

Progress Report

Virginia's Public Defense System

March 2003

Supplementary Information

1 The public defense function including the selection, funding and payment of defense counsel is independent.

The Public Defender Commission sets policy for the public defender offices and is charged with hiring the public defender for each jurisdiction and the capital defender for each region. In addition, the commission sets the salaries of all commission employees. *Virginia Code § 19.2-163.2*. Pursuant to ABA and NLADA national standards, the primary function of a Defender Commission is to support and protect the independence of the defense services program. Both sets of standards prohibit judges or prosecutors from membership on a Defender Commission. In addition, the NLADA standards specify that no single branch of government should have a majority of votes on the Commission. Measured by these standards, Virginia's Public Defender Commission falls short.

All Public Defender Commission members are appointed by a single branch of government, indeed a single person: the Speaker of the House of Delegates, after consultation with the chairs of the House and Senate Courts of Justice Committees. *Virginia Code § 19.2-163.1*. In addition, a third of the commission members are judges. *Id.* Pursuant to the standards, the independence of the commission would be enhanced by a statutory expansion of the appointing authority beyond a single branch of government and to include representatives from various statewide bar associations or other justice system stake-holders. Legislation should also eliminate the judicial members of the commission.

Court appointed lawyers are totally dependent upon local judges for their appointments and for approving their fee requests. Thus, there is an incentive for attorneys to litigate in a fashion that does not upset or offend the trial bench. Additionally, payment for appellate work is at the complete discretion of the court. *House Document No. 32 (2002)* at 8.

2 Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

Prior to 1972, all of the state's indigent defense responsibilities were carried out by the private bar through court appointments. *Virginia Code § 19.2-163*. In 1972, legislation established the Public Defender Commission and authorized the creation of three pilot offices. Since the establishment of those offices, the Public Defender system has grown

office by office through the efforts of individual legislators mostly responding to the desires of the local bench and bar, with no objective criteria to guide their decisions. *House Document No. 15/Senate Document No. 11* (1986) at 4 (“In 1978, the General Assembly authorized the creation of up to five pilot programs . . . The [Public Defender] Commission expressed interest in establishing the fifth program in Alexandria or Richmond. However, because of local opposition to the program in each of these jurisdictions, a fifth office has not yet been funded.”).

Numerous reports to the legislature have found the Public Defender Commission to be an agency that provides cost effective, high quality services to the people of Virginia.ⁱ However, after thirty years, the Public Defender System consists of twenty-one offices covering forty-eight jurisdictions containing about half of Virginia’s population, as well as four regional capital defender offices.ⁱⁱ *Virginia Code* § 19.2-163.2

3 Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after client’s arrest, detention, or request for counsel.

An indigent is defined as a person who requests legal counsel but is unable to provide for full payment of a lawyer’s fee without causing undue financial hardship to himself or his familyⁱⁱⁱ. In Virginia, to be eligible for appointed counsel either through the Public Defender’s Office or the court appointed system the adult must be charged with an offense, which may be punishable by incarceration, or may be subject to the loss of parental rights, indicate to the court that s/he is indigent, wants a court appointed attorney and does not want to waive his/her right to counsel. The defendant must then fill out a form requesting counsel and a financial statement and submit it to the court.^{iv} The court then determines whether or not the defendant is eligible for public defense services.

In Virginia there are three ways to determine whether a defendant is eligible for appointment of counsel: *presumption of indigence*; *financial resources calculation*; and *exceptional circumstances calculation*.^v An adult is presumed eligible if s/he receives state or federally administered public assistance such as food stamps, Medicaid and Supplementary Security Income. If the defendant is not receiving public assistance the court will examine the defendant’s financial resources with consideration given to net income, assets, and exceptional expenses. The court may also in exceptional circumstances and where the ends of justice so require, appoint an attorney to represent the defendant.^{vi}

For juveniles the indigency determination applies to the child’s parents. Virginia does not presume indigency for a child although studies indicate that in practice, the courts routinely find juveniles indigent almost without exception when considering their financial resources apart from those of their parents or guardians.^{vii}

The Virginia Crime Commission recently reported that the number of indigent clients served by Court Appointed Counsel has increased by 40% and that caseload for public defenders has also increased.^{viii}

A direct consequence of the late appointment of counsel in delinquency cases is the loss of time and time restrictions imposed on defense counsel. Many days pass following

arrest before defense counsel is even permitted to visit with a client in detention and many months may pass before counsel can meet with a client who is not detained. Interviews with youth in detention as well as detention personnel revealed that defense counsel rarely contact clients. Geographical limitations further complicate client contact for juvenile defenders in rural areas. Court appointed counsel are often expected to have a trial on the day they are appointed meeting with a client in a crowded hallway in the courthouse. Court appointed counsel has little incentive to meet with a client when paid only \$112.00 for the entire case. Court personnel felt that public defenders have crushing caseloads, late appointments only a few days before trial and do not have the time to prepare a child's case. Overall, interviewees reported that lawyers have little client contact.

4 Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

A direct result of high caseloads and low mandatory fee caps is that defense attorneys are often unable to meet with clients in a timely fashion. *Virginia Assessment (2002)* at 24-26. Although the Public Defender Commission has adopted an internal regulation requiring that counsel meet with incarcerated clients within 48 hours of appointment, the ability of attorneys to abide by this rule is not consistent across the state. Because the Commonwealth lacks a statewide administrative structure to oversee court appointed attorneys, there is no requirement that they meet with incarcerated clients in a timely fashion. In addition to timing issues, both public defenders and court appointed attorneys have difficulty meeting clients with the frequency required to develop the attorney-client relationship and prepare their cases adequately. *Virginia Assessment (2002)* at 25.

Adding to difficulties in meeting with incarcerated clients is the lack of adequate facilities for attorneys to meet with their clients in an expeditious fashion in many jails, detention centers, and courthouses.

5 Defense counsel's workload is controlled to permit the rendering of quality representation.

There are no fixed policies in place at the Public Defender Commission as to the number of cases that an Assistant Public Defender can be expected to handle at any given time. *House Document No. 32, (2002)* at. 4-5 & 11-12; *House Document No. 44 (1990)* at ii-iv.

High juvenile caseloads prevent juvenile defenders in Virginia from meeting with clients and preparing cases. Juvenile public defenders are unable to effectively protect the rights of children and youth in Virginia. *Virginia Assessment (2002)* at 20-21
Court appointed counsel is not required to report total caseload to anyone. They only report the number of court appointed cases they handle, *House Document 32, (2002)* at 18, i.e. if 25% of caseload is court appointed work -- how much other retained work takes time away from representing indigents?

However, the high yearly fees paid to some court-appointed lawyers, combined with the very low caps on individual cases, indicate that they must be handling huge numbers of cases. Generally, all juvenile defenders close cases after a disposition hearing and do not file appeals in juvenile cases. One reason given for lack of appeals from the J&DR

Court to the Circuit Court is “overwhelming caseloads.” *Virginia Assessment (2002)* at 28.

6 Defense counsel’s ability, training, and experience match the complexity of the case.

The Public Defender within each office is responsible for assuring that the assistant assigned to the case has the necessary ability, training, and experience. *House Document 32 (2002)* at 11. Some public defenders, however, whether responding to staff shortages or an office culture that dictates that every attorney should be able to handle any case, assign attorneys lacking in training and experience to serious felonies.

Court appointed lawyers are assigned by individual trial judges who are responsible for assuring that they assign attorneys that are qualified to handle the charges. *House Document 32 (2002)* at 11.

7 The same attorney continuously represents the client until completion of the case.

Most public defender offices practice vertical representation, assigning a single attorney from intake through disposition. In some offices, special appellate attorneys take all cases on appeal. Virginia's payment schedule creates a disincentive for a trial attorney who is also qualified to perform appellate counsel to accept appointments to continue representation through appeal. The ad hoc nature of how payment is authorized by the appellate court can result in statewide inequities for the fees awarded. *House Document No. 32 (2002)* at 8. Thus, in public defender jurisdictions it is not uncommon private counsel to seek to withdraw at the end of the trial phase of a case and seek to have the public defender office appointed on appeal.

8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

Compensation:

Commonwealth’s Attorneys: State salaries are supplemented by the locality in many jurisdictions. In FY02, localities supplemented state salaries by more than \$5.2 million. In addition, localities and grants provided over \$8.8 million to Commonwealth’s Attorneys’ offices to create additional positions above and beyond those positions funded by the Commonwealth. The executive branch and the General Assembly created the “Career Prosecutor” program with enhanced salaries in order to retain experienced prosecutors. Additionally, federal loans such as the Perkins student loans can be forgiven for Commonwealth’s Attorneys.

Public Defenders: Salaries are set by the state to be comparable to Commonwealth’s Attorneys’ state salaries, but with no local supplements or grants, no Career Defender

Program, and no loan forgiveness. As a result, there are significant differences in the salaries of Commonwealth's Attorneys and Public Defenders with comparable experience.

Court Appointed Lawyers: While Virginia's current maximum hourly rate for court-appointed counsel arguably is reasonable (\$90/hour), it is subject to the lowest unwaivable salary caps in the country. "Even when an attorney in a particular case performs an exceptional service, the court cannot exceed the statutory limit allowed for that type of case. If the court allows more than the statutory limit then the Supreme Court is mandated to reduce the voucher to the statutory limit." Virginia Supreme Court, Court-Appointed Counsel – Public Defender Procedure and Guidelines Manual (2002) at 24. Because the caps cannot be exceeded under any circumstances, court appointed counsel may work beyond the hours that will be paid under the caps. Court appointed lawyers may be forced to work for "free" and actually lose money by continuing to have to pay office overhead without adequate income. *House Document 32* (2002) at 7-9; *House Document 46* (1997) at 4; *Senate Document 19* (1995) at 14; *ABA Assessment* (2002) at 19-20; *House Document 48* (1991) at 9-10.

The Virginia Code sets the caps for court appointed fees. *Virginia Code § 19.2-163*. However, even those incredibly low caps are not fully funded by the General Assembly resulting in even lower caps in reality. *House Documents 32* (2002) p. 7-8; *Virginia Code § 19.2-163 (Editor's Note)*; Compare Virginia Code §19.2-163 with Virginia Supreme Court, Court-Appointed Counsel – Public Defender Procedure and Guidelines Manual (2002) p. 48 (*Supreme Court's Chart of Allowances setting lower maximum fees for court-appointed counsel than those found in the Code*).

Resources:

The resources available to Commonwealth's Attorneys include the local police, FBI, and state crime labs. All of these resources are available without notice to defense counsel or permission from the court.

All Public Defenders and PD offices have access to an in-house investigator and some offices have an in-house sentencing advocate. However, they must rely on the trial court to approve funds for all expert assistance (for ex., psychologists) and forensic testing.

Court appointed lawyers must rely on the trial court to approve funds for any investigative resources, expert witnesses and forensic testing.

For both Public Defenders and Court appointed lawyers they have no right to choose their own expert witness or other resource, but must accept the court's appointment. *Funk v. Commonwealth*, 8 Va. App. 91 (1989)

In order to receive expert assistance, an Public Defender or court appointed lawyer (on behalf of an indigent defendant) must demonstrate a "particularized need" to the trial court. *Husske v. Commonwealth*, 252 Va. 203 (1996); *Barnebei v. Commonwealth*, 252 Va. 161 (1996). This request or showing must occur in open court, with the Commonwealth's Attorney being given an opportunity to hear the evidence and argue against the request. No right to an ex-parte proceeding, *Ramdass v. Commonwealth*, 246 Va. 413 (1993)

Expansion:

Commonwealth's Attorneys/Law Enforcement: Over the years, police and prosecutor's offices have expanded through grants, and locally funded positions. The State Compensation Board uses staffing standards to determine how many positions the state will fund, ignoring any additional positions that are funded by localities or grants.

Public Defenders: There are minimal, intermittent and arbitrary increases in office staffing without regard to national staffing standards or the Commonwealth's own standards developed by *Virginia Department of Planning and Budget. House Document 44* (1990). In its FY'02 budget request, the Public Defender Commission identified a staffing shortage of 50 position needed to meet the Department of Planning and Budget standards. The shortage is even greater, because it does not include an allowance for appellate attorneys. Public defenders handle their own appeals, while the Attorney General handles appeals for prosecutors that the appellate courts accept for briefing and argument. Funding for these additional positions (not including appellate attorneys) amounted to nearly \$3 million in FY'02. The Virginia General Assembly provided no funding for FY'02 or FY'03 to fill this funding gap and adequately staff Virginia public defender offices.

9 Defense counsel is provided with and required to attend continuing legal education.

The Commonwealth's Attorneys Services Council funds five multi-day trainings per year: including the Homicide Training Program, Annual Conference, Executive Program, Spring Institute, TOPGUN Training Program, Trial Advocacy Institute. All of these training sessions are specially tailored to the needs of Commonwealth's Attorneys. In addition, CA's are eligible for free trial advocacy skills training through federally-funded National District Attorney Institute in South Carolina

The Public Defender Commission (PDC) provides funding for Public Defender training that includes minimum general training to meet state-mandated attorney continuing legal education requirements (12 hour per year, including 2 hours of ethics). The PDC also holds a one-day CLE seminar per year specially tailored to Public Defenders. Occasionally funds are available through individual office budget savings to pay for Public Defenders to attend 3rd - party defender-specific training.

Court-Appointed are required only to complete general training to meet state-mandated continuing legal education requirements. There is no requirement for specialized criminal defense training for court appointed lawyers.

10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

Public defenders receive yearly performance evaluations. Not based on standards, other than those set by local Public Defenders. For court appointed lawyers there are no qualifications, standards or performance reviews. Local judges set any requirements for court-appointments. *House Documents 32* (2002) at 11-14, 17.

Capital defense counsel must qualify under standards promulgated jointly by Virginia Public Defender Commission, Virginia State Bar, and Virginia Supreme Court. *Virginia Code* § 19.1-163.8. Qualifications are objective and self-reported, based on attorney's previous trial experience and attendance at specialized CLE training. There is no mechanism or resources for examination of the quality of a lawyer's capital defense skills. There is also no way to evaluate performance, or to remove poor quality lawyers from the list of qualified attorneys, so long as they meet the objective, experiential and training criteria.

ⁱ Indigent Defense, Report of the Virginia State Crime Commission (House Document No. 32 2002)
Cost Effectiveness of Public Defender Offices, Report of the Virginia State Crime Commission (House Document No. 46 1997)

An Examination of the Current System of Compensating Court Appointed Counsel and Alternative Methods of Providing Adequate Representation at a Reasonable Cost, Report of the Committee on District Courts (Senate Document No. 19 1995)

Alternative Indigent Defense Systems, Final Report of GA Joint Subcommittee (House Document No. 48 1991)

Indigent Defense Systems in Virginia, Report of the Department of Planning and Budget (House Document No. 44 1990) Virginia's Public Defender Program and Alternative Indigent Defense Systems, Joint Report of Two GA Joint Subcommittees (House Document No. 15/Senate Document No. 11 (1986). Numerous other reports on indigent defense and the public defender system were undertaken during the 1980s by the General Assembly, The Supreme Court of Virginia's Office of the Executive Secretary, the Virginia Bar Association, and the Spangenburg Group, a private consulting firm specializing in indigent defense issues. For a more complete listing of these reports, see An Examination of the Current System of Compensating Court Appointed Counsel and Alternative Methods of Providing Adequate Representation at a Reasonable Cost, Report of the Committee on District Courts at 20-21 (Senate Document No. 19 1995).

ⁱⁱ In 1983, the Judicial Council of Virginia published its 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)." The recently retired Chief Justice of Virginia echoed the earlier report in his final State of the Judiciary Message. "I believe that indigent representation should be provided by appropriately staffed and funded public defender offices throughout the state. Court-appointed counsel would continue to handle those cases in which the public defender's office has a conflict of interest or when workloads preclude the office from accepting assignments." 2001 State of the Judiciary Report at xvi (2002).

ⁱⁱⁱ An Examination of the Current System of Compensating Court Appointed Counsel and Alternative Methods of Providing Adequate Representation at a Reasonable Cost, Report of the Committee on District Courts at 6 (Senate Document No. 19 1995)

^{iv} An Examination of the Current System of Compensating Court Appointed Counsel and Alternative Methods of Providing Adequate Representation at a Reasonable Cost, Report of the Committee on District Courts at 6-8 (Senate Document No. 19 1995); Cost Effectiveness of Public Defender Offices, Report of the Virginia State Crime Commission at 4 (House Document No. 46 1997)

^v Cost Effectiveness of Public Defender Offices, Report of the Virginia State Crime Commission at 8 (House Document No. 46 1997)

^{vi} An Examination of the Current System of Compensating Court Appointed Counsel and Alternative Methods of Providing Adequate Representation at a Reasonable Cost, Report of the Committee on District Courts at 9 (Senate Document No. 19 1995)

^{vii} An Examination of the Current System of Compensating Court Appointed Counsel and Alternative Methods of Providing Adequate Representation at a Reasonable Cost, Report of the Committee on District Courts at 7-10 (Senate Document No. 19 1995)

^{viii} Indigent Defense, Report of the Virginia State Crime Commission at 14 (House Document No. 32 2002)