at \$55 per hour for out-of-court work and \$75 per hour for in-court

work) while counsel for parents are subject to statutory caps of \$112 per case in J&DR court and \$148 for an appeal in circuit court. The pay scheme discourages counsel for parents from putting adequate time into their cases.

## **SPECIFIC FINDINGS PERTAINING TO VIRGINIA'S PUBLIC DEFENDER SYSTEM**

- 15. The Virginia public defender system is greatly over-burdened and substantially under-resourced.** Effects on client representation of the over-stretched offices include lack of client and family member contact, inability to do legal research, little or no motion practice, insufficient investigation, insufficient case and trial preparation, failure to prepare pre-sentence plans and, frequently, burnout. All of these factors affect an attorney's ability to effectively litigate the case, whether going to trial or negotiating a plea bargain. Specific shortcomings of the system include:

  - There is virtually no initial training for public defenders. Supervisors, who carry full caseloads, do not have time to provide training.
  - Public defender attorneys carry excessively high caseloads ranging between 115 and 180 open cases per attorney and average annual caseloads of 507 cases per attorney.
  - There are too few investigators and investigative equipment is non-existent and/or outdated.
  - Salaries of public defender staff are not comparable to the better-funded Commonwealth's attorneys.
  - Attorneys tend to start with little or no experience and many leave within 4-5 years.
- 16. The entity that should be the advocate for adequate resources for public defender offices -- the Public Defender Commission -- has been more concerned with assuring the public and elected officials that public defenders can handle cases as cheaply as or cheaper than appointed counsel.** The emphasis has not been on educating officials that public defender offices are operating under conditions that make it very likely they are not fulfilling their professional responsibilities to clients.
- 17. There is great disparity in resources afforded to public defenders and Commonwealth's attorneys.** Across the board, from entry level to the most senior positions, attorneys working as commonwealth's attorneys earn more - sometimes significantly more - than public defenders in like jobs. Commonwealth's attorneys' offices have more adequate numbers of both attorneys and support staff than do public defenders. Most public defender offices, unlike most Commonwealth's attorneys' offices, do not receive supplemental funding from local governments, further exacerbating disparities of staff and office resources. Public defender offices lack the most basic of office equipment, such as internet access, and up-to-date and operating computers and printers.

## **CHAPTER 10**

### **RECOMMENDATIONS**

As indicated earlier in this report, Appendix A of this study contains a summary of 30 years worth of dozens of reports, studies and legislative initiatives regarding indigent defense in Virginia. All three branches of government in Virginia have studied the system repeatedly for three decades.

In December 1971 the Virginia State Bar issued a report entitled, *A Study of the Defense of Indigents in Virginia and the Feasibility of a Public Defender System: Report of the Board of Governor's Criminal Law Section, Virginia State Bar, to the Governor and the General Assembly of Virginia*. After an extensive study of indigent defense in Virginia was conducted, the 1971 report states on page seven:

Today, the well-to-do-client is likely to be able to put on a defense probably equal to the prosecution, if not often much better. This can be seen particularly in white-collar crime, antitrust violations, tax prosecutions and the like....Studies, including the one embodied in this report, on the other hand, have shown that many court-appointed lawyers are overworked, underpaid, inadequately trained, without adequate, if any, investigational resources and thus unable to provide a full and aggressive defense.

The current report is the most detailed and comprehensive study completed on indigent defense in Virginia to date. The findings made in 1971 by the Virginia State Bar were echoed in the hundreds of interviews conducted throughout Virginia in the summer of 2003 and in an analysis of the data provided by the Supreme Court of Virginia and the Public Defender Commission. In our professional judgment, effective and meaningful representation is not being delivered to all indigent defendants in Virginia. We urge the state to take the necessary steps to remedy a system that has been widely criticized for the last three decades. We recommend below several major systemic changes that the state should undertake forthwith.

- (1) The Virginia General Assembly should fund indigent criminal defense services in cases requiring appointment of counsel at a level that assures that all indigent defendants receive effective and meaningful representation.
- (2) The state should establish a professionally independent statewide indigent defense commission to organize, supervise and assume overall responsibility of Virginia's indigent defense system.
- (3) The newly created commission on indigent defense should have broad power and responsibility for the delivery of indigent criminal defense services.
- (4) The indigent defense commission should adopt performance and qualification standards for both private assigned counsel and public defenders. The standards



should address workload limits, training requirements, professional independence and other areas to ensure effective and meaningful representation.

(5) A comprehensive data collection system designed to provide an accurate picture of the provision of indigent criminal services in Virginia should be established and implemented by the statewide commission.

The task ahead to reform the indigent defense system in Virginia is a daunting one. Much needs to be done, and these five recommendations should not be considered an exhaustive road map outlining all areas of needed improvement. However, we believe that the starting point to begin these efforts is creation of a new indigent defense commission and appropriation of substantial additional state funds during the 2004 legislative session of the General Assembly.

**Appendix A**  
**Summary of Reports, Studies, Legislative Action and Other Actions**  
**Regarding Indigent Defense in Virginia**

**I. Reports and Studies**

- 1971 – Virginia State Bar: *A Study of the Defense of Indigents in Virginia and The Feasibility of a Public Defender System*, reported to the Governor and the General Assembly. The Virginia Courts System Study Commission and Virginia Attorney General, who had noted a problem of inadequacy of representation in the court-appointed system, had also been interested in the study as an adjunct to their existing efforts to improve the state’s criminal justice system. Findings and recommendations included the following:
  - Although Virginia updated some of its compensation schedules for court-appointed counsel, it still did not meet the essential standard for effective assistance of counsel of reasonable compensation. In 1970, the average compensation received by court-appointed attorneys in a criminal case was \$233.
  - “Many court-appointed lawyers are overworked, underpaid, inadequately trained, without adequate, if any, investigational resources and thus often unable to provide a full and aggressive defense.”
  - Many were concerned that newly-graduated lawyers were using the court-appointed system as a classroom or that general practitioners were using the system as “a mass-practice-little preparation sustainer” to supplement a modest private civil practice.
  - A Virginia Commission on the Defense of Indigents be should be created which would establish and oversee Public Defender pilot programs, and determine qualifications and salaries for the public defenders. (In 2003, the General Assembly is still studying the possibility of creating an indigent defense commission.)
  - Public Defender salaries should be equitable to the Commonwealth’s Attorney, and within each Public Defender Office, investigators should be provided at an anticipated ratio of one investigator to every three attorneys. (Note: our 2003 report indicates that as of June 2003, the ratio of investigators to attorneys is one to 8.5.)
- 1974: An evaluation of the first two pilot public defender programs designed to look at the functioning and performance of the offices.
- 1975: An evaluation of the public defender programs in Virginia Beach and Staunton conducted under grants from the Division of Justice and Crime Prevention.
- 1976 – Public Defender Commission: An internal assessment regarding whether the Public Defender offices were meeting certain standards for defense services.

- 1979 – Public Defender Commission: *Fourth Report to the Governor and the General Assembly of Virginia* regarding the pilot public defender offices.
- 1980 – Richmond Bar Association: A study on the feasibility of establishing a public defender program in that region.
- 1980-1981 – State Court Administration: A report on the Public Defender system and indigent defense services generally. With one possible exception, Virginia has the lowest fee schedule for assigned counsel in the country. A survey showed that while there was reported support for the Public Defender system, concerns included salary parity with the Commonwealth’s Attorneys Office and turnover.
- 1981 – Public Defender Commission: *Fifth Report to the Governor and the General Assembly of Virginia* on the pilot public defender system. The Commission found that a statewide public defender system was feasible and the pilot project should be increased for a broader overview statewide.
- 1981 – OES: *Report of the Office of the Executive Secretary of the Supreme Court of Virginia on Cost Containment Within the Criminal Fund* recommends the establishment of a statewide public defender system.
- 1982 – Public Defender Commission: *Sixth Report to the Governor and the General Assembly of Virginia* on the public defender system, stating that “a cost efficient system providing quality defense services to indigent defendants is no longer preferable but appears necessary for the orderly administration of criminal justice in the future” and recommending the expansion of the public defender system as determined by the Commission and OES.
- 1982 – American Institute for Research: A study conducted to compare the quality and cost of the public defender and assigned counsel system in Virginia.
- [year unknown] – House of Delegates: A study mandated by the House of Delegates required the Supreme Court of Virginia to establish a committee to look at the feasibility of developing equitable financial standards for determining indigency and whether or not such guidelines would be administratively efficient and cost effective
- 1982-1984: OES conducts annual updates to criminal fund cost containment (court-appointed counsel) study.
- 1983-1984 – OES: *Indigency Standards: Determining Eligibility for Court-Appointed Counsel Services in Virginia*, a report to the Governor and the General Assembly in response to House Joint Resolution No. 76.
- 1983-1986 – Judicial Council of Virginia: *The 1983-1986 Comprehensive Judicial Plan*. Tasks set forth for the Virginia Judicial System include to:

- Support legislation to establish that, as a matter of public policy, Virginia will proceed toward statewide implementation of a mixed defender system with primary responsibility for handling indigent cases going to salaried public defenders and the private bar handling conflict and overflow cases
  - Provide self-executing legislation to allow funding of new public defender offices through direct transfer of monies from the Criminal Fund to the Public Defender Commission
  - Endorse the elimination of jury sentencing
- 1984 – Public Defender Commission: *Seventh Report to the Governor and the General Assembly of Virginia* regarding the public defender system
  - 1984-1985 - Abt Associates, with Robert L. Spangenberg: *Study of Court Appointed Counsel in Virginia* designed to collect all available data on indigent defense services in Virginia in order to determine whether or not there was a crisis in the present funding for indigent defense services and in the systems for providing the same. The study finds:
    - Virginia has the lowest court-appointed counsel fees in the nation
    - A 15% increase in court-appointed attorney fees is required, but “is clearly only a stopgap method”
    - Much more than an increase in fees is needed for Virginia’s indigent defense system to meet minimal national standards
    - Major structural change in the delivery system may be necessary over time
  - 1985 – House Appropriations Committee Staff: *Chronology of Legislative Actions Related to the Criminal Fund*, presented to the Joint Subcommittee Studying Indigent Defense, House Joint Resolution No. 324. General Assembly action was said to have produced positive results such as standardized procedures and formalized eligibility criteria, but also to have “aggravated existing problems with court assigned counsel system.”
  - 1985 – Abt Associates, with Robert L. Spangenberg: *Analysis of Costs for Court-Appointed Counsel in Virginia*, conducted at the request of the Virginia State Bar and ultimately for the Virginia Law Foundation. The study found the following:
    - With only a few exceptions, the basic fee schedule in Virginia has remained the same for over 15 years in the Circuit, District, and J&DR Courts.
    - For 1982-1983, Virginia ranked 32<sup>nd</sup> among the states in indigent defense cost per capita at \$1.64, but 48<sup>th</sup> in the country for average cost per case at \$111.
    - Virginia has the lowest maximum fee for misdemeanor cases of any state in the country.
    - Virginia has the lowest maximum fee for juvenile cases of any state in the country.
    - Virginia has the lowest maximum fee for felony cases in the country with one exception (in Arkansas for cases carrying a prison sentence of 20 years or more which has a maximum fee \$50 lower)

- Virginia has the lowest average cost per case for court-appointed counsel in states where the predominant system is a private court-appointed attorney one.
  - The disparity between Virginia and most other states is large.
  - A 15% increase in fees would raise the average cost per case to \$120.48, which would still keep Virginia below all other states except Maine with predominantly court-appointed systems, and would not even bring expenditures back to the FY 1983 level.
- 1985-1986 - The Spangenberg Group: *Projecting Costs for Various Indigent Defense Systems in Virginia for FY 1986*. At the request of the Joint Subcommittees Studying Methods of Providing Legal Defense Services for the Indigent and Virginia's Public Defense System, and with the financial support of the ABA Bar Information Project and the Virginia General Assembly, The Spangenberg Group was asked to determine where Virginia stands with respect to the current national picture. The following include some of the findings and recommendations:
- Private attorneys are removing themselves from the system and some judges are finding it more difficult to find qualified attorneys for appointment.
  - A lawsuit has been filed against the Commonwealth challenging the system of compensation provided to court-appointed counsel.
  - The fees create incentive to spend as little time as possible on a case and look for a favorable plea bargain.
  - Among a total of nine states comparable in population, Virginia is the last in average cost per case
  - Virginia continues to rank 50<sup>th</sup> among all states in average cost per case
  - The maximum allowable fees in Virginia are significantly below those in any other state
  - The average cost per defendant for all case types combined in FY 1985 was \$109.99, with a Circuit Court average of \$165.92, a General District Court average of \$87.04, and a J&DR Court average of \$79.66.
  - Based on projected caseload and caseload standards, 153 full-time public defender trial attorneys were necessary to handle 75% of felony, misdemeanor and juvenile cases
  - In order to provide quality representation, one full-time secretary was needed for every four full-time trial attorney, and one full-time investigator was needed for every eight full-time attorneys
  - The Virginia system in most ways fails to adequately meet minimum national standards for indigent defense systems:
    - The system overall is hopelessly under-funded in terms of the average cost per case for court-appointed counsel
    - There is no statewide monitoring or administration of the system
    - Ancillary services are wholly inadequate
    - There is no comprehensive training program for court-appointed counsel statewide
    - There is no assurance that all indigent defendants are appointed counsel as required by law, particularly in misdemeanor cases

- It is strongly recommended that Virginia take the steps necessary in its 1986 legislative session to increase the funding for its system and that some form of central commission be established to develop uniform standards for program operation and to provide an ongoing function of monitoring and evaluation.
- 1986 – Joint Subcommittees: *Joint Report of the Joint Subcommittees Studying Virginia's Public Defender Program and Alternative Indigent Defense Systems*, to the Governor and the General Assembly, House Document No. 15 and Senate Document No. 11. The joint subcommittees had the following findings and concerns:
  - The most immediate problem facing the court-appointed counsel system is a decreasing availability of experienced attorneys willing to accept appointments, and there is a concern about the impact of the fee schedule on the availability of quality representation
  - A 100% increase in the maximum fee schedule would be necessary to bring the schedule up to the national average for compensation paid to court-appointed counsel. A minimum 15% increase is feasible, essential, and is “only a beginning.”
  - Maximum fees, which have not been increased significantly in 15 years, do not even cover attorneys’ overhead expenses in court-appointed cases
  - A majority of the joint subcommittees do not believe that, in general, the \$400 maximum fee is reasonable for capital cases. By comparison, the customary fee for private counsel in a case involving the possible loss of a driver’s license is \$500-\$700.
  - The fees should cover overhead costs and “not be so artificially low as to discourage qualified counsel from accepting appointments.”

Recommendations were made to:

- Establish a fifth pilot public defender program in Portsmouth
- Raise the maximum fees by 15%
- Allow the joint subcommittee to continue its study and afford members to: address problems faced by court-appointed counsel in capital and juvenile cases; evaluate the need to develop uniform statewide eligibility standards; determine the appropriate methods for selecting court-appointed counsel; and continue to review and evaluate administrative procedures of the public defender program.
- 1988 – Joint Subcommittee: A study finds that a fee increase of 99% would be necessary to reach the national average.
- 1989 – Joint Subcommittee: A report, House Document No. 40, was filed with the Governor and General Assembly recommending another 15% increase in the maximum fees. The report noted that inadequate funding of indigent defense leads to unreasonable caseloads for prosecutors and defense attorneys, possible compromise of prosecutions through plea bargaining, inadequate representation of accused persons, crowded court dockets, jails and prisons. The Department of Planning and Budget evaluated the suggestion of The Spangenberg Group that a statewide appellate defender office be established, but in evaluating costs, concluded that “[a]lthough the issue is clouded to

some degree by the low fees paid to private bar counsel, even with additional increases in those fees it would be cheaper to continue the present system.” Also noted in the report is The Spangenberg Group’s suggestion that a fully funded, centrally located capital resource center be created. At the time, Virginia was the only Southern state which imposed the death penalty but lacked such a resource center.

- 1989 – Commission of the Future of Virginia’s Judicial System: *Courts in Transition: Report of the Commission on the Future of Virginia’s Judicial System* recommends that public defender offices be established with appropriate staff and funding in each judicial circuit as the primary indigent defense provider.
- 1989-1990 - Department of Planning and Budget, in cooperation with the Supreme Court of Virginia: *A Study of Indigent Defense Systems in Virginia*. Despite the 15% increase in fees in 1989, Virginia still ranked near the bottom in indigent defense costs. With the information and support of the work of The Spangenberg Group on indigent defense expenditures across the nation, the report recommends two consecutive increases of 20% each in court appointed counsel fees in order to bring Virginia towards the middle of the states in terms of average cost on indigent defense.
- 1990 – Department of Planning and Budget: *Indigent Defense Systems in Virginia*, House Document No. 44, a report regarding the multi-agency study of implications of an expanded public defender system and modifications of the court-appointed counsel and public defender systems. Findings and recommendations of the subcommittee included:
  - Adoption of appropriate workload standards, staffing levels, and salary levels. Workload standards and corresponding staffing levels should take into account types of defendants, number of preliminary hearings, number of misdemeanor and felony appeals, and number of jury trials.
  - Funding 37 new public defender positions to maintain current workload levels
  - Funding 11 additional public defender positions to reduce attorney workload to an appropriate level
  - Adoption of procedures to make appropriate training and in-service legal education programs available to public defenders
  - The use of court-appointed counsel as the primary indigent defense provider should remain because it is currently cost-effective, although this is due in large part to the low fees
  - If court-appointed counsel fees were increased by 20 % in two consecutive years, then a shift to a statewide public defender system should be considered
  - Examination of the feasibility of regional appellate representation and attaching regional appellate specialists to existing public defender offices. (In 1991, this was still not implemented due to budget reductions)
  - Greater financial support from Virginia is necessary if the indigent defense system is to remain constitutionally sufficient
  - The Public Defender Commission should continue to facilitate the creation of new public defender offices and help develop local support in areas where a public defender could improve quality, availability or expense problems

- 1991 - Joint Subcommittee: *Final Report of the Joint Subcommittee Studying Alternative Indigent Defense Systems* to the Governor and the General Assembly, House Document No. 48 (see also 1990 House Document No. 44), reiterating previous recommendations that fees be increased by 20% “as soon as possible.” Findings and recommendations include:
  - A capital resource center is needed to fill an existing gap in capital litigation, and future General Assemblies should appropriate necessary funds to operate such a center as previously proposed by the Virginia Bar Association
  - Compensation for court-appointed counsel should be proportionate to the demands made on the attorney, and there is currently little correlation in misdemeanor and juvenile proceedings
  - “The Commonwealth must avoid a system of compensating those who volunteer to provide legal assistance to persons who are constitutionally entitled to representation at state expense which imposes upon those volunteers a requirement that they subsidize the state’s obligation”
  - The 20% fee increases proposed in House Bill No. 212 should be approved and implemented as soon as possible
  
- 1994 – OES: *An Examination of the Current System of Compensating Court Appointed Counsel and Alternative Methods of Providing Adequate Representation at a Reasonable Cost* (1994), delivered to the Governor and the General Assembly in 1995, recommended a 20% increase in court appointed counsel fees across the board. Support for the report was found in the work of The Spangenberg Group on court-appointed counsel rates in non-capital felony trial cases in all 50 states.
  
- 1997 – Virginia State Crime Commission: *Cost Effectiveness of Public Defender Offices*, Report of the Virginia State Crime Commission to the Governor and General Assembly, House Document No. 46 (at the direction of House Joint Resolution 79). Among the information studied by the Commission were other states’ rates of compensation for court-appointed counsel in non-capital felony cases and systems for providing indigent defense system (with reference to the work of The Spangenberg Group). Findings and recommendations include:
  - Virginia’s rate of compensation for court-appointed counsel is among the lowest of any state in the nation
  - The percentage of cases handled by public defender offices varies widely among jurisdictions, with several jurisdictions reporting public defender offices handling only 50-60 % of indigent cases, and several reporting large numbers of indigent cases being handled by only one or two members of the local bar
  - The Crime Commission should introduce a joint resolution to request the Supreme Court and the Public Defender Commission to study the system of assigning indigent defense counsel, including whether jurisdictions are using a fair rotating system and the methods that are being used by the courts and public defender offices
  - Statutory caps on court-appointed counsel fees should be raised to provide for reasonable compensation



This report also looked at the rates of compensation in non-capital felonies in the 50 states in 1995. For a look at 2002 rates, see Appendix D. Since 1995, at least fifteen states have increased the hourly rates for court-appointed counsel as of 2002. Most of the increases are substantial, with a few even doubling or tripling 1995 hourly rates. In addition, at least eight states have increased their maximum fees (all but two of which are waiveable), and four have removed previous fee caps.

- 1998 – OES: *Court-Appointed Counsel and Public Defenders in Virginia - Study of Procedures for the Appointment and “Fair” Rotation of Counsel in Virginia’s Courts* (as recommended in 1997 by the Crime Commission). This study was taken in response to a request to further study whether the public defender was being used as the primary indigent defense provider in public defender jurisdictions, and whether jurisdictions were using a fair rotation system in appointing indigent cases (since a 1996 study revealed that in some jurisdictions only one or two local attorneys were handling indigent cases). In 1997, OES surveyed all the courts and public defender offices across the state regarding mechanisms used for appointing counsel. The study found that:

- In most jurisdictions with public defender offices, public defenders were handling over 75% of total indigent defense charges
- Survey responses revealed a positive view of the appointment practices
- Cases are assigned fairly considering factors such as individual schedules, court and defendant needs, and opportunities of counsel to be appointed indigent cases

- 2002 – Virginia State Crime Commission: Report of the Crime Commission pursuant to House Joint Resolution 178, submitted to the Governor and the General Assembly. Recommendations included the following:

- Support the installation of public defender offices in Chesterfield County, Hampton, Newport News, Henrico County, Norfolk, and Prince William County.
- Modify Virginia code to eliminate the financial disincentive to appeal J&DR cases (\$112) to circuit courts (\$100 on appeal)
- Modify the pay disparity between juvenile and adult indigent cases
- Allow trial courts to waive fee caps in appropriate cases
- Establish minimum training and qualifications for court-appointed attorneys in criminal cases
- Create a special task force to examine the feasibility of implementing a system of quality review for court-appointed attorneys
- Establish specialized capital defense units to handle capital cases within the Public Defender Commission
- Create a task force to determine the feasibility of creating caseload limits for all public defender attorneys and for attorneys appointed in capital cases

(Note: the legislature has acted on only two of the above recommendations, creating a public defender office in Norfolk and establishing a capital defense unit.)

- 2002, American Bar Association Juvenile Justice Center: *An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*. The report

notes that representation of juveniles in Virginia had been studied and criticized two decades ago, yet little had been done since then to make improvements to the system. Findings included:

- Delay in appointment of counsel to juveniles prosecuted as delinquents;
  - A high incidence of children waiving the right to counsel without prior consultation with a lawyer;
  - Inadequate juvenile-training and experience for both assigned counsel and public defenders;
  - A need to expand the public defender system;
  - Inadequate access to ancillary services (support staff, investigators, paralegals, social workers and sentencing advocates);
  - Inappropriate referrals to the juvenile justice system of mental health- and school-related cases;
  - Inadequate mental health services for children;
  - A widespread perception that juvenile court is “kiddy court,” which serves merely as a training ground for lawyers handling adult criminal cases;
  - Overrepresentation and disparate treatment of minority youths in the juvenile justice system; and
  - Inadequate compensation for court-appointed counsel.
- 2002 – Supreme Court of Virginia: *Court-Appointed Counsel Procedures and Guidelines Manual*. As of July 1, 2002, although hourly fees in misdemeanor and felony cases increased to \$90, and in capital cases to \$125, statutory caps in misdemeanor and felony cases remained the same.
  - 2003 – Virginia State Crime Commission: *Indigent Defense Commission, Interim Report* to the Governor and General Assembly, Senate Document No. 11 (in response to Senate Joint Resolution 43 and House Joint Resolution 94). With reference to the work of The Spangenberg Group, the study committee analyzed other statewide indigent defense systems. With reference to the study pursuant to House Joint Resolution 178, findings included:
    - A literature review and survey analysis indicated problems with attorneys providing indigent representation failing to maintain minimal standards of quality
    - No ready mechanisms exist, other than the oversight of judges, to provide any quality review of court-appointed attorneys
    - Handling too many cases affects the quality of representation; still, no caseload limits are in place for attorneys handling capital cases or for public defenders
    - Between FY94 and FY00, the number of indigent persons represented by court-appointed counsel has increased by 40%

## **II. Legislative Action**

- 1920 – General Assembly: Virginia General Assembly passed legislation authorizing public defender programs in jurisdictions with a population over 100,000. No offices were established for many years in part because the funding responsibility was

with the local governments and it was felt that public defender programs would cost more than court-appointed counsel systems.

- 1981 – General Assembly: The General Assembly requested a study of statutory and administrative changes which could contain costs of the criminal fund.
- 1982 – General Assembly: The General Assembly took the following actions:
  - set the appropriation for each year of the next biennium at a level equal to 1980-1982 expenditures plus annual caseload increase
  - stipulated appropriation for the criminal fund, and recommended the establishment of income eligibility criteria
  - reviewed the OES study on cost containment which recommended establishing a statewide public defender system
  - rejected the proposal to establish a public defender office in Alexandria and requested a follow-up study on areas where public defender offices would be most cost-effective
  - provided general fund support to the public defender office in Petersburg which was about to lose federal funding
- 1983 – General Assembly: The General Assembly instituted cost containment measures, including:
  - 4% across the board reduction in fees and reduced appropriation by \$352,000
  - Provided an indigency standard and required OES to modify and implement eligibility criteria
  - Instituted a cap on the stacking of payments for defense on multiple counts of the same offense
  - Requested an audit of indigent defense expenditures in the criminal fund
  - Reviewed second report on areas where public defender offices would be more cost effective
  - Determined that information was inadequate to document savings or improved quality
  - Refused to approve establishment of offices in Richmond, Fairfax, and Alexandria
- 1984 – General Assembly: The General Assembly took the following actions:
  - Continued appropriation level for criminal fund at level of previous biennium plus annual caseload increase
  - Removed 4% reduction on fee schedule
  - Adjusted cap on payment for defense of multiple counts from one to three
  - Allowed fees for defense of capital murder to be set at court's discretion
  - Reviewed and approved income eligibility standard
  - Failed to approve a fifth public defender office in Richmond
  - Reduced appropriation level by \$371,000, below the level of expenditures
- 1985 – General Assembly: Legislature appoints two joint subcommittees to study (i) alternative methods of providing criminal defense services to indigent persons and (ii)

the feasibility and desirability of expanding the public defender system beyond the then-authorized four pilot programs.

- 1988 – Joint House Resolution No. 141 finds it necessary to request continuation of the joint subcommittee study of indigent defense to await the results of the Bar Association project and The Spangenberg Group analysis regarding methods of providing indigent representation in post-conviction proceedings (under a Virginia Law Foundation grant), as well as a decision in the systemic class action law suit challenging the indigent defense system (*Giarratano v. Sielaff*, U.S. District Court for the Eastern District of Virginia, Civil Action No. 85-0655-R).
- 1989 – General Assembly: The public defender system was expanded to include coverage of Page County and create offices in Suffolk, Danville, Bedford, City of Franklin, and Counties of Isle of Wight and Southampton. The expansion was due to local initiatives not recommendations of the subcommittee.
- 1989 – General Assembly: House Joint Resolution No. 279. Upon recommendation of the subcommittee, the General Assembly authorized the Department of Planning and Budget to conduct a multi-agency study of the cost and policy implications of further expansion of the public defender system and modifications in the court-appointed counsel and public defender systems.
- 1989 - General Assembly: The General Assembly enacts a 15% increase in maximum allowable fees to court appointed counsel.
- 1990 – General Assembly: The General Assembly approved funding for 50 additional positions in the public defender system, but because of budgetary constraints, in 1991 the positions were still not filled. Upon recommendation of the subcommittee, the General Assembly also removed the requirement that public defenders assist the courts in indigency screening and authorized a \$40 per diem compensation for Public Defender Commission members.
- 1990 – General Assembly: The subcommittee studying indigent defense recommended:
  - a 20 % increase in fees for juvenile court cases. House Bill No. 211 was carried-over by the House Appropriations Committee for consideration in the 1991 session, but due to fiscal concerns it was not likely to pass.
  - a 20 % increase in the maximum fees in criminal cases. House Bill No. 212 was carried over by the House Appropriations Committee
- 1994 – General Assembly: Senate Joint Resolution No. 186 was adopted by the General Assembly, requesting the Committee on District Courts (CDC) study court appointed counsel fees in juvenile and domestic relations courts, inherent problems in the current system, and alternative methods for providing adequate representation at a reasonable cost. Later that year, at the request of the General Assembly, the study is expanded to include all case types.

- 1996 – General Assembly: House Joint Resolution No. 79, directing the Virginia State Crime Commission to study the cost-effectiveness of public defender offices versus court-appointed counsel and the level of court-appointed counsel fees. In support of the need for the study, the resolution finds that “although the entire criminal justice system is suffering from a lack of adequate resources, the current level of funding for indigent defense has reached a crisis level”
- 1999 – Special Committee on Court-Appointed Fees: Following the 1998 session of the General Assembly, the Chief Justice appointed the Special Committee as part of an effort to address the issue of Virginia having the lowest court-appointed counsel fees in the nation. As a result of the recommendation of the Special Committee, the Supreme Court budget requested a 20% increase in misdemeanor caps, from \$100 to \$120 in district court and \$132 to \$158 in circuit court. It was also requested that support be given for inclusion of language in the Budget Act which would require the administration to address the fees issue in the preparation of the next biennium budget. The Judicial Council and the Crime Commission supported the proposal, but the efforts failed when the bill (HB 1660) was voted down.
- 1999 – Special Committee on Court-Appointed Fees. For the next session of the General Assembly, the Special Committee proposed fee cap increases of 20% in misdemeanors (as previously requested), and 40% in Class II-VI felonies (from \$318 to \$445 and \$882 to \$1235) which would, at most, raise Virginia’s rates to the third lowest in the nation (not considering Mississippi’s reimbursement for expenses). The Special Committee requested and received information from The Spangenberg Group regarding court-appointed fees across the nation. The proposal was endorsed by the Judicial Council, the Virginia Bar Association, and the Virginia Trial Lawyers Association, and was submitted as part of the proposed Supreme Court budget for the FY 2000-2002 budgetary cycle. The Governor did not support the proposal. What passed was a 24% increase in all non-capital felony and misdemeanor cases for the second half of the biennium (beginning 7/1/01).
- 2000 – General Assembly: House Joint Resolution No. 178, directing the Virginia State Crime Commission to study existing methods for providing indigent defense, covering quality of representation, efficiency of service, and cost effectiveness. It was resolved that quality of representation should include the impact of public defender workloads and cost effectiveness should include the impact of the current fees on the quality of indigent defense.
- 2002 – General Assembly: Senate Joint Resolution 43 and House Joint Resolution 94 requested the Virginia State Crime Commission to study the potential use of an indigent defense commission to improve the quality and efficiency of Virginia’s indigent defense services. Under the resolutions, the Crime Commission is to create an indigent defense study committee to consider the establishment of a statewide commission and whether such a commission should have any of the following responsibilities: to determine the appropriate mechanism for delivering indigent defense

services within a given jurisdiction; to set training and other quality control standards for indigent defense counsel; to fund and provide specialized training for indigent defense counsel; to set standards for court-appointed attorneys; to set caseload standards; and to oversee Virginia's expenditure of funds paid to private indigent defense counsel and to expert witnesses. Findings and recommendations are to be reported to the Governor and the 2004 Session of the General Assembly.

### **III. Other Action**

- 1964 – Governor: The Governor commissioned a study to examine the need for a public defender system and to generally review indigent defense services in Virginia. A public defender system was recommended but not implemented.
- 1980 - Office of the Executive Secretary of the Supreme Court of Virginia (OES): OES asked The Spangenberg Group to provide specific information on various aspects of indigent defense systems in other states
- 1983 – State Bar: A letter to the Governor was sent laying out the developing crisis in indigent defense in Virginia. Reference is made to:
  - The refusal of attorneys to accept court-appointments
  - A corresponding difficulty of the courts in finding competent counsel to handle more complex indigent cases
  - Meritorious claims of ineffective assistance of counsel are felt to be on the rise for reasons beyond the normal increase in cases being tried
  - A concern for the potential for litigation by parties who feel that the schedule of maximum fees is inadequate
- 1984 – OES: *Court-Appointed Counsel Procedures and Guidelines Manual*
- 1986-1987 – Virginia Bar Association: The Defense of Indigents in Virginia recommends that court-appointed fees be increased, beginning with a 15% increase.
- 1989 – Virginia Bar Association: With encouragement from the subcommittee studying alternative indigent defense systems, the Virginia Bar Association (VBA) explored the feasibility of creating a capital resource center. President of VBA testified before the subcommittee that such a center is needed to ensure competent representation and to educate those handling capital cases in order to improve quality of representation. VBA applied for and received temporary funding from the Virginia Law Foundation, contingent upon federal funding, for a capital resource center with three or four full-time attorneys and at least one investigator.
- 1993 - Commission on Youth: The Commission on Youth studies the appointment of GAL in juvenile cases and recommends establishment of specific standards and training for lawyers who represent children in certain cases.

- 1997-1998 – Virginia State Bar: Ad Hoc Committee on Court-Appointed Counsel Fees steps up efforts before the legislature for fee increases. The Bar’s efforts are supported by the National Association of Criminal Defense Lawyers (NACDL) and by information supplied by The Spangenberg Group. A modest proposal was developed to raise misdemeanor fees from \$130 to \$172, felonies up to Class III from \$265 to \$345, and Class II felonies (20 years to life) to \$1,500. The Crime Commission, the Committee on District Courts, and the Judicial Counsel, endorsed the proposal. The 1998 General Assembly passed more modest increases. Fees in Class III to Class VI felonies were raised to \$305, in Class II felonies from \$735 to \$845, and in the second year of the biennium the same fees were raised by another 5%, to \$318 and \$882 respectively. During the legislative process, Co-Chair of the Senate Finance Committee commented that this was an issue he knew would need to be addressed in coming years, and other legislators suggested that the Bar plan to return to address the issue in the future.

## Appendix B: Tally of Interviewees by Judicial District and Type of Position

	4th & 7th: Norfolk & Newport News	10 <sup>th</sup> : Halifax & Mecklenburg	13th: Richmond	15th: Spotsylvania & Hanover	18th: Alexandria	19th: Fairfax	23rd & 24th: Roanoke/ Roanoke City & Lynchburg	26th & 31st: Rockingham & Prince William	27th & 29th: Russell/ Tazewell & Pulaski/ Montgomery	Total in Each Category
<b>Circuit Court Judges</b>	6	3	5	1	1	2	3	1	3	25
<b>General District Court Judges</b>	3	1	3	2	1	2	9	7	2	30
<b>Juvenile Judges</b>	6	2	5	0	2	2	2	1	3	23
<b>Clerks</b>	6	6	5	1	4	6	6	7	8	49
<b>Court Appointed Attorneys</b>	21	4	10	11	7	9	21	11	18	112
<b>Chief Public Defenders</b>	1	1	1	0	1	1	2	1	1	9
<b>Assistant Public Defenders</b>	7	5	9	5	10	8	8	3	1	56
<b>Commonwealth's Attorneys</b>	1	1	1	2	1	1	1	1	3	12
<b>Assistant Commonwealth's Attorneys</b>	1	0	0	0	0	2	3	0	1	7
<b>Appellate Public Defenders</b>	0	0	3	0	0	0	0	0	0	3
<b>Capital Public Defenders</b>	0	0	2	0	0	0	0	0	0	2
<b>Other</b>	5	1	7	1	10	9	5	2	2	42
<b>Total in Each Circuit</b>	<b>57</b>	<b>24</b>	<b>51</b>	<b>23</b>	<b>37</b>	<b>42</b>	<b>60</b>	<b>34</b>	<b>42</b>	<b>370</b>

“Clerks” includes Assistant and Deputy Clerks

“Other” includes Public Defender support staff, court support staff, probation officers, sheriffs, etc.

There were 27 court observations conducted and 5 jails visited.



**Appendix C**  
**ABA Letters to Site Work Interviewees**

Standing Committee on  
Legal Aid and Indigent  
Defendants  
321 N. Clark St.  
Chicago, Illinois 60610  
Fax: 312-988-5483  
[www.abalegalservices.org](http://www.abalegalservices.org)

August 22, 2003

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Diane Kutzko  
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**Committee Counsel**

Shubhangi M. Deoras  
312-988-5765  
[deorass@staff.abanet.org](mailto:deorass@staff.abanet.org)

Dear Colleague:

The ABA is undertaking a thorough examination of Virginia's indigent defense systems involving extensive on-site data collection, observation and analysis. The study promises to be one of the most comprehensive works of its kind and an invaluable tool in helping Virginia gauge the degree to which we deliver competent, effective legal representation to criminal defendants.

Assisting the ABA with the study is The Spangenberg Group, a nationally recognized research and consulting firm specializing in the improvement of indigent defense systems. In the coming months, you may be contacted by The Spangenberg Group to schedule an in-person interview so that the study may profit from your knowledge and perspective on this important matter. Your cooperation is absolutely essential to the success of the study and would be greatly appreciated.

If you have questions, please feel free to contact Shubhangi Deoras, Assistant Counsel for the ABA Standing Committee on Legal Aid and Indigent Defendants, at (312) 988-5765.

Thank you for your support of this important venture. The results of the study will be shared with all participants as soon as they are available.

Sincerely,



Robert J. Grey, Jr.  
President-Elect (2003-2004)  
American Bar Association

**Standing Committee on  
Legal Aid and Indigent  
Defendants**  
321 N. Clark St.  
Chicago, Illinois 60610  
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August 22, 2003

Dear Colleague:

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The American Bar Association (ABA) is pleased to announce that it is undertaking a comprehensive, statewide study to evaluate indigent defense in Virginia. We write to ask for your cooperation.

The purpose of this important study will be to gauge the degree to which the indigent defense system in Virginia delivers competent, effective legal representation. The study, which involves extensive on-site data collection and analysis, will be performed by The Spangenberg Group, a nationally recognized research and consulting firm specializing in the improvement of indigent defense systems.

Although other studies relating to indigent defense have been conducted in Virginia in the past, our intention is to make this study the most thorough and complete examination of the topic ever conducted in the Commonwealth. Moreover, the study will be completely independent.

We would appreciate greatly any assistance you may provide in response to requests from The Spangenberg Group for interviews as they engage in their data collection efforts. If you have any questions about the ABA study, please feel free to contact me at (317) 274-8241 or Shubhangi Deoras, ABA Assistant Counsel, at (312) 988-5765.

Thank you in advance for your invaluable support.

Sincerely,



Norman Lefstein  
Chair, Indigent Defense Advisory Group  
ABA Standing Committee on Legal Aid and Indigent Defendants

cc: L. Jonathan Ross, Chair, ABA Standing Committee on Legal Aid and Indigent Defendants  
Robert L. Spangenberg, President, The Spangenberg Group

# THE SPANGENBERG GROUP

## Rates of Compensation for Court Appointed Counsel in Non-Capital Felonies at Trial, July 2002

Excerpted from an August 2003 report prepared on behalf of the ABA Bar Information Program

### Appendix D Table of Assigned Counsel Compensation Rates in Non-Capital Felony Cases at Trial

State <sup>160</sup>	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
<b>Alabama</b>	\$70	\$90 <sup>161</sup>	Class A Felony: \$3,500 Class B Felony: \$2,500 Class C Felony: \$1,500	Yes		Code of Alabama § 15-12-21 <i>James W. May v. State</i> CR-92-350, AL Court of Criminal Appeals (Oct. 1992-93)
<b>Alaska</b>	\$50	\$60	Felony disposed following a trial - \$4,000; Felony disposed of following a plea of guilty or nolo contendere, or by dismissal - \$2,000	Yes		2 AA.C.60 Alaska Administrative Code
<b>Arizona</b>	Varies	Varies	Varies	Yes	Varies	AZ Rev. Stat. Ann. § 13- 4013(a) grants authority to local court
<b>Arkansas</b>	Non-capital homicide, A and Y felonies: between \$70-\$90, all other felonies: between \$60- \$80.		None			Arkansas Code Ann. § 16-87- 2121 authorizes the Public Defender Commission to set the rates
<b>California</b>	Varies: In San Francisco: \$77 for felonies, \$92 for serious or life felonies, with no maximum		None		Varies	California Penal Code § 98.7.2

<sup>160</sup> With the exception of New York data, the data in this table is current as of July 2002. New York information is current as of August 2003. This table updates a table originally produced in 1997 and most recently updated in 1999.

<sup>161</sup> Alabama statutory law sets compensation rates at \$40/hour for in court work and \$60/hour for out of court work. The language in the statute authorizing these rates states, "Counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in such defense to be approved in advance by the trial court." In *James W. May v. State*, the Alabama Court of Criminal Appeals ordered the state to pay an additional amount for overhead as "expenses reasonably incurred." The presumptive hourly overhead is \$30 an hour, bringing the typical hourly compensation to \$70 an hour out of court and \$90 an hour in court.

# THE SPANGENBERG GROUP

## Rates of Compensation for Court Appointed Counsel in Non-Capital Felonies at Trial, July 2002

Excerpted from an August 2003 report prepared on behalf of the ABA Bar Information Program

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court		In Court			
<b>Colorado</b>	Type A Felonies: \$51 (violent crimes) Type B Felonies: \$47 <sup>162</sup> (non-violent felonies)		Felony 1 (trial): \$15,000 Felony 1 (no trial): \$7,500 Felony 2 (trial): \$7,500 Felony 2 (no trial): \$3,750 Felony 3 (trial): \$5,000 Felony 3 (no trial): \$2,500	Yes		Rates set by Chief Justice Directive 97-01, per Colorado Revised Statutes § 21-2-105 <sup>163</sup>
<b>Connecticut</b>	\$45	\$65	If a case is not at trial an attorney may bill for 6 hours in court and 6 hours out of court per day.			Appointed Counsel rates are set by the State Public Defender and approved by the Public Defender Commission pursuant to § 51-293 C.G.S., established in accordance with C.G.S. sex. 51-291(12).
<b>Delaware</b>	\$50 <sup>164</sup>		None			Delaware Code Ann. 29 § 4605 grants authority to Supreme Court.
<b>D.C.</b>	\$50	\$50	\$2,450 <sup>165</sup>	Yes		D.C. Code Ann. § 11-2604(a)
<b>Florida</b>	Varies		Non-capital, non-life felonies: \$2,500 life felonies: \$3,000	Yes		Florida Statutes § 925.036 grants authority to set hourly rates to Chief judge or Senior judge of the circuit. <sup>166</sup>

<sup>162</sup> Travel time is paid at \$30 an hour with an additional \$0.28 paid per mile.

<sup>163</sup> In January of 1997 the Colorado Alternate Defense Counsel was established. This agency provides legal representation in cases presenting conflicts of interests for the State Public Defender system. Participating attorneys enter contracts with the Alternate Defense Counsel but receive appointments and payment like court-appointed counsel as opposed to contract counsel.

<sup>164</sup> The majority of the public defender conflict of interest cases are handled by contract counsel. The \$50 hourly rate applies only to attorneys not on contract.

<sup>165</sup> In addition to a per-case cap, no attorney may earn more than \$96,000 annually from court appointments in the District of Columbia.

<sup>166</sup> In 2003 all costs associated with indigent defense will be assumed by the state.

# THE SPANGENBERG GROUP

## Rates of Compensation for Court Appointed Counsel in Non-Capital Felonies at Trial, July 2002

Excerpted from an August 2003 report prepared on behalf of the ABA Bar Information Program

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
<b>Georgia</b>	\$45	\$60 <sup>167</sup>	None			Georgia Code Ann. § 17-12-5 grants authority to local court. The supreme court has established guidelines for the operation of local indigent defense systems to be adhered to as a condition for receiving GIDC funding.
<b>Hawaii</b>	\$40	\$60	\$3,000	Yes		H.R.S. § 802 5(b)
<b>Idaho</b>	Varies. Typical: \$50		None			Idaho Code § 19-860(b) grants authority to local judge.
<b>Illinois</b>	\$30	\$40	\$1,250	Yes		I.L.C.S. 5/113
<b>Indiana</b>	\$60 <sup>168</sup>		None			Ind. Code § 33-9-13-3 Establishes the Public Defender Commission. Rates are set by Indiana Public Defender Commission Standards for Indigent Defense Services in Non-Capital Cases.

<sup>167</sup> Hourly rates apply to the counties that meet GIDC Standards.

<sup>168</sup> Rate applies to those counties that meet Indiana Public Defender Commission Standards for Indigent Defense Services in Non-Capital Cases.

# THE SPANGENBERG GROUP

## Rates of Compensation for Court Appointed Counsel in Non-Capital Felonies at Trial, July 2002

Excerpted from an August 2003 report prepared on behalf of the ABA Bar Information Program

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
<b>Iowa</b>	Felony punishable by life w/out parole: \$60   \$60 Felony punishable by 25 years to life: \$55   \$55 Other: \$50   \$50		Felony punishable by life w/out parole: \$15,000 Felony punishable by 25 years to life: \$3,000 Felony punishable by 10 years: \$1,200 Felony punishable by 5 years: \$1,000	Yes		I.G.S. sets the rates. I.G.S. § 13.B.4 (3) grants the State Public Defender authority to contract with attorneys, and State Public Defender Admin. Rules set out fee limitations.
<b>Kansas</b>	\$50	\$50	\$5,000	Yes		K.S.A. 22-4501 et. seq. grants authority to Kansas Board of Indigents' Defense Services.
<b>Kentucky</b>	Non-violent felonies: \$40 Violent felonies subject to 85% parole eligibility: \$50		Non-Violent Felonies: \$1,800 Violent felonies subject to 85% parole eligibility: \$3,000	Yes		K.R.S. Ann. 31.170(4).
<b>Louisiana</b>	Varies; \$42 is typical rate.		None			L.A. Code Crim. Proc. § 15-144 et. seq.
<b>Maine</b>	\$50	\$50	Class A: \$2,500 Class B/C against a person: \$1,875 Class B/C against property: \$1,250	Yes		Maine Revised Statutes Ann. Title 15 § 810 grants authority to Superior Court.

# THE SPANGENBERG GROUP

## Rates of Compensation for Court Appointed Counsel in Non-Capital Felonies at Trial, July 2002

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<b>Maryland</b>	\$30	\$35	\$1,000	Yes		Ann. Code of Maryland Art. 27 § 6(d) grants Public Defender authority to promulgate administrative law.
<b>Massachusetts</b>	No distinction between in and out of court rates. murder cases: \$54; superior court felonies and youthful offender cases: \$39; all other criminal cases : \$30.		None			Massachusetts General Laws Ann. Chapter 211D § 11 grants authority to Committee for Public Counsel Services; must get legislative approval of rates.
<b>Michigan</b>	Varies widely		Varies			Michigan Compiled Laws Ann. § 775.16 grants authority to presiding judge.
<b>Minnesota</b>	\$50	\$50 <sup>169</sup>	None			No official authority; Public Defender establishes rates.
<b>Mississippi</b>	Varies		\$1,000 plus overhead expenses, which are presumptively set at \$25 an hour.	No		Miss. Code Ann. § 99-15-170 <i>Wilson v. State</i> , 574 So. 2d 1338 (1990).
<b>Missouri</b>	Rarely Used		None			Mo. Rev. Stat. § 600.017 grants authority to State Public Defender
<b>Montana</b>	Varies. Typically \$40-\$60 for both in court and out of court work.		None			Montana Code Ann. § 46-8-201(1) grants authority to local judge.

<sup>169</sup> The majority of the public defender conflict of interest cases are handled by contract counsel. Hourly rate applies only to attorneys not on contract.



# THE SPANGENBERG GROUP

## Rates of Compensation for Court Appointed Counsel in Non-Capital Felonies at Trial, July 2002

Excerpted from an August 2003 report prepared on behalf of the ABA Bar Information Program

<b>Nebraska</b>	Varies. Typical: \$60      \$60 Omaha: \$65      \$80		Typically there is no maximum, but Omaha uses \$12,000.	Yes		Nebraska Code 29-1804.12 grants authority to local judge.
<b>Nevada</b>	\$100		\$12,000 facing life without the possibility of parole; \$2,500 if facing less than life without parole.	Yes		N.R.S. 7.125
<b>New Hampshire</b>	\$60	\$60	\$3,000	Yes		Part 2 Art. 73A of New Hampshire Constitution grants authority to the State Supreme Court.
<b>New Jersey</b>	\$25	\$30	None			N.J.S.A. § 2A:158A-7 grants authority to the New Jersey Public Defender.
<b>New Mexico</b>	Rarely Used					New Mexico Statutes Ann. § 31-15-7(11) authorizes Chief Public Defender to formulate a fee schedule.
<b>New York</b> <sup>170</sup>	\$75		\$4,400	Yes		Article 18-B of the County Law § 722-b.
<b>North Carolina</b>	\$65		None			General Statutes of North Carolina § 7A-498.5 grants authority to the Office of Indigent Defense Services.

<sup>170</sup> Rates effective as of January 1, 2004.

# THE SPANGENBERG GROUP

## Rates of Compensation for Court Appointed Counsel in Non-Capital Felonies at Trial, July 2002

Excerpted from an August 2003 report prepared on behalf of the ABA Bar Information Program

<b>North Dakota</b>	Varies Typical: \$60-\$85		None			North Dakota Supreme Court's Advisory Commission on Indigent Defense.
<b>Ohio</b>	Varies. Public Defender Standards recommend: \$50 \$60		Public Defender Commission recommends: Aggravated Murder: \$8,000 (1 attorney), \$10,000 (2 attorneys); Murder and Felony w/ possibility of life sentence/repeat Violent Offender/Major Drug Offender: \$5,000; Felonies (degrees 1-3): \$3,000; Felonies (degrees 4&5): \$2,500.	Yes		Ohio Revised Code Ann. § 120.33 grants local board of county commissioners authority to set rate after soliciting local bar association for proposed rate schedule. <sup>171</sup>
<b>Oklahoma</b>	\$40	\$60 <sup>172</sup>	\$3,500 <sup>173</sup>	Yes		22 O.S. § 1355.8 G2 (OSCN 2001).
<b>Oregon</b>	\$40	\$40	None			O.R.S. § 151.430(5) grants authority to State Court Administrator, O.R.S. ann. 135.055
<b>Pennsylvania</b>	Varies from \$40-\$75 per hour. Philadelphia County pays on a per diem basis.		Varies		Varies	Pennsylvania Statutes Ann. Article 13A § 9960.7 grants authority to local judge.
<b>Rhode Island</b>	If potential sentence is greater than 10 years: \$50 \$50 If potential sentence is less		If potential sentence is more than 10 years: \$5,000. If potential sentence is less than 10	Yes		General Laws of the State of RI sec. 8-15-2 vests authority w/ Chief

<sup>171</sup> Ohio Revised Code Annotated § 120.04(7) authorizes State Public Defender to set rate at which Ohio Public Defender Commission will reimburse counties.

<sup>172</sup> In cases not under contract with Oklahoma Indigent Defense System and out side of Tulsa and Oklahoma counties.

<sup>173</sup> *Ibid.*

# THE SPANGENBERG GROUP

## Rates of Compensation for Court Appointed Counsel in Non-Capital Felonies at Trial, July 2002

Excerpted from an August 2003 report prepared on behalf of the ABA Bar Information Program

	than 10 years: \$35	\$35	years: \$2,500			Justice. Supreme Court Executive Order No. 95-01.
<b>South Carolina</b>	\$40	\$60	\$3,5000	Yes		Code of Law of S.C. Ann. § 17-3- 50.
<b>South Dakota</b>	\$67	\$67	None			S.D.C.L. § 23A- 40-8. <sup>174</sup>
<b>Tennessee</b>	\$40	\$50	\$1,000	Up to \$3,000 <sup>175</sup>		Supreme Court Rule 13
<b>Texas</b>	Varies from \$50-\$125 per hour.		Varies Widely			Texas Statutes Ann. Art. 26.05 grants authority to local judge. <sup>176</sup>
<b>Utah</b>	Varies					Utah Code Ann. § 72-32-3(3) grants authority to district court.
<b>Vermont</b>	\$50	\$50	Felony involving life in prison; \$25,000 Major felony: \$5,000 Minor felony: \$2,000	Yes		13 V.S.A. § 5205(a) and administrative order of the Vermont Supreme Court.
<b>Virginia</b>	\$90	\$90	\$1,235 to defend charges punishable for more than 20 years; \$445 to defend other felony charges. <sup>177</sup>	No		Virginia Supreme Court sets recommended hourly rate. Virginia General Assembly sets per-charge maximums. VA Code Ann. § 19.2-163.

<sup>174</sup> The source of authority for this rate is a Supreme Court rule. The South Dakota Supreme Court rules are incorporated into the state code.

<sup>175</sup> The \$3,000 maximum may be waived in a homicide case if the Chief Justice finds that extraordinary circumstances exist and the failure to waive the maximum would result in undue hardship.

<sup>176</sup> The Texas Task Force on Indigent Defense, created in 2001, will establish standards for the operation of local indigent defense systems that counties will be required to follow. Among the standards is expected to be a minimum rate of compensation for court appointed counsel.

<sup>177</sup> Though by statute the per case maximums are set at \$1,235 and \$445, the Virginia Legislature has not appropriated funds sufficient to pay court appointed counsel at this level. Thus the per case maximums are, in practice, \$1,096 for felonies punishable by more than 20 years and \$395 for felonies punishable by less than 20 years.

# **THE SPANGENBERG GROUP**

## **Rates of Compensation for Court Appointed Counsel in Non-Capital Felonies at Trial, July 2002**

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<b>Washington</b>	Varies from \$40-\$80 Pierce County: \$40-\$50 Lincoln County: \$40 Stevens County: \$70		Varies, e.g., Pierce County: \$550-\$1,000 for cases that don't go to trial, \$1,500-\$5,000 for trials.	Varies	Varies	Revised Code of Washington Ann. § 36.26.090 grants authority to court.
<b>West Virginia</b>	\$45	\$65	\$3,000	Yes		West Virginia Code Ann. § 29- 21-13a.
<b>Wisconsin</b>	\$40 plus \$25 per hour for travel	\$40	None			Wisconsin Statutes Ann. § 977.08(4m).
<b>Wyoming</b>	\$25-\$50		None			Wyoming Rules of Criminal Procedure Rule 44(e).
<b>U.S. Government</b>	\$90	\$90	\$5,200	Yes		18 U.S.C. § 3006 A(d).