

**REPORT OF THE  
COMMITTEE ON DISTRICT COURTS ON**

**AN EXAMINATION OF THE CURRENT SYSTEM OF  
COMPENSATING COURT APPOINTED COUNSEL AND  
ALTERNATIVE METHODS OF PROVIDING ADEQUATE  
REPRESENTATION AT A REASONABLE COST**

**TO THE GOVERNOR AND  
THE GENERAL ASSEMBLY OF VIRGINIA**



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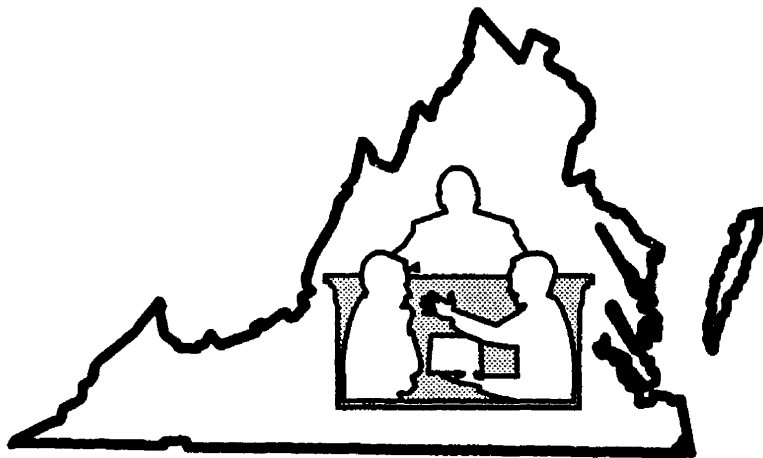
**COMMONWEALTH OF VIRGINIA  
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1995**



# REPORT OF THE COMMITTEE ON DISTRICT COURTS

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***An Examination of the Current System of  
Compensating Court Appointed Counsel and  
Alternative Methods of Providing Adequate  
Representation at a Reasonable Cost***



*Prepared by*

*Supreme Court of Virginia  
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## Table of Contents

<b>Introduction .....</b>	<b>1</b>
<b>Background .....</b>	<b>1</b>
<b>Appointment of Counsel for Indigents in Virginia .....</b>	<b>6</b>
Introduction .....	6
Procedures for Determining Eligibility of An Adult for Court Appointed Counsel.....	7
Financial Eligibility Guidelines for Court Appointed Counsel.....	8
Procedures for Determining Eligibility of a Juvenile for Court Appointed Counsel.....	10
Procedures for Appointment of Counsel .....	10
Appointment of Counsel in Capital Cases.....	11
<b>Virginia’s Current Fee Schedule for Court Appointed Counsel .....</b>	<b>11</b>
<b>Studies of Indigent Defense: A Historical Summary .....</b>	<b>16</b>
<b>Review of Indigent Defense Costs and Court Appointed Counsel Fees.....</b>	<b>24</b>
<b>Projections of Court Appointed Counsel Costs .....</b>	<b>27</b>
<b>National Trends and Issues in Indigent Defense Inadequate Funding and Increased Caseloads.....</b>	<b>34</b>
Alternative Methods of Indigent Defense .....	35
Caseload Growth .....	38
<b>What Can Be Done to Address Caseload and Funding Problems?.....</b>	<b>39</b>
Developing Caseload/Workload Standards .....	39
Finding Alternative Sources .....	40
Methods to Contain the Cost of the Criminal Justice System.....	41
Reducing the Number of Criminal Cases and Their Costs.....	41
<b>Summary and Recommendations .....</b>	<b>42</b>
<b>Appendix: Rates of Compensation for Assigned Counsel by State .....</b>	<b>A1</b>
<b>Senate Joint Resolution No. 186 .....</b>	<b>A5</b>

## List of Tables and Displays

Display 1	Localities in Virginia Served by a Public Defender.....	4
Table 1	Number of Charges Represented by Court Appointed Counsel and Public Defenders in Areas Served by Public Defenders, Fiscal Year 1993-94 .....	5
Table 2	Number of Charges Represented by Public Defenders and Court Appointed Counsel, Fiscal Year 1993-94.....	5
Table 3	Virginia Court Appointed Counsel Rate Schedule, 1994 Maximum Allowable Fees by Category of Case.....	14
Table 4	Virginia Court Appointed Counsel Maximum Fees.....	15
	Significant Events in the Study of Indigent Defense Issues in Virginia .....	20
	Summary Comparison of Court Appointed Counsel Fees in Virginia and Other Areas, 1982-1994.....	21
Table 5	Indigent Defense Costs in Virginia Fiscal Years 1985-86 Thru 1993-94.....	26
Table 6	Criminal Fund Activity: Defendants and Charges Represented by Court Appointed Counsel.....	27
Table 7	Court Appointed Counsel Costs in J&DR District Courts, Fiscal Year 1993-94 .....	27
Table 8	Caseload Projections for the Criminal Fund.....	28
Table 9	Projected Court Appointed Counsel Costs: Current Fees .....	29
Table 10	Projected Court Appointed Counsel Costs: 15% Increase in Fees.....	30
Table 11	Projected Court Appointed Counsel Costs: 20% Increase in Fees.....	31
Table 12	Court Appointed Counsel Costs: Summary of Projections .....	32
Table 13	Court Appointed Counsel Costs in J&DR District Courts: Summary of Projections .....	32
Table 14	Court Appointed Counsel in J&DR District Courts: No Increase in Fees .....	33
Table 15	Court Appointed Counsel Costs in J&DR District Courts: 15% Increase in Fees .....	33
Table 16	Court Appointed Counsel Costs in J&DR District Courts: 20% Increase in Fees.....	34
	Alternative Methods of Providing Indigent Defense Services.....	36

## **Introduction**

Adequate provision of indigent defense services funding has been a perennial issue for the legislative and judicial branches for many years. No fewer than ten studies have been undertaken since 1980 to examine both the costs involved and concerns about the quality of representation provided. Most recently, Senate Joint Resolution No. 186 was adopted by the 1994 General Assembly. The resolution, a copy of which is included in the appendix, requested that the Committee on District Courts (CDC) study court appointed counsel fees in the juvenile and domestic relations district courts and, in particular, to examine the problems inherent in the current system of compensating court appointed counsel for children and alternative methods of providing adequate representation at a reasonable cost. In the spring of 1994, the Committee expanded the scope of the study to examine the fees paid to court appointed counsel in all cases. This report is in response to the General Assembly's request.

## **Background**

As mentioned above, the General Assembly and judiciary have long recognized the importance of providing effective representation to indigent defendants and have studied alternative methods of providing such service. More specifically, policy-makers have explored various aspects of the problem, with primary focus on five issues: (1) how to adequately fund indigent defense services and appropriately compensate court appointed counsel to ensure quality representation; (2) the extent to which the Commonwealth should rely on court-appointed counsel or public defenders to provide such representation; (3) which localities should be authorized to establish public defender offices and under what circumstances; (4) how the Commonwealth can continue to ensure that indigent defendants who are sentenced to death receive effective assistance of counsel, and (5) what alternative methods exist for providing indigent defense services.

These are difficult issues; they go to the heart of ensuring that our criminal justice system provides the effective assistance of counsel that the Sixth Amendment, the Fourteenth Amendment and the Code of Virginia demand. One of the most important

issues in providing effective indigent defense services continues to be adequate compensation to the private bar when appointed by the court to represent indigent defendants. The costs of providing court appointed counsel services in criminal cases have grown dramatically in the last decade due primarily to increases in caseload. The maximum allowable fees, however, paid have remained relatively stable. The most recent increase in fees occurred in 1989 when the General Assembly passed a 15% increase in the maximum allowable amount to be paid in a single case. Despite that increase, Virginia remains near the bottom among all states in the fees paid to court appointed counsel. The primary goal of this report is to review the fee schedule in Virginia and to examine the financial impact of increasing maximum allowable rates to levels commensurate with the national average.

Legal representation to indigent defendants is provided in two ways. The first method is for the court to appoint private counsel to represent the defendant (the "court-appointed counsel" system). Fees of court-appointed counsel are paid primarily from state funds, subject to certain statutory limits. (Va. Code § § 19.2-157, 19.2-159, 19.2-163). However, where charges involve local ordinances, the localities pay for counsel for indigents. In the early 1970s, the General Assembly authorized an alternative method of providing such assistance -- state-funded "public defender offices" administered by a state Public Defender Commission. (Va. Code § § 19.2-163.1 to -163.6). The General Assembly first authorized a pilot program of three public defender offices in the early 1970s; that number was expanded to five in the late 1970s. Following a comprehensive study of cost containment of indigent defense expenditures, the Judicial Council recommended expansion of public defender offices in those circuits where they would be cost effective. In 1986, one additional office was established. This was followed by three in 1987, and two more in 1988, bringing the total to 11 authorized and established public defender offices. With the addition of several new offices in 1992, the total number of public defender offices reached 19 serving 44 localities. See Display 1.

In their 1983-1986 strategic plan for the judiciary, the Judicial Council supported legislation to proceed toward statewide implementation of a mixed public defender

system. Under the proposal, the primary responsibility for handling indigent cases would have gone to salaried public defenders with the private bar handling conflict and overflow cases. Self-executing legislation would have allowed funding of new public defender offices through direct transfer of monies from the Criminal Fund to the Public Defender Commission. Such transfers would not have exceeded 75% of the Criminal Fund budget for the circuit where the offices were to be established.

With regard to the appointment of court appointed counsel, § 19.2-159 provides, in part, that

“Except in jurisdictions having a public defender..., counsel appointed by the court for representation of the accused shall be selected by a fair system of rotation among members of the bar practicing before the court whose practice regularly includes representation of persons accused of crimes and who have indicated their willingness to accept such appointments.”<sup>1</sup>

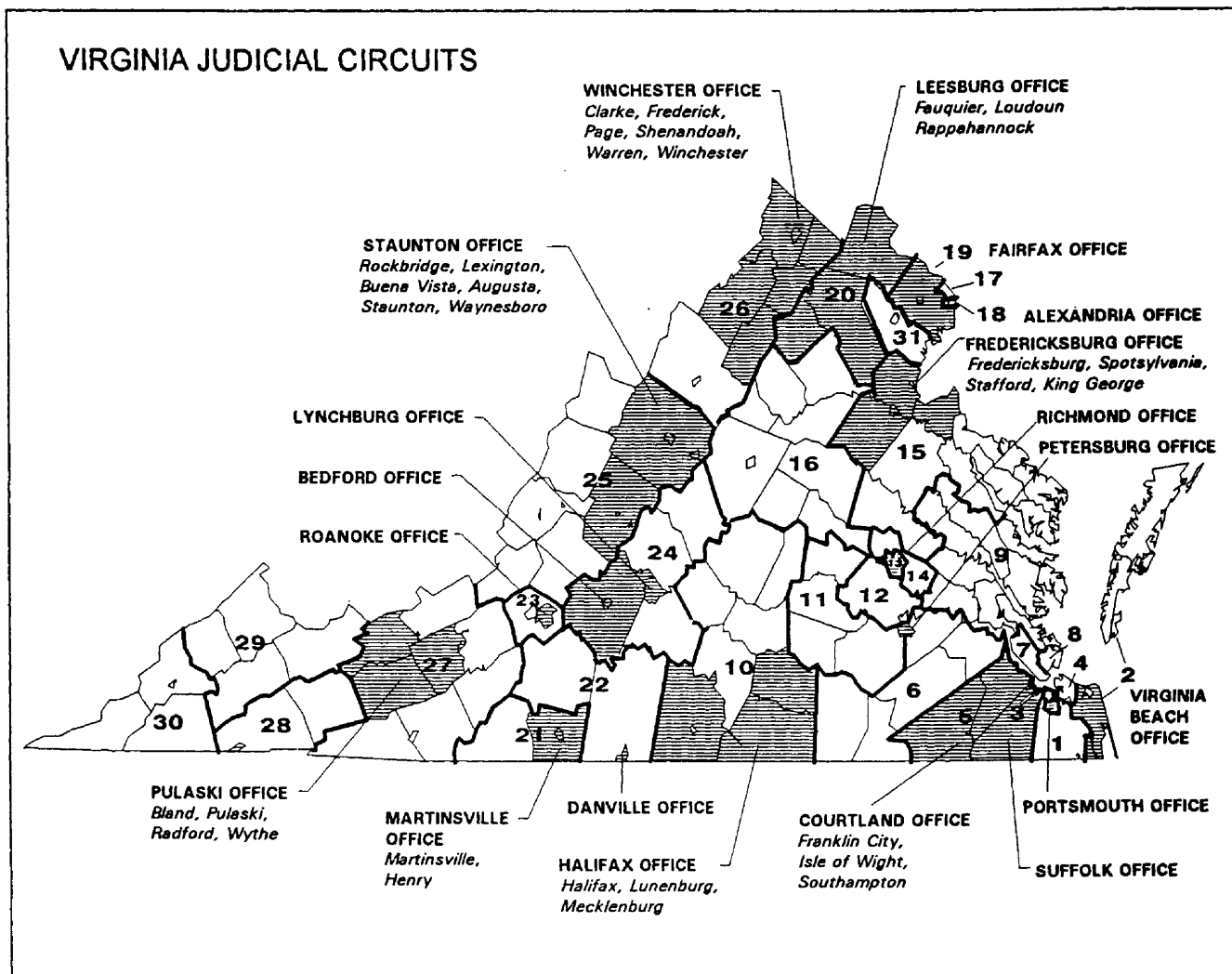
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<sup>1</sup> In order to provide Circuit Court and District Court judges and clerks, and magistrates, with guidance in implementing § 19.2-159, the Office of the Executive Secretary of the Supreme Court of Virginia first published in 1984, and has updated annually since that time, a procedures and guidelines manual: *Court-Appointed Counsel Procedures and Guidelines Manual*. The manual contains guidelines for determining indigency and suggested general procedures for appointing counsel and maintaining a rotation list of eligible counsel.



Display 1

Localities in Virginia Served by a Public Defender



**Table 1**  
**Number of Charges Represented by Court Appointed Counsel & Public Defenders**  
**In Areas Served By Public Defenders, Fiscal Year 1993-94**

Areas Served by Public Defender (Office Location)	Court Appointed Counsel		Public Defenders		Total	
	Charges	Percent of Total	Charges	Percent of Total	Charges	Percent of Total
Staunton	936	9.9%	8,490	90.1%	9,426	100.0%
Virginia Beach	1,995	18.2%	8,970	81.8%	10,965	100.0%
Roanoke City	2,716	28.7%	6,746	71.3%	9,462	100.0%
Petersburg	1,556	26.0%	4,421	74.0%	5,977	100.0%
Portsmouth	3,423	36.4%	5,986	63.6%	9,409	100.0%
Richmond	7,551	33.9%	14,711	66.1%	22,262	100.0%
Alexandria	1,907	25.0%	5,725	75.0%	7,632	100.0%
Fairfax	6,424	47.3%	7,170	52.7%	13,594	100.0%
Winchester	999	22.5%	3,449	77.5%	4,448	100.0%
Pulaski	1,242	37.5%	2,072	62.5%	3,314	100.0%
Leesburg	1,285	34.4%	2,447	65.6%	3,732	100.0%
Suffolk	396	16.5%	2,011	83.5%	2,407	100.0%
Bedford	225	16.8%	1,111	83.2%	1,336	100.0%
Courtland	360	20.9%	1,362	79.1%	1,722	100.0%
Danville	259	13.4%	1,678	86.6%	1,937	100.0%
Fredericksburg	1,793	23.9%	5,696	76.1%	7,489	100.0%
Halifax	556	21.1%	2,079	78.9%	2,635	100.0%
Lynchburg	1,109	23.2%	3,671	76.8%	4,780	100.0%
Martinsville	324	13.8%	2,021	86.2%	2,345	100.0%
<b>Total</b>	<b>35,056</b>	<b>28.1%</b>	<b>89,816</b>	<b>71.9%</b>	<b>124,872</b>	<b>100.0%</b>

*Table 1: In fiscal year 1993-94, public defenders handled an average of approximately 72% of the total charges involving indigent defendants in those areas where they operate. The remaining 28% were handled by court appointed counsel.*

**Table 2**  
**Number of Charges Represented by**  
**Public Defenders and Court Appointed Counsel**  
**Fiscal Year 1993-94**

Court	Total Charges	Percent of Total
<b>Virginia Totals</b>		
Public Defender	89,816	35.0%
Court Appointed Attorney	166,774	65.0%
<b>Total</b>	<b>256,590</b>	<b>100.0%</b>

*Table 2: Statewide, public defenders handled 35% of the charges involving indigent defendants and court appointed counsel handled 65% in FY 1993-94.*

The Commonwealth paid nearly \$34 million for the representation of indigent defendants during fiscal year 1993-94, an increase of 8.4% from the previous year. These expenditures included those made to court-appointed attorneys from the Criminal Fund administered by the Supreme Court and to public defender personnel from funds administered by the Public Defender Commission. Payments from the criminal fund to court-appointed counsel increased from \$22.6 million to \$23.6 million, an increase of 4.7%. Public Defender expenditures rose from \$8.7 million to \$10.3 million, an increase of 18.1%.

The number of defendants receiving services paid for from the Criminal Fund remained relatively stable in FY 1993-94. There was a 0.1% increase in defendants receiving attorney services for a total of 134,346. This was the smallest increase in over a decade. The number of charges represented by court appointed counsel increased from 183,692 to 184,843 in FY 1993-94, a rise of 0.6%. The average fee paid to attorneys for representing indigent defendants rose from \$123 per charge in FY 1992-93 to \$128 in FY 1993-94.

## **Appointment of Counsel for Indigents in Virginia**

### ***Introduction***

Statutory procedures on the right to representation by a lawyer and appointment of counsel for indigents are found in §§ 16.1-266 through 16.1-268 and 19.2-157 through 19.2-163 of the Code of Virginia. A person appearing in court has the right to legal representation and may choose to obtain their own counsel. The accused may also waive their right to legal representation. The right to be represented by a court appointed attorney is restricted by law to those individuals who are indigent and charged with an offense which may be punishable by incarceration or adults who may be subjected to loss of parental rights by court order. 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 family. Ability to pay is based on specific financial eligibility guidelines which are discussed below.

The court is not required to appoint counsel in instances where the accused is charged with a non-jailable misdemeanor or, if charged with a jailable misdemeanor, where the judge has declared in writing prior to trial that any sentence upon conviction will not include imprisonment.

The appointment of counsel in cases involving juveniles is handled differently according to the type of case. In abuse, neglect, termination of parental rights cases, and entrustment agreement proceedings, a lawyer must be appointed pursuant to §16.1-266 of the Code of Virginia. The parents of the juvenile must reimburse the state the costs of such representation not to exceed \$100 under § 16.1-267, if they are determined to be financially able to do so.

In cases involving children alleged to be in need of services or delinquent, an attorney is appointed if the court determines that the child is indigent and his or her parent or guardian does not retain counsel on the child's behalf. In practice, juveniles are found to be indigent almost without exception when considering their financial resources apart from those of their parents or guardian. If the parents are found to be financially able to retain counsel and refuse to do so, then they may be ordered by the court to reimburse the costs for such representation. In custody cases where each parent or person is represented by counsel, the court does not appoint an attorney for the child except in instances in which the judge finds that the interests of the child are not being adequately represented.

### ***Procedures for Determining Eligibility of An Adult for Court Appointed Counsel***

The determination of the right to court appointed counsel is made prior to the trial if no determination was made in a pre-trial procedure. Every person accused of having committed a crime or who may be subjected to loss of parental rights must be advised of his/her right to legal representation: the person may hire their own attorney; the person may waive their right to legal representation; or the judge may appoint a lawyer to represent the accused at public expense if the person indicates that he is indigent and that it is his desire to obtain a court-appointed attorney by filing a request for counsel form

together with a financial statement; and the person indicates that he is indigent and meets the eligibility requirements established by law.

The court is not required to appoint counsel in instances where the accused is charged with a misdemeanor if the judge has stipulated in writing prior to trial that, if convicted, no jail sentence will be imposed. The person is advised that if a lawyer is appointed by the court, the accused is liable for the full costs allowed by the court for such counsel if convicted.

The person is asked to indicate their choice regarding representation by a lawyer. If the accused indicates that they wish to hire an attorney, they are instructed to have the attorney notify the clerk's office that the lawyer will be representing the accused. If the accused wishes to waive their right to counsel, they must sign the Trial Without A Lawyer form (DC- 335 in district courts) and follow the appropriate waiver process in circuit courts. If the accused executes a waiver prior to an appearance before a judge, the judge must ask the accused at the trial if they still wish to waive the right to legal representation. This act is required to comply with Virginia Code § 19.2-160.

If the accused asks for court appointed counsel, it must be determined whether they are eligible given the charge(s) pending against them. In order to be eligible for representation by a court appointed lawyer, the accused must be charged with a felony or a misdemeanor for which a jail sentence may be imposed, and be without counsel; they must not have waived their right to legal representation, and they must claim indigency.

The accused must prepare and sign a form requesting representation by a lawyer as well as a financial statement form (Right to Representation by a Lawyer Form, DC-334, and Financial Statement - Eligibility Determination for Indigent Defense Services, DC-333 for district courts) These forms are also used in the circuit courts. Once completed, the forms are transmitted to the court according to the instructions of the judge.

### ***Financial Eligibility Guidelines for Court Appointed Counsel***

The financial eligibility guidelines for court appointed counsel are established by the General Assembly for use by all courts and are as follows:

1. Presumption of Indigency

A defendant is presumed eligible for appointed counsel if they are a current recipient of a state or federally administered public assistance program for the indigent. Examples are AFDC, Food Stamps, Medicaid, and Supplemental Security Income (SSI). This presumption shall be rebuttable where the court finds that a more thorough examination of financial resources of the defendant is necessary.

2. Financial Resources

If the defendant requests court-appointed counsel and is not presumptively eligible as described previously, the court shall examine the financial resources of the defendant with consideration given to net income, assets, and exceptional expenses. The defendant's net income shall include total salary and/or wages minus deductions required by law. Also to be considered are funds and amenities from any other sources including but not limited to social security payments, union funds, veteran's benefits, workmen's compensation, unemployment benefits, other regular support from an absent family member, public or private employer pensions, or income from dividends, interest, rents, estates, trusts, or gifts.

3. Indigency Formula

A defendant is deemed eligible for defense services at public expense if their available funds from these sources are less than or equal to 125% of the federal poverty income guidelines as prescribed for the size of the household of the accused by the federal Department of Health and Human Services. The Office of the Executive Secretary of the Supreme Court of Virginia distributes updates to these income levels to all courts on an annual basis.

4. Exceptional Circumstances

If the available funds of the accused exceed recommended guidelines and the defendant fails to employ counsel and does not waive his right to counsel, the Court may, in exceptional circumstances and where the ends of justice so require, appoint an attorney to represent the defendant. In making such appointments, the Court shall state in writing

its reasons for so doing. The written statement by the Court in these cases is included in the permanent record of the case. In district court cases, the written statement is made in the order portion of Right to Representation by a Lawyer, DC-334.

***Procedures for Determining Eligibility of a Juvenile for Court Appointed Counsel***

If a juvenile is eligible for court appointed counsel under the provisions of § 16.1-266, the same financial eligibility guidelines are applied in determining whether counsel should be appointed. The financial and legal responsibility of parents or persons standing in loco parentis is provided in §§ 16.1-266 and 16.1-267. Parents or guardians must complete a financial statement if a court appointed lawyer for the juvenile is requested. Parents must reimburse costs of such counsel up to \$100 if a lawyer is appointed and the parents are deemed financially able to pay.

***Procedures for Appointment of Counsel***

After the decision has been made to appoint counsel, the court must select an attorney and confirm the appointment. Section 19.2-159 of the Code of Virginia, states in part ... "Except in jurisdictions having a public defender pursuant to Article 4 (§ 19.2-163.1 et. seq.) of Chapter 10 of Title, § 19.2, counsel appointed by the court for representation of the accused shall be selected by a fair system of rotation among members of the bar practicing before the court whose practice regularly includes representation of persons accused of crimes and who have indicated their willingness to accept such appointments."

In capital cases the Public Defender Commission provides periodically to each clerk's office a current statewide list of attorneys qualified to represent indigent defendants charged with capital murder or sentenced to death. This list should be maintained with the local court appointed counsel list, however, it should not be integrated into that list since its only use is in capital cases.

There are several methods courts may use for selecting counsel:

Individual Appointment: This method is the most frequently used. An attorney is selected from a rotating list to represent a single defendant. The next defendant qualifying for appointed counsel receives the next attorney on the list.

Multiple Appointments or Time Segment: The court selects an attorney to take all court appointments during a given time frame, i.e. by day, week, or month.

Recidivist Appointment: The court appoints the same attorney that was appointed originally to represent the defendant on repeated charges. The advantage in this type of appointment is that the attorney is already familiar with the person and his/her background.

Selective Appointment: This method is not used as frequently as others, but in some of the more serious crimes the court may desire to select a more experienced attorney and therefore may bypass the normal rotation sequence.

### ***Appointment of Counsel in Capital Cases***

In any case in which an indigent defendant is charged with a capital offense, the judge of the circuit court, upon request for the appointment of counsel, shall appoint one or more attorneys from the list or lists established by the Public Defender Commission pursuant to §19.2-163.8 to represent the defendant at trial and, if the defendant is sentenced to death, on appeal. If the sentence of death is affirmed on appeal, the court shall, upon request, appoint counsel from the same list, or such other list as the Commission may establish, to represent an indigent prisoner under sentence of death in a state habeas corpus proceeding. According to Va. Code §19.2-163.8.C, notwithstanding the requirements of §19.2-163.7, the judge of the circuit court may appoint counsel who is not included on the list or lists, but who otherwise qualifies under the standards established and maintained by the Commission.

### **Virginia's Current Fee Schedule for Court-Appointed Counsel**

The General Assembly has established certain statutory limitations on payment of fees from the Criminal Fund and these limitations are followed by the Office of the Executive Secretary of the Supreme Court which administers payments to court appointed



counsel. The uniform criteria for payment is hours of service which is documented on the Time Sheet (form DC-50), submitted by attorneys for payment.

The provisions of § 2.1-204 of the Code of Virginia provide that the comptroller shall not pay any allowance made by any court of the Commonwealth until the Supreme Court of Virginia has approved such allowance for payment. Pursuant to this section, the Supreme Court has established the policy that the court will not approve any allowance for court appointed attorney fees which exceed sixty dollars (\$60) per hour for in-court service and forty dollars (\$40) per hour for out of court service. Such allowances are subject to the applicable statutory maximums. However, in capital murder cases, the court may allow an amount deemed reasonable.

In general district and juvenile and domestic relations district courts, when counsel conducts the defense of a single charge to its conclusion, compensation up to one hundred dollars (\$100). Counsel appointed by the court to represent an indigent charged with repeated violations of the same section of the Code of Virginia, with each of such violations arising out of the same incident, occurrence, or transaction, shall be compensated in an amount not to exceed the fee prescribed for the defense of a single charge, if such offenses are tried as part of the same judicial proceeding.

Counsel appointed to represent an indigent charged with capital murder may submit a monthly bill when the fees and costs incurred during that month exceed \$1,000. If the court deems such charges as reasonable, and they have not been previously paid, then the court may direct that payment be made from the criminal fund.

The statutory limit to defend a felony charge in circuit court that is punishable by confinement in the penitentiary for a period of more than twenty years is a sum not to exceed \$575. To defend any other felony charge, a sum not to exceed \$265. The statutory limit to defend any misdemeanor charge in circuit court that is punishable by confinement in jail is a sum not to exceed \$132.

Counsel appointed by circuit court to represent parolees in any proceeding before a hearing officer in 53.1-165.C shall be paid according to the hourly rate guideline of sixty

dollars (\$60) per hour for in-court service and forty dollars (\$40) per hour for out of court service. The maximum amount allowed in these cases is not to exceed the total paid on the original charge.

In juvenile cases, the court shall assess the costs in whole or in part against the parents for court-appointed counsel in an amount not to exceed \$100 in district court and not to exceed \$100 in circuit court, if the court finds the parents are financially able to pay (Section 16.1-267 Code of Virginia) regardless as to the adjudication of delinquency or a finding of guilt. In cases where a guardian ad litem has been appointed to represent a child in accordance with § 16.1-266A, the court shall assess costs against the parent for such legal services in the amount awarded the attorney by the court under the circumstances of the case, considering such factors as the ability of the parents to pay and the nature and extent of the guardian ad litem's duties in the case. Such amount assessed against the parents shall not exceed one hundred dollars (\$100.00) if the action is in the circuit court or in the district court.

Prior to the hearing by the court of any case involving a child who is alleged to be abused or neglected or who is the subject of an entrustment agreement or a petition terminating residual parental rights or is otherwise before the court pursuant § 16.1-241A.4, the court is required by § 16.1-266 to appoint an attorney as guardian ad litem to represent the child. This appointment must be made pursuant to § 16.1-266.1 of the Code of Virginia.

Payment for attorneys who serve as guardians ad litem for these children is made in accordance with guidelines established by the Supreme Court. The Supreme Court has approved the policy that guardians ad litem shall be compensated sixty dollars (\$60.00) per hour for in-court service and forty-dollars (\$40.00 per hour for out-of-court service. There is no limitation on these payments for hours which are documented and approved by the judge who appointed the guardian ad litem. 1986-87 Op. Att'y Gen. Va. 153; see also 1980-81 Op. Att'y Gen. Va. 177. Further, the court is authorized to pay for the reasonable expenses of a guardian ad litem incurred in representing a child.

In summary, subject to the \$60/\$40 rule, the maximum allowed rates for court appointed counsel as of July 1, 1994, are \$100 for the defense of a single charge in district court, \$265 for the defense of a class 3 felony, and \$575 for the defense of a class 2 or unclassified felony. There is no limit on the maximum rate for certain other services such as guardian ad litem, consultation with indigent convicts, and juvenile appeals in circuit court except that the total fees cannot exceed \$60 per hour for in-court service and \$40 per hour for out of court service. See Table 3. Table 4 shows that maximum allowable fees have remained relatively unchanged for several years.

States vary widely in compensation levels for court-appointed counsel. In 1992, before a state Supreme Court decision overturned the statute, South Carolina had the lowest fee level for non-capital felonies at \$10-15 per hour. In many states, low fee schedules are further discounted because fee "caps" are imposed for each case, regardless of the number of hours worked. These caps or maximums vary widely among the states with Virginia having one of the lowest in the nation.

**Table 3**  
**Virginia Court Appointed Counsel Rate Schedule, 1994**  
**Maximum Allowable Fees by Category of Case**

<b>CATEGORY</b>		<b>COURT APPOINTED COUNSEL SERVICE</b>
\$100.00		In a district court, counsel conducts the defense of a single charge against an indigent defendant, be it a juvenile or adult.
\$132.00		In a circuit court, counsel conducts the defense for a misdemeanor charge punishable by confinement in jail.
\$265.00	Class III	In a circuit court, counsel conducts the defense for a felony charge.
\$575.00	Class II	In a circuit court, counsel conducts the defense for a felony charge that may be punishable by confinement for a period of more than twenty years.
\$0-\$575.00		Unclassified felony.
No Limit		Counsel for Special Grand Jurors, indigent appeals, guardian ad litem, court appointed attorney for consultation with indigent convicts, revocation of parole, juvenile appeal in circuit court, etc.
Capital	Class I	Counsel conducts the defense for a felony charge that may be punishable by death. The court approves compensation to the attorney in an amount deemed reasonable.

Subject to the above maximums, fees cannot exceed \$60 per hour for in-court and \$40 per hour for out-of-court services.

**Table 4**

**Virginia Court Appointed Counsel Maximum Fees**

	<i>GD &amp; J&amp;DR</i>		<i>Circuit Court</i>	
	<i>District Court</i>			
	Single Charge*	Misde-meanor	Class 3 Felony	Class 2 Felony
1973	\$75	\$100	\$200	\$400
1980	\$75	\$100	\$200	\$400
1983	\$72	\$96	\$191	\$382
1984	\$75	\$100	\$200	\$400
**1986	\$86	\$115	\$230	\$460
1987	\$86	\$115	\$230	\$500
1988	\$86	\$115	\$230	\$500
**1989	\$100	\$132	\$265	\$575
1990	\$100	\$132	\$265	\$575
1991	\$100	\$132	\$265	\$575
1992	\$100	\$132	\$265	\$575
1993	\$100	\$132	\$265	\$575

\* Includes criminal and traffic cases, delinquency cases in J&DR District Courts..

\*\* The General Assembly enacted an increase of 15% in 1986 and again in 1989.

*Table 4: Notwithstanding the statutory maximums listed, the fees paid to court appointed counsel cannot exceed \$60 per hour for in-court service and \$40 per hour for out of court service.*

Appendix A, prepared by the Spangenberg Group, presents a state-by-state comparison of rates of compensation for court appointed counsel.<sup>2</sup> The table shows under the column marked "Maximum" that Virginia continues to have among the lowest fees for court appointed counsel services. Among those states indicating a maximum dollar amount, only Missouri and Arkansas show amounts as low as Virginia. There are now only two or three states where the maximum is mandatory by statute and there is no exception for extraordinary cases. In fact, there are several states that show a maximum but the maximum is waived in virtually every case. In looking down the list, Alabama has a \$1,000 non-waiveable maximum, Kentucky has a \$1,250 non-waiveable maximum, and Tennessee has a \$1,000 non-waiveable maximum. All of the other states with a dollar amount as a maximum waive routinely this figure. The ABA Standards for Criminal Justice state clear opposition to the enforcement of maximum fee caps. Standard 5-2.4 of

<sup>2</sup> The Spangenberg Group, 1994.

these standards reads, “Assigned counsel shall be compensated for all hours necessary to provide quality legal representation.”

## **Studies of Indigent Defense Issues: A Historical Summary**

As mentioned above, issues related to the provision of indigent defense services have received considerable attention in Virginia for many years. In the early 1970s, the Virginia State Bar focused their attention on the adequacy and efficiency of the various systems of providing court appointed counsel for persons charged with felonies or juvenile offenses in Virginia. Their final report, entitled “A Study of the Defense of Indigents in Virginia and the Feasibility of a Public Defender System,” resulted in the creation of the Public Defender Commission and the initial pilot offices. In addition, the report outlined concern over the rising cost of the appointed counsel system, the adequacy of state compensation schedules for court appointed attorneys, and other indigent defense issues related to the court appointed counsel system.

Concern over rising costs prompted the General Assembly in its 1981 Session to request the Supreme Court of Virginia to “study, recommend, and institute where appropriate, administrative and statutory revisions to contain costs within the criminal fund...” In response to the legislature’s request, the Office of the Executive Secretary (OES) undertook a detailed analysis of the criminal fund. The fund refers to a variety of payments authorized by numerous statutes for services rendered incident to the trial of criminal cases. Reimbursements include payments for court appointed attorneys, expert witness fees, court reporters, and other costs. The OES considered the central issue of cost containment within the criminal fund to be the determination of better methods of controlling court appointed counsel costs yet continuing to provide quality representation for indigents. This study, entitled “Report of the Office of the Executive Secretary of the Supreme Court of Virginia on Cost Containment within the Criminal Fund and Involuntary Mental Commitment Fund,” undertook an analysis of the possible advantages and costs of expanding the public defender system and concluded that the establishment of public defender offices in 22 circuits would result in cost savings of \$1.1 million.

Findings of the study were presented to the Committee on District Courts which adopted a proposal to expand the Public Defender system into those jurisdictions where such offices would prove cost effective. Legislation to that effect was introduced in the 1982 General Assembly but was not enacted.

The 1982 General Assembly again requested the Supreme Court to make a report on indigent defense costs in Virginia and to determine in which localities a public defender system might prove cost effective. The OES undertook this study in the fall of 1982 and directed its efforts toward refining the major assumptions underlying the methods of analysis used in the cost containment study the year before. The study also projected the costs associated with implementing a mixed public defender-court appointed counsel system for the defense of indigents. Several circuits were identified as potentially saving the Commonwealth costs. Over the next several years, the OES annually updated the "Report on Cost Containment Within the Criminal Fund" with the latest caseload and financial information.

As previously stated, the fees paid to court appointed counsel in Virginia have long been the lowest or nearly the lowest in the nation. This has been clear from many studies conducted over the past several years. In 1984, Abt Associates, a consulting firm specializing in indigent defense issues and now known as the Spangenberg Group, undertook a study of the court appointed counsel system in Virginia at the request of the Virginia State Bar. The findings of this study included the fact that Virginia had the lowest fee schedule for compensating court appointed counsel in the nation with an average fee paid of \$110 per defendant or \$80 per charge.

The 1985 Session of the General Assembly created a joint subcommittee to study the methods of providing criminal defense services to indigent persons. The joint subcommittee was created in response to indications that attorneys were becoming increasingly reluctant to take court appointed criminal cases. Specifically, the joint subcommittee was directed to conduct a review of the costs to the Commonwealth of providing such services and the means to ensure that quality legal representation continued to be available to indigent persons.

In 1985, the General Assembly also created a joint subcommittee to study Virginia's Public Defender Program. This joint subcommittee was specifically directed to study the operations of the existing public defender offices and to consider the feasibility and desirability of establishing additional public defender offices. The impetus for this study was a need to determine how the Commonwealth could ensure that high quality and cost effective representation continued to be available to indigent criminal defendants.

A subsequent study by the Spangenberg Group undertaken at the request of the joint subcommittees compared Virginia with nine of those seventeen states having total populations comparable to Virginia and with four of those nine states geographically closest to Virginia. This study found that Virginia had the lowest cost per case in the nation (\$111), 20% below the state most similar to Virginia in terms of population. The consultant concluded that a 100% increase in fees was necessary to bring Virginia up to the national average and estimated that such an increase would require additional appropriations of \$8 million. The average cost per indigent case increased to \$116 (4.5%) in 1986 but still ranked 48<sup>th</sup> in the nation and last among the groups against which Virginia had been compared in 1985. During that same four-year period (1982-86), the national average increased from \$196 to \$223 (13.8%) -- over three times the increase in Virginia.

In addition to the low fee schedule, the joint subcommittees also found that the current court-appointed counsel system had serious problems that needed to be addressed. It was suggested that many court-appointed counsel are not fully reimbursed for the expenses they incur and, therefore, may decide not to incur reasonable and prudent expenses. Also cited was an identified trend among some attorneys, especially the more experienced attorneys, in some jurisdictions not to volunteer to be included on the court-appointed counsel list for that jurisdiction, or if they are on the list, to ask to be removed from the list after a number of years of service.

In their combined report to the Governor and General Assembly in 1986, the joint subcommittees subsequently recommended the expansion of the public defender system through the establishment of a fifth office in Portsmouth. They also recommended that the maximum fees allowed to court appointed counsel for indigent persons be increased by

15% to alleviate the financial hardships placed on these attorneys and to encourage them to continue to make themselves available for court appointed work. The joint subcommittees stated:

“[that they did] not believe that the fees for court-appointed counsel should be equal to the fees charged for similar services by the private bar. However, the fees should be sufficient to cover fixed overhead expenses and should not be so artificially low as to discourage qualified counsel from accepting appointments. The joint subcommittees recommend that the maximum fees for court-appointed counsel be increased by 15%.

“The joint subcommittees strongly believe that the minimal fifteen percent increase in the maximum fees allowed to court-appointed counsel is essential if Virginia is to continue to meet its Constitutional obligation to provide counsel for indigent criminal defendants. The joint subcommittees caution that this is only a beginning.”

The subcommittees also proposed that their work be continued in order to study other issues related to the provision of indigent defense services. These included (1) problems faced by counsel appointed for indigent defendants charged with capital offenses as well as problems faced in the representation of juveniles, (2) the need to develop uniform statewide eligibility standards for court appointed counsel, (3) the determination of appropriate methods for selecting court appointed counsel, and (4) a review and evaluation of the administrative procedures of the public defender program.

In 1986 and 1987, the Virginia Bar Association Special Committee on Indigent Defense conducted a study to evaluate the methods of providing legal services to indigent criminal defendants. The major findings of the study, “The Defense of Indigents in Virginia: A Consensus for Change,” issued in 1988, found that fee schedules for court appointed counsel in non-capital cases, and fees actually awarded in capital cases, were much too low despite the increases in fees enacted by the General Assembly in 1986. The Virginia Bar Association recommended that the General Assembly increase the maximum fees payable to court appointed counsel by 15% and “continue to increase the maximum fees payable each year in an amount sufficient to ensure that, by 1992 and thereafter, Virginia ranks in the upper half of the states with regard to such maximum fees.”

The study also examined the cost effectiveness of expanding the public defender system and concluded that should court appointed fees be increased 15% as proposed for



FY 1990, a statewide public defender system would be less expensive than the existing system. The Committee stated its belief that should court appointed counsel fees be increased, the savings shown by a statewide public defender system would increase accordingly.

In late 1988, the Joint Subcommittee Studying Alternative Indigent Defense Systems again studied cost issues related to indigent defense. At that time, the national average cost was \$271 per defendant (case) compared to \$137 in Virginia and it was found that it would require an increase of 99% in fees at a cost of over \$11 million to reach the national average.

*Significant Events in the Study of Indigent Defense Issues In Virginia*

1974	Virginia State Bar	"A Study of the Defense of Indigents in Virginia and the Feasibility of a Public Defender System."
1981	Supreme Court of Virginia (OES)	"Report of the Office of the Executive Secretary of the Supreme Court of Virginia on Cost Containment Within the Criminal Fund."
1982-1984	OES	OES conducts annual updates to criminal fund cost containment (court appointed counsel) study.
1984	Abt Associates	"Study of Court Appointed Counsel in Virginia" finds that Virginia has lowest court appointed counsel fees in nation
1985	General Assembly	Legislature appoints two joint subcommittees to study indigent defense issues and the Public Defender System.
1986	Spangenberg Group	Study undertaken at the request of joint subcommittees confirms that fees in Virginia are the lowest in the nation. Joint subcommittees recommend 15% increase in fees.
1986	General Assembly	The General Assembly enacts a 15% increase in maximum allowable fees to court appointed counsel.
1986-1987	Virginia Bar Association	"The Defense of Indigents in Virginia" recommends that court appointed fees be increased, beginning with a 15% increase.
1988	Joint Subcommittees	Study finds that an increase of 99% in fees would be required to reach the national average.
1989	General Assembly	The General Assembly enacts a 15% increase in maximum allowable fees to court appointed counsel.
1989-1990	Department of Planning and Budget	"A Study of Indigent Defense Systems in Virginia" recommends two consecutive increases of 20% each in court appointed counsel fees.

1991	Joint Subcommittee	Joint Subcommittee Studying Alternative Indigent Defense Systems issues its final report to the General Assembly and reiterates earlier recommendations that fees be increased by 20% "as soon as possible."
1993	Commission on Youth	The Commission on Youth studies appointment of GAL in juvenile cases and recommends establishment of specific standards and training for lawyers who represent children in certain cases.
1994	CDC	At the request of the General Assembly, a study of court appointed counsel fees in juvenile cases is expanded to include all types of cases.

*Summary Comparison of Court Appointed Counsel Fees  
in Virginia and Other Areas, 1982 - 1994*

Year	Description of Fee	Virginia	Other
1982	Average fee per defendant	\$110 "Lowest"	\$196 National average
	Average fee per charge	\$80 "Lowest"	--- Not Available
1985	Average cost per case	\$111 "Lowest"	--- Not Available
1986	Average cost per case	\$116 "48th"	\$223 National average
1988	Average cost per defendant	\$137 "Among the lowest"	\$271 National average
1991	Maximum fees in juvenile cases	\$100 "Lowest"	\$250 Maryland / "Next lowest"
1994	Maximum; non-capital felony	\$575 "Lowest"	\$1,000 Alabama / "Among the lowest"
	Average cost per defendant	\$176 FY 1993-94	--- Not Available

*The summary above presents the findings of several studies discussed in this report which were undertaken between 1982 and 1994 by the Judiciary and Joint Subcommittees of the General Assembly of Virginia. The studies all point to the fact that Virginia remains near the bottom among the states in terms of the fees paid to court appointed counsel.*

The last major study of indigent defense systems in Virginia was conducted in 1989-1990 by the Department of Planning and Budget in cooperation with the Supreme Court of Virginia, the Public Defender Commission and the Department of Criminal Justice Services. The study found that despite the fact that the 1989 General Assembly increased the maximum allowable fees for court appointed attorneys by 15%, Virginia still ranked near the bottom of all the states in terms of costs associated with indigent defendants. A review of the fee schedule in Virginia at that time by the Spangenberg Group indicated that two additional 20% increases in the maximum allowable fees would be required to put Virginia near the midpoint in terms of the average cost for indigent defense services. The study recommended that the General Assembly approve additional 20% increases in the fees paid to court appointed counsel in fiscal years 1990-91 and 1991-92 at a cost of \$3.4 million the first year and \$3.8 million the second year.

In late 1991, the Joint Subcommittee Studying Alternative Indigent Defense Systems issues its final report to the Governor and General Assembly of Virginia. In this report, members of the subcommittee stated that court appointed counsel in the juvenile courts were faring the worst in terms of compensation for representing indigent defendants. The subcommittee said,

“[We] continue to believe that the compensation system for court-appointed counsel should be proportionate to the demands made on the attorney and little correlation exists between misdemeanor proceedings and juvenile court proceedings. The attorney must frequently make three appearances in the juvenile and domestic relations district court on one case for the detention, adjudication and dispositional hearings.

“A twenty percent increase in the fees for juvenile court cases was recommended by the subcommittee during the 1990 Session. The subcommittee recognized the difficulty of finding the \$800,000 needed to fund the increase. Nonetheless, the cost is justified by the critical nature of the work done by counsel in these cases to identify appropriate services and treatment for children and families and the protracted nature of the proceedings.”

The joint subcommittee also repeated its earlier recommendation that the maximum fees for court appointed counsel in all criminal cases be increase by 20% stating, “Fees paid to court appointed counsel have been increased, but further increases are needed.”

In 1993, the Virginia Commission on Youth examined the role of guardians ad litem and the courtroom environment in certain juvenile-related matters. In terms of legal representation, the Commission concluded that children who are victims of abuse and neglect are unique clients whose representation requires special expertise and attention. Unlike adults, children do not have the ability to “shop around” in selecting their attorneys. They are totally dependent on the justice system to select qualified attorneys trained to represent their best interests. Child victims lack the physical and mental ability to protect their own interests and well-being, both in and outside the courtroom. Children are also ill-equipped to understand court proceedings. Comprehending legal and judicial proceeding can be extremely difficult for well educated adults. Children, whose mental and emotional abilities are not yet fully developed, have even greater difficulty understanding and advocating for themselves in these proceedings.

Children often need representation by attorneys with specialized knowledge in the areas of juvenile court procedure, child psychology and development, and community treatment resources. As guardians ad litem, attorneys often need to (1) attend the depositions, hearings, and trial proceedings in which a child participates, (2) make recommendations to the court concerning the welfare of the child, (3) have access to all reports, evaluations and records necessary to effectively advocate for the child, and (4) marshal and coordinate the delivery of resources and special services to the child. It is also the guardian ad litem’s responsibility to assist the child in preparing a victim impact statement.

These specialized skills needed by attorneys who serve as guardians ad litem echo the findings of the 1991 Joint Subcommittee which studied indigent defense in Virginia and, as noted previously, recommended a 20% increase in fees for court appointed attorneys in juvenile court cases.

In its report to the Governor and General Assembly, the Commission offered legislative recommendations designed to improve legal representation for juveniles. The 1994 General Assembly subsequently passed legislation requiring the adoption of standards for attorneys appointed as guardians ad litem for children in child abuse and

neglect cases.<sup>3</sup> These standards, adopted by the Judicial Council in October of 1994, were developed by an advisory group of members from the bar and the judiciary, including a representative of the Court-Appointed Special Advocates Program (CASA). They will take effect January 1, 1995. Training was provided in November, 1994 to approximately 750 lawyers in the handling of their guardian ad litem duties as related to these standards.

Study of court appointed counsel fees continues as part of the regular budgeting process. The Department of Planning and Budget has continued to work with the Supreme Court in order to forecast costs associated with the defense of indigent defendants through the criminal fund. Staffs of both agencies work together to arrive at the most reliable estimates of future growth in the criminal fund to assure that the recommendations made to the General Assembly are as accurate as possible.<sup>4</sup>

## **Review of Indigent Defense Costs and Court Appointed Counsel Fees**

The costs of providing indigent defense services have grown dramatically in the past decade. Total indigent defense costs increased over 255% between fiscal years 1986 and 1994 with total expenditures rising from under \$10 million to nearly \$34 million. Fees paid to court appointed counsel increased by nearly 175% during this period while public defender expenditures rose over 1,000% as the public defender system has grown to serve 44 localities. See table 5. In the past five years, court appointed costs have risen over 74% and public defender commission costs have grown by nearly 193%.

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<sup>3</sup> "Report of the Virginia Commission on Youth On The Study of the Role of Guardians ad Litem and the Modification of Courtroom Environment in Child Sexual Abuse Cases to the Governor and General Assembly of Virginia," House Document No. 64, Commonwealth of Virginia, Richmond, 1994.

<sup>4</sup> Reflecting the national scope of the issues regarding the provision of indigent defense services, the Spangenberg Group and others continue to examine methods and costs of providing such services across the nation. For example, the Spangenberg Group undertook in 1989 a project sponsored by the State Justice Institute entitled "A Comprehensive Approach to Containing the Cost and Caseload of Indigent Defense Services in the Criminal Justice System." While this project did not directly involve Virginia, it did address the national problems of the ever-growing costs of indigent defense services, an increasing indigency rate, and rising caseloads. The objective of the study was to identify possible measures to control indigent defense costs and caseloads while safeguarding constitutional rights of defendants. More recently, a newsletter dealing with indigent defense issues on a national level has begun publication.

Total payments made to court appointed counsel have increased primarily due to increases in the volume of defendants and charges over the past years. Table 6 shows that between fiscal years 1986 and 1994, the number of defendants and charges represented by court appointed counsel has increased by approximately 79%. Accompanying this increase has been a rise of 54% in the average cost per defendant and per charge. As indicated above, the maximum allowable fees paid to court appointed counsel were increased by 15% in fiscal years 1986 and 1989. (Table 4 presented previously presents a historical review of the fee schedule for each year since 1973).

In FY 1993-94, \$7.0 million was spent to compensate court appointed counsel in juvenile related cases. This constituted 29.3% of the total amount made that year to court appointed counsel. There were 45,772 individuals represented on 60,646 charges in the juvenile and domestic relations district courts. Approximately 46% (or 27,881) of these charges were "juvenile cases," 24% (14,571) were guardian ad litem actions, 23% were misdemeanors, and 7% were felonies. See table 7.

**Table 5**  
**Indigent Defense Costs in Virginia**  
**Fiscal Years 1985-86 Thru 1993-94**

Fiscal Year	Public		Total Costs	Percent Change
	Defender Commission	Court Appointed Counsel Fees		
* 1985-86	\$ 933,042	\$ 8,601,365	\$ 9,534,407	---
1986-87	\$ 1,734,000	\$ 9,504,417	\$ 11,238,417	17.9%
1987-88	\$ 2,777,498	\$ 11,676,609	\$ 14,454,107	28.6%
* 1988-89	\$ 3,507,954	\$ 13,549,689	\$ 17,057,643	18.0%
1989-90	\$ 4,855,486	\$ 16,746,805	\$ 21,602,291	26.6%
1990-91	\$ 6,478,946	\$ 19,462,732	\$ 25,941,678	20.1%
1991-92	\$ 7,144,879	\$ 20,845,885	\$ 27,990,764	7.9%
1992-93	\$ 8,695,314	\$ 22,577,032	\$ 31,272,346	11.7%
1993-94	\$ 10,265,276	\$ 23,632,169	\$ 33,897,445	8.4%
<i>Total Costs</i>				
	Percent Change 1985-86 to 1993-94			255.5%
	Percent Change 1988-89 to 1993-94			98.7%
<i>Public Defender Costs</i>				
	Percent Change 1985-86 to 1993-94			1000.2%
	Percent Change 1988-89 to 1993-94			192.6%
<i>Court Appointed Counsel Fees</i>				
	Percent Change 1985-86 to 1993-94			174.7%
	Percent Change 1988-89 to 1993-94			74.4%

\* Years in which the General Assembly increased maximum allowable fees to court appointed counsel by 15%.

*Table 5: The most dramatic increases in indigent defense costs occurred in the 1980s when annual increases averaged over 20%. While growth has slackened in the past few years, total costs have still grown by nearly 31% in the past three years.*

**Table 6**  
**Criminal Fund Activity**  
**Defendants and Charges Represented by Court Appointed Counsel**

Fiscal Year	Total Defendants	Percent Change	Cost Per Defendant	Percent Change	Total Charges	Percent Change	Cost Per Charge	Percent Change
1985-86	75,202		\$ 114.38		103,468		\$ 83.13	
1986-87	74,683	0.7%	\$ 127.26	11.3%	102,792	-0.7%	\$ 92.46	11.2%
1987-88	85,010	13.8%	\$ 137.36	7.9%	115,694	12.6%	\$ 100.93	9.2%
1988-89	95,424	12.3%	\$ 141.99	3.4%	130,492	12.8%	\$ 103.84	2.9%
1989-90	107,022	12.2%	\$ 156.48	10.2%	145,432	11.5%	\$ 115.15	10.9%
1990-91	121,682	13.7%	\$ 159.95	2.2%	163,930	12.7%	\$ 118.73	3.1%
1991-92	128,416	5.5%	\$ 162.33	1.5%	173,964	6.1%	\$ 119.83	0.9%
1992-93	134,259	4.6%	\$ 168.16	3.6%	183,692	5.6%	\$ 122.91	2.6%
1993-94	134,346	0.1%	\$ 175.91	4.6%	184,843	0.6%	\$ 127.85	4.0%

*Table 6: Between fiscal years 1986 and 1994, the number of defendants and charges represented by court appointed counsel has increased by approximately 79%. Accompanying this increase has been a rise of 54% in the average cost per defendant and per charge.*

**Table 7**  
**Court Appointed Counsel Costs in J&DR District Courts**  
**Fiscal Year 1993-94**

Type of Charge As Defined in Criminal Fund	Total Individuals	Total Charges	Total Costs
Capital Murder	19	40	\$61,340
Guardian Ad Litem	12,862	14,573	\$2,555,165
Juvenile Case	19,025	27,881	\$2,683,508
Felony in J&DR Court	2,661	3,961	\$366,438
Misdemeanor in J&DR Court	11,205	14,191	\$1,318,043
<b>Total</b>	<b>45,772</b>	<b>60,646</b>	<b>\$6,984,494</b>

*Table 7: In FY 1993-94, \$7.0 million was spent to compensate court appointed counsel in J&DR District Courts. This constituted 29.3% of the total amount made that year to court appointed counsel.*

## Projections of Court Appointed Counsel Costs

Current projections indicate that the number of criminal cases in Virginia's courts will continue to increase in the next several years. According to table 8 below, an average annual growth rate of 3.7% is expected. Based on these projections and the current fee



schedule, a 7.2% increase is forecast in total court appointed counsel costs for fiscal year 1994-95 with an 8.1% increase expected in fiscal year 1995-96. See table 9.

**Table 8**  
**Caseload Projections for the Criminal Fund**

Fiscal Year	Circuit Court Cases	General District Cases	J&DR District Cases	Combined District Cases	Total Cases	Percent Change
<i>Actual</i>						
1980-81	61,202	280,203	171,259	84,022	596,686	
1981-82	66,292	284,753	176,821	86,707	614,573	3.00%
1982-83	66,894	295,005	183,869	82,737	628,505	2.27%
1983-84	65,749	289,546	182,461	81,406	619,162	-1.49%
1984-85	68,776	298,007	187,414	80,485	634,682	2.51%
1985-86	68,389	325,013	203,251	85,415	682,068	7.47%
1986-87	73,841	344,273	205,284	88,841	712,239	4.42%
1987-88	80,543	369,427	230,815	97,608	778,393	9.29%
1988-89	89,320	393,832	252,058	108,619	843,829	8.41%
1989-90	97,561	412,346	276,810	117,652	904,369	7.17%
1990-91	99,030	408,215	282,797	117,525	907,567	0.35%
1991-92	109,913	400,185	299,692	121,029	930,819	2.56%
1992-93	110,368	365,262	329,861	121,957	927,448	-0.36%
1993-94	111,075	353,877	347,400	122,518	934,870	0.80%
<i>Projections</i>						
1994-95	116,286	360,289	366,825	126,125	969,525	3.71%
1995-96	121,742	366,817	387,336	129,838	1,005,733	3.73%
1996-97	127,453	373,463	408,994	133,660	1,043,570	3.76%
1997-98	133,433	380,230	431,863	137,595	1,083,121	3.79%

*Table 8: Caseloads upon which projections for criminal fund expenditures are based are expected to grow an average of 3.7% in the next several years.*

At projected caseload levels, an increase of 15% in the maximum allowable fees to court appointed counsel would cost an additional \$3.8 million in the first year of the 1994-96 biennium and \$4.1 million in the second year for a total of approximately \$7.9 million over the entire biennium. An increase of 20% in fees would cost an additional \$10.5 million. Increases of 15% and 20% for court appointed counsel only in J&DR district courts would require an additional \$2.3 million and \$3.0 million, respectively, over the biennium. See tables 10 through 16. These projections assume increases in all rate categories and for capital cases and other cases in which there is currently "no limit" such as guardian ad litem.

**Table 9**

**Projected Court Appointed Counsel Costs  
Fiscal Year 1994-95**

Current Rate Category	Total Projected Charges	Projected Average Rate Paid	Total Projected Costs
\$ 100.00	128,050	\$ 88.56	\$ 11,339,889
\$ 132.00	5,122	\$ 107.52	\$ 550,739
\$ 265.00	18,781	\$ 176.45	\$ 3,313,918
\$ 575.00	1,707	\$ 444.33	\$ 758,615
\$ 0-575	17,073	\$ 210.60	\$ 3,595,553
	170,733	\$ 114.56	\$ 19,558,714
<b>CAPITAL</b>			\$ 1,231,390
<b>OTHER AREAS</b>			\$ 4,549,077
<i>Total</i>			\$ 25,339,181

**Projected Court Appointed Counsel Costs  
Fiscal Year 1995-96**

Current Rate Category	Total Projected Charges	Projected Average Rate Paid	Total Projected Costs
\$ 100.00	132,833	\$ 90.44	\$ 12,012,827
\$ 132.00	5,313	\$ 109.85	\$ 583,656
\$ 265.00	19,482	\$ 179.67	\$ 3,500,262
\$ 575.00	1,771	\$ 501.82	\$ 888,782
\$ 0-575	17,711	\$ 212.70	\$ 3,767,148
	177,110	\$ 117.17	\$ 20,752,675
<b>CAPITAL</b>			\$ 1,416,099
<b>OTHER AREAS</b>			\$ 5,231,439
<i>Total</i>			\$ 27,400,213

*Table 9 presents the detailed projections for court appointed counsel costs for fiscal years 1995-95 and 1995-96 based on the current fee schedule and projected caseloads. At the current maximum allowable fees, court appointed attorney costs should total \$25.3 million in the first year and \$27.4 million in the second year of the biennium.*

**Table 10**

**Projected Court Appointed Counsel Costs  
Fiscal Year 1994-95: 15% Increase**

Increased Rate Category	Total Projected Charges	Projected Average Rate Paid	Total Projected Costs
\$ 115.00	128,050	\$ 101.84	\$ 13,040,898
\$ 152.00	5,122	\$ 123.65	\$ 633,351
\$ 305.00	18,781	\$ 202.92	\$ 3,811,081
\$ 665.00	1,707	\$ 510.98	\$ 872,239
\$ 0-665	17,073	\$ 242.18	\$ 4,134,814
	170,733	\$ 131.74	\$ 22,493,048
CAPITAL			\$ 1,416,099
OTHER AREAS			\$ 5,231,439
Total			\$ 29,140,586

**Projected Court Appointed Counsel Costs  
Fiscal Year 1995-96: 15% Increase**

Increased Rate Category	Total Projected Charges	Projected Average Rate Paid	Total Projected Costs
\$ 115.00	132,833	\$ 104.01	\$ 13,815,429
\$ 152.00	5,313	\$ 126.33	\$ 671,178
\$ 305.00	19,482	\$ 206.62	\$ 4,025,381
\$ 665.00	1,771	\$ 577.09	\$ 1,022,032
\$ 0-665	17,711	\$ 244.61	\$ 4,332,199
	177,110	\$ 134.75	\$ 23,864,776
CAPITAL			\$ 1,628,514
OTHER AREAS			\$ 6,016,155
Total			\$ 31,509,445

Table 10 presents the detailed cost projections for a 15% increase in court appointed counsel fees. A 15% increase in court appointed counsel fees would require total expenditures of \$29.1 million in the first year and \$31.5 million in the second year of the biennium

The projections are based on historical average rates paid in each rate category. In each case, this rate is less than the maximum allowable. For example, the maximum amount allowed for the defense of a single charge in the district courts would increase from \$100 to \$115 under a 15% increase in fees. However, the average amount paid per charge in this category is forecast to be only \$104 based on historical data from the criminal fund. This average fee paid is used to project the costs of the 15% increase in fees for representing a single charge in the district courts. A similar procedure is used to project costs in each rate category.

**Table 11**

**Projected Court Appointed Counsel Costs  
Fiscal Year 1994-95: 20% Increase**

Increased Rate Category	Total Projected Charges	Projected Average Rate Paid	Total Projected Costs
\$ 120.00	128,050	\$ 106.27	\$ 13,607,894
\$ 158.00	5,122	\$ 129.03	\$ 660,888
\$ 318.00	18,781	\$ 211.74	\$ 3,976,780
\$ 690.00	1,707	\$ 533.19	\$ 910,163
\$ 0-690	17,073	\$ 252.71	\$ 4,314,588
	170,733	\$ 137.47	\$ 23,471,007
<b>CAPITAL</b>			\$ 1,477,668
<b>OTHER AREAS</b>			\$ 5,458,892
<i>Total</i>			\$ 30,407,567

**Projected Court Appointed Counsel Costs  
Fiscal Year 1995-96: 20% Increase**

Increased Rate Category	Total Projected Charges	Projected Average Rate Paid	Total Projected Costs
\$ 120.00	132,833	\$ 108.53	\$ 14,416,100
\$ 158.00	5,313	\$ 131.82	\$ 700,360
\$ 318.00	19,482	\$ 215.60	\$ 4,200,397
\$ 690.00	1,771	\$ 602.18	\$ 1,066,468
\$ 0-665	17,711	\$ 255.24	\$ 4,520,556
	177,110	\$ 140.60	\$ 24,902,374
<b>CAPITAL</b>			\$ 1,699,319
<b>OTHER AREAS</b>			\$ 6,277,727
<i>Total</i>			\$ 32,879,420

*Table 11: Based on historical data from the criminal fund and caseload statistics, a 20% increase in court appointed counsel fees would require total expenditures of \$30.4 million in the first year and \$32.9 million in the second year of the biennium.*

**Table 12****Court Appointed Counsel Costs:  
Summary of Projections for the 1994-96 Biennium**

	Actual 1992-93	Actual 1993-94	Percent Change	Projected 1994-95	Projected 1995-96
Current Fee Schedule (1)	\$22,577,032	\$23,632,169	4.7%	\$25,339,181	\$27,400,213
15% Increase in Fees (2) Additional Cost				\$29,140,586 \$3,801,405	\$31,509,445 \$4,109,232
20% Increase in Fees (3) Additional Cost				\$30,407,567 \$5,068,386	\$32,879,420 \$5,479,207

(1) See Table 9

(2) See Table 10

(3) See Table 11

*Table 12 presents a summary of tables 9, 10 and 11 on the preceding pages. One 15% increase in maximum allowable fees would cost an additional \$7.9 million over the biennium at forecast caseload levels. An increase of 20% would require an additional \$10.5 million. These figures include increases of 15% and 20% in fees paid in capital cases and in "no limit" cases.*

**Table 13****Court Appointed Counsel Costs in J&DR District Courts:  
Summary of Projections for the 1994-96 Biennium**

	Actual 1992-93	Actual 1993-94	Percent Change	Projected 1994-95	Projected 1995-96
Current Fee Schedule	\$5,836,927	\$6,984,494	19.7%	\$7,375,713	\$7,788,753
15% Increase in Fees Additional Cost				\$8,481,899 \$1,106,186	\$8,956,886 \$1,168,133
20% Increase in Fees Additional Cost				\$8,850,952 \$1,475,239	\$9,346,606 \$1,557,853

(1) See Table 14

(2) See Table 15

(3) See Table 16

*Table 13 summarizes tables 14, 15 and 16 on the following pages. An increase of 15% in maximum allowable fees for court appointed counsel in J&DR District Courts would cost an additional \$2.3 million over the biennium at forecast caseload levels. An increase of 20% would require an additional \$3.0 million. These figures include increases of 15% and 20% in fees paid in capital cases and in "no limit" cases such as guardians ad litem.*

Table 14

**Court Appointed Counsel Costs in J&DR District Courts  
Projected for FY 1994-95, FY 1995-96: No Increase**

Type of Charge As Defined in Criminal Fund	Actual Fiscal Year 1993-94		Projected Fiscal Year 1994-1995		Projected Fiscal Year 1995-96	
	Total Charges	Total Costs	Projected Charges	Projected Costs	Projected Charges	Projected Costs
<i>No Limit</i>						
Capital Murder	40	\$61,340	42	\$64,775	45	\$68,402
Guardian Ad Litem	14,573	\$2,555,165	15,389	\$2,698,254	16,251	\$2,849,356
<b>Sub-Total</b>	<b>14,613</b>	<b>\$2,616,505</b>	<b>15,431</b>	<b>\$2,763,029</b>	<b>16,295</b>	<b>\$2,917,759</b>
<i>Maximum \$100</i>				<i>Maximum \$100</i>		
Juvenile Case	27,881	\$2,683,508	29,442	\$2,793,783	31,091	\$2,950,235
Felony in J&DR Court	3,961	\$366,438	4,183	\$396,907	4,417	\$419,134
Misdemeanor in J&DR Court	14,191	\$1,318,043	14,986	\$1,421,993	15,825	\$1,501,624
<b>Sub-Total</b>	<b>46,033</b>	<b>\$4,367,989</b>	<b>48,611</b>	<b>\$4,612,683</b>	<b>51,333</b>	<b>\$4,870,994</b>
<b>Total</b>	<b>60,646</b>	<b>\$6,984,494</b>	<b>64,042</b>	<b>\$7,375,713</b>	<b>67,629</b>	<b>\$7,788,753</b>

Table 14 presents detailed projections for court appointed counsel costs in the J&DR District Courts for fiscal years 1995-95 and 1995-96 based on the current fee schedule and projected caseloads. At the current maximum allowable fees, J&DR court appointed attorney costs should total \$7.4 million in the first year and \$7.8 million in the second year of the biennium.

Table 15

**Court Appointed Counsel Costs in J&DR District Courts  
Projected for FY 1994-95, FY 1995-96: 15% Increase**

Type of Charge As Defined in Criminal Fund	Actual Fiscal Year 1993-94		Projected Fiscal Year 1994-1995		Projected Fiscal Year 1995-96	
	Total Charges	Total Costs	Projected Charges	Projected Costs	Projected Charges	Projected Costs
<i>No Limit</i>						
Capital Murder	40	\$61,340	42	\$74,491	45	\$78,663
Guardian Ad Litem	14,573	\$2,555,165	15,389	\$3,102,992	16,251	\$3,276,760
<b>Sub-Total</b>	<b>14,613</b>	<b>\$2,616,505</b>	<b>15,431</b>	<b>\$3,177,483</b>	<b>16,295</b>	<b>\$3,355,423</b>
<i>Maximum \$100</i>				<i>Maximum \$115</i>		
Juvenile Case	27,881	\$2,683,508	29,442	\$3,212,748	31,091	\$3,392,662
Felony in J&DR Court	3,961	\$366,438	4,183	\$456,429	4,417	\$481,989
Misdemeanor in J&DR Court	14,191	\$1,318,043	14,986	\$1,635,239	15,825	\$1,726,813
<b>Sub-Total</b>	<b>46,033</b>	<b>\$4,367,989</b>	<b>48,611</b>	<b>\$5,304,416</b>	<b>51,333</b>	<b>\$5,601,463</b>
<b>Total</b>	<b>60,646</b>	<b>\$6,984,494</b>	<b>64,042</b>	<b>\$8,481,899</b>	<b>67,629</b>	<b>\$8,956,886</b>

Table 15 presents the detailed cost projections for a 15% increase in J&DR District Court court appointed counsel fees. A 15% increase in the maximum allowable fee for J&DR court appointed counsel would require total expenditures of \$8.5 million in the first year and \$9.0 million in the second year of the biennium

**Table 16**

**Court Appointed Counsel Costs in J&DR District Courts  
Projected for FY 1994-95, FY 1995-96: 20% Increase**

Type of Charge As Defined in Criminal Fund	Actual Fiscal Year 1993-94		Projected Fiscal Year 1994-1995		Projected Fiscal Year 1995-96	
	Total Charges	Total Costs	Projected Charges	Projected Costs	Projected Charges	Projected Costs
<i>No Limit</i>						
Capital Murder	40	\$61,340	42	\$77,730	45	\$82,083
Guardian Ad Litem	14,573	\$2,555,165	15,389	\$3,237,905	16,251	\$3,419,228
<i>Sub-Total</i>	14,613	\$2,616,505	15,431	\$3,315,635	16,295	\$3,501,311
<i>Maximum \$100</i>				<i>Maximum \$120</i>		
Juvenile Case	27,881	\$2,683,508	29,442	\$3,352,599	31,091	\$3,540,344
Felony in J&DR Court	3,961	\$366,438	4,183	\$476,297	4,417	\$502,970
Misdemeanor in J&DR Court	14,191	\$1,318,043	14,986	\$1,706,421	15,825	\$1,801,981
<i>Sub-Total</i>	46,033	\$4,367,989	48,611	\$5,535,317	51,333	\$5,845,295
<i>Total</i>	60,646	\$6,984,494	64,042	\$8,850,952	67,629	\$9,346,606

*Table 16: Based on historical data from the criminal fund and caseload statistics, a 20% increase in J&DR District Court court appointed counsel fees would require total expenditures of \$8.9 million in the first year and \$9.3 million in the second year of the biennium.*

**National Trends and Issues in Indigent Defense:  
Inadequate Funding and Increased Caseloads**

The mandate to provide legal representation to indigent defendants is explicit; however, the method by which counsel should be provided has been left to the discretion of the states and counties. Some states and localities have created public defender programs, while others rely on the private bar to accept court appointments. In many states, such as Virginia, a mixed system of public defenders and court appointed counsel is in place. There are three basic models for providing representation to indigent defendants:

- (1) The public defender model involves a public or private non-profit organization with full or part-time staff attorneys and support personnel.
- (2) The assigned counsel model involves the assignment of indigent criminal cases on either a systematic or an ad hoc basis to private attorneys who are compensated on a case-by-case basis.
- (3) The contract model involves a contract between the jurisdiction and an attorney, group of attorneys, a bar association, or a private non-profit organization which agrees to provide representation in some or all of the indigent cases in the jurisdiction in a given period of time.

The most recent data available, reported by the Bureau of Justice Statistics of the United States Department of Justice in 1988, revealed that there were 1,144 counties in the country which employed the public defender model, 1,609 counties which employed

the assigned counsel model and 330 counties which utilized the contract model as the primary provider of representation to indigent defendants.

All three types of indigent defense systems have faced serious funding problems in a substantial majority of the states in the past five years. Many have reached the crisis stage. According to the Spangenberg Group, one of the most significant current trends across the country in the provision of indigent defense services is the elimination of court-appointed counsel systems as we know them. They are being replaced by contract with private lawyers, law firms or bar associations, usually for a fixed annual amount. The reason for this is obviously cost and reflects affirmative litigations in many states that have either waived the maximum or found the low hourly rates to be unconstitutional. The contract system in many jurisdictions is a low bid, low fee and low quality representation system.

While the contract is replacing court-appointed counsel as the primary system in some counties and as the system for conflict counsel with public defenders in other counties, the contract system is not replacing exist public defender systems. There are only one or two examples around the country in the last five years where a public defender system has been replaced by a contract system and a noted expert in the indigent defense field believes that it is unlikely that there will be much of this over the next few years.

### ***Alternative Methods of Indigent Defense***

As mentioned previously, there are three basic models currently in use across the country for providing indigent defense services. Research for the ABA indicates there are many combinations of these models or methods for providing and funding these services.

The first method, the court appointed or ad-hoc assigned counsel system, is the primary method by which legal services are delivered to indigent persons in Virginia. As described earlier in more detail, typically within the state, judges of each of the circuit and district courts maintain lists of attorneys in private practice within their jurisdiction(s). When a defendant charged with a criminal offense, either a misdemeanor or a felony, is before the court and is without counsel, the judge, upon reviewing the facts, makes a



determination as to whether or not the defendant is indigent. If so, an attorney is appointed from the list, usually on a rotational basis. This system utilizes the judges and clerks' offices in maintaining and updating the rosters, scheduling cases among the attorneys, and reviewing fees and expenses submitted by them.

### **Alternative Methods of Providing Indigent Defense Services**

#### **Three Basic Models**

- Public Defender Model
- Assigned Counsel Model
- Contract Model

#### **Alternative Methods**

1. Court Appointed or Ad-Hoc Counsel System
2. Coordinated Assigned Counsel System
3. Contract Bid System
4. No-Bid Contract System
5. Individual Judges Contract With Individual Attorneys in Private Practice
6. Mixed Public Defender Systems

An alternative to the ad-hoc system is the coordinated assigned counsel system. Private attorneys represent indigent clients but the administrative duties of assigning counsel, scheduling cases, and reviewing fees and expenses are handled by an administrative staff separate from the court.

Thirdly, a number of states and localities contract with attorneys to represent indigents. In the contract bid system, the locality or the funding authority sends out a request for proposal to individual lawyers, law firms, and local bar associations who, in turn, bid to provide representation for a certain number of indigents at a specified price and for a specified period of time. Bids are very specific and can be tied to certain types of offenses. They are awarded on a competitive basis. Usually there are multiple contracts awarded because no one "contractor" is able to or wants to handle many of the cases. When "conflicts" arise (multiple co-defendants involved in the same offenses who must be represented by separate counsel) the cases are distributed among those attorneys contracting with the locality to handle particular types of cases, such as felonies.

The fourth method is a variation of the third and is referred to as the no-bid contract system. The difference between the two is that under the latter system the locality or funding authority enters into a contract awarded to an attorney or group of attorneys who handle all types of cases involving indigents for a fixed price over a specified period of time.

The no-bid contract system is said to be attractive to the localities because the ceiling on costs is set by the bid. The attorneys attempt to predict the number of cases and amount of work involved. If either exceeds their expectations they continue to be bound by the contract and essentially must assume the difference between the anticipated and the actual number of cases.

The early experience that local governments appear to have had both with the bid and no-bid contract systems is that they are particularly economical the first year but, in subsequent years, the bids submitted increase substantially.

Indiana experimented with a fifth type of system in the 1980s. Under this method individual judges contracted with individual attorneys in private practice to handle all indigent cases within a specific time frame. Later, however, within the state of Indiana, a number of jurisdictions implemented public defender programs.

Four remaining four methods can be classified as mixed public defender systems. They are characterized principally by a shared responsibility between the private bar and salaried public defenders. Each of these methods is merely a variation of the others. The primary difference among them is in the designation of responsibility as to administration of the system. For example, in one such method, the public defender, in addition to handling his own caseload, provides administrative supervision (including training) of private attorneys designated in conflict cases. In another system, indigent defense services are handled by the public defender and the locality provides an administrative staff to oversee the appointment of lawyers in conflict cases. Finally, there are some jurisdictions where a public defender system exists in the same jurisdiction as an assigned counsel system. In these localities the Court determines on an individual basis whether cases will be handled by the public defender or by the private bar.

Of all the methods described it is generally concluded that the trend is toward statewide funding and statewide administration of indigent defense services. This usually has been accompanied by a shift from the ad-hoc assigned counsel system to a mixed defender system, and as described above, a more recent trend in some localities toward greater usage of contract systems. This shift away from the use of court appointed counsel appears to have its basis both in controlling costs and improving the quality of representation. In most states the concerns are expressed in that order.

### ***Caseload Growth***

In the last ten years, tremendous increases in the caseload and workload of indigent defense systems have far exceeded increases in funding. Criminal justice policy, the economy, and the "War on Drugs" have all combined to increase the number of indigent defendants who require representation, while straining the limited resources available for providing counsel.

The United States Justice Department has determined that in the four year period from 1982 to 1986, a 40% increase in caseload occurred for the nation's indigent defense programs. In 1990, the findings of the Justice Department were confirmed by the American Bar Association's Standing Committee on Legal Aid and Indigent Defense which concluded that "caseloads of most public defenders have grown at an alarming rate." Not only has the number of criminal cases risen sharply over the past decade, but so has the percentage of defendants who are found to be indigent. In 1982, the Department of Justice report indicated that 48% of all defendants charged with felony cases in state courts received court-appointed counsel. Numerous recent studies in a number of areas of the country now place that figure at 80% or higher.

A substantial part of the increased caseload can be attributed to drug filings. Increased use of mandatory minimum sentences, particularly in drug cases, has further exacerbated the problem of public defenders. In February, 1993, the American Bar Association's Criminal Justice Section published the results of a study entitled, *The State of Criminal Justice: An Annual Report*. The report states:

“Between 1985 and 1991, arrests for drug offenses increased 245%, compared to an increase of 19% for all non-drug arrests. Between 1986 and 1991, adult arrests rose 15% and the total number of state prisoners 50%. In drug cases, adult arrests rose 25% while persons imprisoned for these offenses rose 327%.”

According to the Department of State Police, between 1985 and 1993 arrests for drug related offenses in Virginia rose from 12,348 to 20,251, an increase of 64%. In 1993, drug violations constituted 5.2% of the total number of persons arrested. Between 1985 and 1993, the total number of criminal cases in Virginia’s courts increased over 46%.

## **What Can Be Done To Address Caseload and Funding Problems?**

A major report recently published by the American Bar Association sets out a variety of approaches, targeted to local conditions, that might be considered by public defenders, bar associations, legislative bodies, executive agencies and other policy makers to address case overload and increases in costs of providing indigent defense services.<sup>5</sup> Among the approaches presented are: caseload standards for public defenders, performance standards, alternative funding sources, limitations on the number of criminal filings, alternative methods of handling criminal cases, and the building of task forces or coalitions in support of indigent defense programs.

### ***Developing Caseload/Workload Standards***

Some state or local public defenders have been successful in convincing their funding source that some reasonable limits must be placed on attorneys’ caseload. A few of the most successful of these programs have been able to build their annual budget around concrete, numerical standards. This approach often prompts the funding source to seek to determine what would constitute a reasonable caseload for a public defender attorney.

### ***Finding Alternative Sources***

The vast majority of indigent defense systems, whether public defender, assigned counsel or private contract, rely principally on general appropriations from the state, the

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<sup>5</sup> American Bar Association, “The Indigent Defense Crisis,” August, 1993.

county or a combination of both. A few indigent defense programs have been able to achieve budget increases from general fund appropriations in spite of the financial crisis regarding public funds in most states.

However, programs in many states have, for the past three to five years, sought alternative revenue sources, other than general fund, to maintain staff levels and in some cases to increase yearly budgets. In looking for alternative funding sources, as with all of the approaches contained in the second half of the report, what may work in one jurisdiction may not in another. The purpose of detailing many different approaches is simply to set out the options and alternatives and let the local jurisdictions decide which options might best be pursued. A number of alternative funding proposals is briefly outlined below:

**(a) User Fees/Costs**

Assessment costs involve obtaining a portion of the costs of representation from indigent defendants. Some examples include:

- **Registration Fees:** A number of public defenders, including those in Connecticut, New Jersey, King County (Washington), Colorado, and Massachusetts, charge an up-front fee for indigent defense services. A waiver provision is in place for indigents who are unable to pay the fee. These fees range from \$5 to \$75.
- **Cost Recovery and Recoupment:** Cost recovery involves the contributions of the defendant toward the cost of counsel prior to disposition, recoupment involves the assessment of costs upon disposition of all charges.

The appropriateness and effectiveness of levying such fees upon indigent defendants has been questioned by many.

**(b) Filing Fees and Court Costs**

Imposing court costs at the disposition of criminal and/or civil cases is another method used in a number of states, including Virginia. There are several versions of this option:

- **Assessment on Criminal Filings:** In Louisiana, courts in each judicial district are required to impose assessments on all criminal violations ranging from \$17.50 to \$25.00. These assessments produced nine million dollars in FY 1990.
- **Assessment on Both Civil and Criminal Filings:** In Arkansas, an assessment of costs, not exceed five dollars, is placed on all civil filings and all criminal convictions and violations. In Alabama, a number of fees and costs, for jury demands, small claims docket cases, civil cases, felonies, misdemeanors, and traffic offenses, are paid into a Fair Trial Tax Fund.
- In Ohio, an \$11 court cost charge is placed on anyone pleading guilty or convicted of an offense. These assessments generate approximately \$19 million per year in Ohio.
- In Oklahoma, a recently enacted statute assess a surcharge of \$13 on all cases.

It is important to note that while court costs and assessment schemes can be important as a supplement to the general revenue funds, they should not be expected to substitute for local or state funding. These methods are useful to augment existing budget appropriations, but do not raise nearly enough funds to wholly support indigent defense.

### ***Methods to Contain the Cost of the Criminal Justice System***

As state and local government continue to face shortfalls in revenue and substantial budget deficits, many are taking a second look at their criminal justice policies. The cost of operating the criminal justice system has skyrocketed in the last ten years, fueled, in part, by the “War on Crime.” In order to contain costs, attempts to reduce caseload and revise sentencing policies have been successfully tried by some jurisdictions. These methods either limit the number of cases which enter the system or utilize less costly sentencing options.

### ***Reducing the Number of Criminal Cases and Their Costs***

The most recent report from the National Center for State Courts indicates that 1991 marked the first year that there were more than 100 million lawsuits brought in state courts around the country. It is significant to note the record high level of litigation; however, the data reveals that over 60% of these cases are traffic offenses. Increasingly our lower criminal courts are overwhelmed with minor criminal cases—traffic, ordinance violations and minor property offenses, for which jail sentences are not imposed, but for which a large majority of the states require counsel. Efforts are underway in several states to reduce the number of minor offenses formally charged and to dispose of these cases as early as possible when they are filed in the criminal courts.

In response to a request by the 1992 Session of the Virginia General Assembly, the Committee on District Courts explored the feasibility of alternative methods for disposing of traffic infractions. The Committee found that no one traffic adjudication method is inherently more cost-effective or more likely to improve the quality of service offered to citizens than another. The Committee recommended that a thorough examination and cost benefit analysis be undertaken on the advisability of transferring to the Department of

Motor Vehicles the responsibility for administrative processing of *uncontested* traffic infractions. A second recommendation of the study was that that local courts be encouraged to establish “segmented” docketing procedures in order to reduce the waiting time litigants, witnesses, law enforcement, lawyers, and others must spend in court disposing of traffic cases.<sup>6</sup>

Mediation and dispute resolution programs may well be another method, effective in very minor criminal cases, to relieve pressure on the overburdened criminal justice system. In addition to savings to the courts, prosecutors and defense counsel, dispute resolution can be a more meaningful process to the involved parties who can directly participate in resolving the dispute. In Virginia, significant growth in the availability of alternative forms of dispute resolution has been experienced in the last two years. In 1993, for example, pilot dispute resolution programs were conducted in several localities and a certification program for individuals and for training in mediation services was initiated.

## **Summary and Recommendations**

In 1985, the Joint Subcommittee Studying Alternative Indigent Defense Systems recommended to the General Assembly that fees to court appointed counsel be increased 15% and stated that this was “. . . only a beginning.”<sup>7</sup> According to the Subcommittee’s final report to the General Assembly, notwithstanding the increases approved in 1985 and 1989, in comparisons with the other states, Virginia still ranked near the bottom with respect to compensation paid to court appointed attorneys.

The latest data available (1991) show that court appointed counsel in the juvenile courts fare the worst. At that time, the \$100 per charge maximum fee in Virginia was among the lowest in the nation. While approximately half the states had maximum fees applicable in juvenile cases, Maryland’s \$250 cap was the next lowest after Virginia. The

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<sup>6</sup> “Report of the Committee on District Courts Examining the Feasibility of An Alternative Method for Disposing of Traffic Infractions to the Governor and the General Assembly of Virginia,” House Document No. 31, Richmond, 1993.

<sup>7</sup> Background information on these recommendations can be found in the “Final Report of the Joint Subcommittee Studying Alternative Indigent Defense Systems to the Governor and General Assembly of Virginia,” House Document No. 48, Richmond, 1991.

Commonwealth's maximum fee has not changed since 1991, and while more recent data for other states is not available specifically for juvenile cases, Virginia continues to rank near the bottom in terms of maximum allowed fees per charge in non-capital cases. See Appendix A.

The Joint Subcommittee stated in its 1991 report that "the compensation system for court appointed counsel should be proportionate to the demands made on the attorney and little correlation exists between misdemeanor proceedings and juvenile court proceedings. The attorney must frequently make three appearances in the juvenile and domestic relations district court on one case for the detention, adjudication and dispositional hearings."

An increase of 20% in the fees for juvenile court cases was recommended during the 1990 session. At that time, such an increase was estimated to cost an additional \$800,000 annually. Today, an increase of 20% is estimated to cost an additional \$1.5 million in first year and \$1.6 million in the second year. While the Committee recognizes the difficulty of finding such monies to fund the increase, it also believes the cost is justified by the critical nature of the work done by counsel in these cases to identify appropriate services and treatment for children and families and the protracted nature of the proceedings.

Fees paid to court appointed counsel were last increased in 1989 but further increases are needed. In 1990, the Joint Subcommittee recommended and the Committee on District Courts now reiterates the recommendation that the maximum fees for court appointed counsel in criminal cases be increased by 20%. As discussed in this report, such an increase, along with the recommended increase in juvenile cases, would cost an additional \$10.5 million over the biennium.

The Committee on District Courts believes that attorneys will continue to provide competent legal assistance to those who cannot afford to pay, notwithstanding the low fees; but these attorneys, who ensure that the Commonwealth meets the constitutionally mandated obligation to provide counsel, should not be asked to subsidize the system



indefinitely. Thus, the Committee recommends to the General Assembly an increase of 20% in fees for court appointed counsel across the board.

# **APPENDIX**

RATES OF COMPENSATION FOR ASSIGNED COUNSEL AT TRIAL IN NON-CAPITAL FELONIES

1994

<u>State</u>	<u>Hourly*</u>	<u>Authority</u>	<u>Maximum</u>	<u>Authority</u>
Alabama	\$20/\$40	Statute	\$1,000	Statute
Alaska	\$40/\$40	Court Rule	No maximum	-
Arizona	\$40/\$45**	Local Judge	No maximum	-
Arkansas	\$50/\$50	Local Judge	\$350	Statute
California	\$45-\$85	Local Judge	No maximum	-
Colorado	\$45/\$50	S.C. Rule	\$5,000 (depends on felony class) always waivable.	S.C. Rule Trial: Fel.1- \$10,000; Fel.2- \$5,000; Fel.3 - \$3,500
Connecticut	\$20-\$25	State PD	No Maximum	-
Delaware	\$50	Superior Ct. Rule	\$2,000	Superior Ct. Rule
District of Columbia	\$35 (apptd. to case before 10/1/93) \$50	Statute	\$1,700 \$2,450	Statute
Florida	\$20/\$25 to \$50/\$65	Local Judge	\$2,500	Statute
Georgia	\$35/\$45	G.I.D.C.	No Maximum	-
Hawaii	\$40/\$60	Statute	\$3,000	Statute
Idaho	\$40/\$50	Local Judge	No Maximum	-

\* These rates are out-of-court/in-court. If only one number appears, it is applied to both out-of-court and in-court hours. In states where the determining authority is local, the rates given are ranges and estimates given by reliable sources in the state.

\*\* As of 1990, Maricopa (Phoenix) and Pima (Tucson) Counties pay appointed counsel at \$45 per hour out-of-court and \$50 in-court.

Illinois	\$30/\$40	Statute	\$1,250	Statute
Indiana	\$40/\$50	Local Judge	No Maximum	-
Iowa	\$45-\$50	State PD	No Maximum	-
Kansas	\$50	State Board of Indigent Defense	\$5,000	State Board of Indigent Defense
Kentucky	\$25/\$35	Statute	\$1,250	Statute
Louisiana	Out-of-pocket expenses & overhead	Local Judge	No Maximum	<u>State v. Wigley 1993</u>
Maine	\$40	SJC * Order	\$2,500	SJC order
Maryland	\$30/\$35	State PD	\$1,000	COMAR**
Massachusetts	\$25/\$35	CPSC ***	No Maximum	-
Michigan	\$40/\$60	Local Judge	Varies by county	Local Judge
Minnesota	\$50****	County Board	Varies by county	Local Judge
Mississippi	\$20/\$30	Local Judge	No Maximum	Statute
Missouri		State PD	A or B fel.-\$400-\$500; C or D fel.-\$300; Trial-\$1,000	State PD
Montana	Varies widely	Local Judge		
Nebraska	\$40-\$80 (Ave. \$50)	S.C. Case Org. by county	No Maximum	-
Nevada	\$75	Statute	\$2,500 if facing less than life w/out parole; \$12,000 if facing death or life w/ or w/out parole.	Statute
New Hampshire	\$60	S.C. Rule	Homicide \$15,000; Other Felonies \$3,000	S.C. Rule

New Jersey	\$15/\$22.50	State PD	No Maximum	-
New Mexico	\$20/\$30	State PD	\$4,000	-
New York	\$25/\$40	Statute	\$1,200	Statute
North Carolina	\$30/\$40	Local Judge	No Maximum	-
North Dakota	\$50/\$50	Local Judge	No Maximum	-
Ohio	\$40/\$50	State PD	\$1,500-fel.; \$2,000- Aggravated fel.; \$3,000-Murder	State PD
Oklahoma	\$40-max; \$60 ave.	Local Court	\$3,500	Statute
Oregon	\$30-\$55/hr.	State Court Admin.	No Maximum	-
Pennsylvania	\$20/\$50	Local Judge	\$1,500-\$6,000	Local Judge
Rhode Island	\$50 Class-1 & murder cases; \$35 Class-2 cases	S.C. Rule	\$5,000 Class-1 & murder cases; \$2,500 Class-2 cases	Trial Judge
South Carolina	\$40/\$60	Statute	\$3,500	Statute
South Dakota	\$55	Local Judge	No Maximum	-
Tennessee	\$20/\$30	S.C. Rule	\$1,000	
Texas	Varies widely	Local Judge	Varies widely	Local Judge
Utah	\$30-\$75	Local Judge	No Maximum	-
Vermont	\$25	S.C. Admin. order	\$1,000	S.C. Admin. order
Virginia	None	Statute	\$100, \$265 & \$575	Statute
Washington	\$30-\$50	Local Judge, County Council	No Maximum	Local Judge
West Virginia	\$45/\$65	Statute	\$3,000	Statute

Wisconsin	\$40/\$50	State PD	No Maximum	-
Wyoming	\$50/\$25-40	State PD	No Maximum Guidelines	-

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\* Supreme Judicial Court.

\*\* Code of Maryland Regulations.

\*\*\* Committee for Public Counsel Services (State Public Defender).

\*\*\*\* Counsel only appointed to select paternity and mental health commitment cases; state public defender handles vast majority of cases.

**SENATE JOINT RESOLUTION NO. 186**  
**AMENDMENT IN THE NATURE OF A SUBSTITUTE**  
**(Proposed by the House Committee on Rules on February 23, 1994)**  
**(Patron Prior to Substitute-Senator Saslaw)**

*Requesting the Committee on District Courts to study court-appointed counsel fees in the juvenile and domestic relations district courts.*

WHEREAS, under current law, counsel appointed to represent a child in the juvenile and domestic relations district courts may receive no more than \$100 for his services; and

WHEREAS, the total amount allowed to counsel appointed by the court to represent a child was last increased in 1981, when the amount was increased from \$75 to the current level of \$100; and

WHEREAS, cases involving the representation of children are complex, frequently involving a great deal of investigative time and numerous court appearances; and

WHEREAS, court-appointed counsel for children in Virginia are paid less than their counterparts in other states for similar services; and

WHEREAS, there are growing concerns about the ability to obtain competent counsel for indigent children if the compensation system remains unchanged; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Committee on District Courts be requested to study court-appointed counsel fees in the juvenile and domestic relations district courts. The Committee shall examine the problems inherent in the current system of compensating court-appointed counsel for children and alternative methods of providing adequate representation at a reasonable cost.

The Office of the Executive Secretary of the Supreme Court, the Department of Planning and Budget, the Virginia State Bar, and the Public Defender Commission shall provide technical assistance for the study.

All agencies of the Commonwealth shall provide assistance to the Committee, upon request.

The Committee shall complete its work in time to submit its findings and recommendations to the Governor and the 1995 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative document.