

# VIRGINIA INDIGENT DEFENSE COMMISSION

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September 28, 2006

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Executive Director

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Deputy Director

**BONNIE R. FARRISH**

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**CARLOS L. HOPKINS**

Training & Attorney Certification Director

**EDWARD ERNOUF, III**

Information Systems Director

To: Virginia State Crime Commission  
Members of House Committee for Courts of Justice  
Members of Senate Committee for Courts of Justice  
Members of House Committee on Appropriations  
Members of Senate Committee on Finance

RE: 2006 Annual Report of the Virginia Indigent Defense Commission

Dear Sirs and Madams:

Pursuant to §19.2-163.01 of the Code of Virginia of 1950 as amended, enclosed please find a copy of the 2006 Annual Report of the Virginia Indigent Defense Commission. The Report contains information relating to the state of indigent defense in Virginia, caseloads of public defenders, and the status of the Commission's compliance with statutory mandates.

Please contact me with any questions, concerns or comments you have concerning this report.

Sincerely,



David J. Johnson



# Virginia Indigent Defense Commission

Annual Report 2006

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## **Commission Members and (Appointing Authorities)**

Chairman

Jo-Ann Wallace (Governor)

Vice Chairman

Robert E. Shepherd, Jr. (Virginia State Bar)

The Honorable David B. Albo, Virginia House of Delegates

Christopher L. Anderson (Governor)

Steven D. Benjamin (Senate of Virginia)

Karl R. Hade, Executive Secretary of the Supreme Court

The Honorable Edward W. Hanson, Jr. (Senate of Virginia)

Maria D. Jankowski (Speaker of the House)

Alexander N. Levay, Jr. (Virginia State Bar)

The Honorable Frederick M. Quayle, Senate of Virginia

The Honorable Alan E. Rosenblatt (Senate of Virginia)

The Honorable Kenneth W. Stolle, Senate of Virginia

David D. Walker (Speaker of the House)

Carmen B. Williams (Speaker of the House)

### **Commission Staff**

Executive Director

David J. Johnson

Deputy Director

D. J. Geiger

Fiscal Director

Bonnie R. Farrish

Information Systems Director

Edward Ernouf III

Training & Attorney Certification Director

Carlos L. Hopkins

## Public Defender Offices

Office	Localities Served	Year Established
Alexandria Appellate	City of Alexandria as appointed	1987
Arlington	County of Arlington and City of Falls Church	2005
Bedford	City/County of Bedford	1989
Capital Defender (Central)	Cities of Bedford, Charlottesville, Colonial Heights, Emporia, Hopewell, Lynchburg, Petersburg, Richmond, Staunton, Waynesboro and Counties of Albermarle, Amelia, Amherst, Appomattox, Bedford, Brunswick, Buckingham, Campbell, Charles City, Charlotte, Chesterfield, Cumberland, Dinwiddie, Essex, Fluvanna, Goochland, Greensville, Halifax, Hanover, Henrico, King and Queen, King William, Lancaster, Louisa, Lunenburg, Mecklenburg, Nelson, New Kent, Northumberland, Nottoway, Powhatan, Prince Edward, Prince George, Richmond, Surry, Sussex, Westmoreland	2002
Capital Defender (North)	Cities of Alexandria, Fredericksburg, Winchester and Counties of Arlington, Clarke, Culpeper, Fairfax, Fauquier, Frederick, Greene, Harrisonburg, King George, Loudoun, Madison, Orange, Page, Prince William, Rappahannock, Rockingham, Shenandoah, Spotsylvania, Stafford, Warren	2003
Capital Defender (Southeast)	Cities of Chesapeake, Franklin, Hampton, Newport News, Norfolk, Portsmouth, Suffolk, Virginia Beach, Williamsburg, and Counties of Accomack, Gloucester, Isle of Wight, James City, Mathews, Middlesex, Northampton, Southampton, York	2003



## Public Defender Offices

Office	Localities Served	Year Established
Capital Defender (Western)	Cities of Bristol, Buena Visra, Covington, Danville, Galax, Lexington, Martinsville, Norton, Radford, Roanoke, Salem, Staunton, Waynesboro and Counties of Alleghany, Augusta, Bath, Bland, Botetourt, Buchanan, Carroll, Craig, Dickenson, Floyd, Franklin, Giles, Grayson, Henry, Highland, Lee, Montgomery, Patrick, Pittsylvania, Pulaski, Roanoke, Rockbridge, Russell, Scott, Smyth, Tazewell, Washinton, Wise, Wythe	2003
Charlottesville	City of Charlottesville and County of Albermarle	1998
Chesapeake	City of Chesapeake	2005
Danville	City of Danville	1990
Fairfax	City and County of Fairfax	1987
Franklin	City of Franklin and Counties of Isle of Wight and Southampton	1989
Fredericksburg	City of Fredericksburg and Counties of King George, Stafford, and Spotsylvania	1990
Halifax	Counties of Halifax, Lunenburg, And Mecklenburg	1990
Hampton	City of Hampton	2005
Leesburg	Counties of Fauquier, Loudoun, and Rappahannock	1988
Lynchburg	City of Lynchburg	1991
Martinsville	City of Martinsville and Counties of Henry and Patrick	1992

## Public Defender Offices

<b>Office</b>	<b>Localities Served</b>	<b>Year Established</b>
Newport News	City of Newport News	2005
Norfolk	City of Norfolk	2002
Petersburg	City of Petersburg	1979
Portsmouth	City of Portsmouth	1986
Pulaski	City of Radford and the Counties of Bland, Pulaski, And Wythe	1988
Richmond	City of Richmond	1986
Roanoke	City of Roanoke	1976
Staunton	Cities of Buena Vista, Lexington, Staunton, and Waynesboro and the Counties of Augusta and Rockbridge	1972
Suffolk	City of Suffolk	1989
Virginia Beach	City of Virginia Beach	1973
Winchester	Counties of Clarke, Frederick, Page, Shenandoah, and Warren, and the City of Winchester	1989

## **I. VIRGINIA INDIGENT DEFENSE COMMISSION**

### **A. INTRODUCTION**

The 2004 General Assembly created the Virginia Indigent Defense Commission (VaIDC) to fulfill the Commonwealth's constitutional obligation to provide attorneys for indigent people accused of crimes.<sup>1</sup> Commission clients are persons charged with crimes that carry a potential penalty of incarceration or death and who have been determined indigent pursuant to state guidelines. In such cases, Virginia courts appoint public defender offices or members of the private bar certified by the Commission to provide legal representation.

In response to a two-year study of the feasibility of creating a state entity to effectively advocate for indigent defense needs in Virginia, the 2004 General Assembly created the VaIDC by adding a governing commission that is supervisory and by expanding the scope of responsibilities of and renaming the Virginia Public Defender Commission. Senate Document 11 (2003)<sup>2</sup> and Senate Document 13 (2004)<sup>3</sup> contain details of the study.

### **B. VIRGINIA CODE § 19.2-163.01 - STATUTORY MANDATES**

The 2004 legislation, and the 2006 amendments thereto, included several statutory mandates for the VAIDC. Many of these mandates relate to the VaIDC's responsibility to oversee court appointed private bar attorneys. The following is a summary and update for each mandate.

- 1. VIRGINIA CODE § 19.2-163.01A(1) - Publicize and enforce the qualification standards for attorneys seeking eligibility to serve as court-appointed counsel for indigent defendants.**

During FY05, the VaIDC published articles detailing qualification standards and requirements for indigent defense certification in the *Virginia Lawyers Weekly* newspaper, the *Voice* newspaper, the Virginia Lawyer magazine, the Virginia Trial Lawyers Association publications and the Virginia Bar Association publications. VaIDC staff presented the qualification standards and requirements at local Town Hall meetings, to which the VaIDC invited local bar associations, local judges, and the Commonwealth's Attorneys. The meetings were open to the public and provided attendees with an opportunity to ask questions about the certification process. The VaIDC distributed written materials, including the certification applications, to attendees. Based on feedback from attorneys, legislators, and judges, the VaIDC made changes to the application, streamlining and clarifying questions contained on the form. The VaIDC also prepared and submitted attorney certification information packets to be included in bar admission materials for new attorneys and to be included in registration materials at certification training events. The qualification standards are available twenty-four hours a day on the VaIDC web site at [www.indigentdefense.virginia.gov](http://www.indigentdefense.virginia.gov).

**2. VIRGINIA CODE § 19.2-163.01A(2) - Develop initial training courses for attorneys who wish to begin serving as court-appointed counsel, and to review and certify legal education courses that satisfy the continuing requirements for attorneys to maintain their eligibility for receiving court appointments.**

In October 2004, the Virginia State Bar, Virginia CLE, the Virginia Association of Criminal Defense Lawyers, and several public defenders helped the VaIDC develop a core curriculum for initial certification training courses which the Executive Secretary of the Supreme Court distributed to the Circuit Court judges for feedback. **(Appendix A, VaIDC Court Appointed Attorney Certification Training Curriculum)** The VaIDC incorporated many of the judges' recommendations into the final curriculum. The VaIDC developed a mechanism to review and certify legal education courses that satisfy the continuing education

requirements for attorneys to maintain their eligibility for receiving court appointments. The VaIDC certified 13 programs, between July 1, 2005 and June 30, 2006, for this purpose.

The VaIDC began conducting Indigent Defense Certification Trainings in March 2005. From July 2005 to June 2006, 92 private bar attorneys and 60 Public Defenders have attended 11 certification training events held throughout the state.

**3. VIRGINIA CODE § 19.2-163.01A(3) - Maintain a list of attorneys admitted to practice law in Virginia who are qualified to serve as court-appointed counsel for indigent defendants based upon the official standards. Disseminate the list by July 1 of each year and updates throughout the year to the Office of the Executive Secretary of the Supreme Court for distribution to the courts.**

To fulfill this obligation, the VaIDC developed the Certified Assigned Attorney Process (CAAP) in November 2004 to (1) record and monitor the names and qualifications of attorneys eligible for indigent defense court appointment and (2) to establish the training and experience criteria for representing misdemeanor, juvenile, and felony cases. (The capital case requirements were already established and in use.) Using these requirements, the VaIDC developed an application to obtain the information needed to verify an attorney's compliance with the different case standards. The VaIDC tracks and maintains applications electronically.

In April 2005, the VaIDC sent the certification application to all public defenders and private attorneys who had submitted vouchers for indigent defense representation in the preceding year. The VaIDC web site contains links to a printable version of the application allowing Virginia court personnel to easily retrieve certification information by jurisdiction and/or case type. The system became operational in June 2005. As of June 30, 2006, the VaIDC had received 1,812 applications, and had certified 1,793 attorneys for indigent defense representation.

As of June 30, 2006, the number of attorney certifications by case type was as follows:

Case Type	Number of Certified Attorneys 6/30/05	Number of Certified Attorneys 6/30/06	Annual Change
Capital Appellate	45	64	19
Capital Habeas	32	49	17
Capital Trial Co-Counsel	142	199	57
Capital Trial Lead Counsel	96	131	35
Juvenile	1,013	1,338	325
Misdemeanor	1,240	1,724	484
Felony	1,158	1,533	375

- 4. VIRGINIA CODE § 19.2-163.01A(4) - Establish official standards of practice for court-appointed counsel and public defenders to follow in representing their clients and guidelines for the removal of an attorney from the official list. Notify the Office of the Executive Secretary of the Supreme Court of any attorney whose name has been removed from the list.**

The VaIDC has created a Committee on the Standards of Practice to develop the official standards of practice for court-appointed counsel and public defenders. The nearly 30 member Committee members include representatives from public defender offices, the Office of the Executive Secretary of the Supreme Court of Virginia, the Office of the Attorney General, Commonwealth's Attorneys offices, the Ethics Counsel of the Virginia State Bar, members of the judiciary, and members of the private bar.

The VaIDC will circulate and publish the Proposed Standards of Practice for Indigent Defense Counsel in non-capital criminal cases at the trial level for public comment in the fall of 2006.

While the Standards of Practice circulate, the Committee will begin developing guidelines for removing an attorney from the certified list when that attorney has not upheld the Standards of Practice.

**5. VIRGINIA CODE § 19.2-163.01A(5) - Develop initial training courses for public defenders and to review and certify legal education courses that satisfy the continuing requirements for public defenders to maintain their eligibility.**

The VaIDC continues to enhance training and development opportunities for the private bar of court appointed counsel as well as its public defender office attorneys, investigators, sentencing advocates and support staff. Information on upcoming training programs is available on the VaIDC website.

The VaIDC offered Indigent Defense Certification Training programs on a monthly basis during FY05-06. These training programs were held in Richmond, Newport News, Roanoke and Fredericksburg.

Additional non-certification training programs provided to attorneys in Public Defender offices included the 2<sup>nd</sup> Trial Skills Bootcamp, Employee Performance Evaluation Training for Public Defenders, a Freedom of Information Act Presentation, a Refresher on Workplace Harassment and Related Discriminatory Practices, the Public Defender Conference, and DNA for Dummies.

The VaIDC held non-certification training programs, which were open to both private bar court appointed counsel and Public Defender office attorneys including Advocating for Alternatives to Juvenile Detention, which was presented in Manassas, Richmond, Virginia Beach, Roanoke, and Charlottesville; the 3<sup>rd</sup> Juvenile Defense Summit, and the VaIDC Advanced Indigent Defense Training which was co-sponsored by the Richmond Public Defender Office and the Richmond Criminal Bar Association.

Two additional certification trainings and a Public Defender Management Training Conference are scheduled to be held before the end of the year.

During FY06, public defender employees and support staff attended a number of non-VaIDC sponsored training programs held in and outside of Virginia. Many employees who attended these programs provided presentations at VaIDC-sponsored training events, sharing many valuable trial skills acquired with their colleagues.

**6. VIRGINIA CODE § 19.2-163.01A(12) – Approve requests for appropriations and expend moneys appropriated by the General Assembly of Virginia and to receive other moneys as they become available to it and expend the same in order to carry out the duties imposed upon it.**

The General Assembly appropriated funds in the amount of \$36,162,445 for FY07 and \$36,055,009 for FY08. The Commission approved a Budget Procedures for the development, adoption and execution of its plan to expend moneys appropriated by the General Assembly. The VaIDC approves initial field office base budgets, which are developed based on prior operating costs for the office and any known or predicted increases for the coming fiscal year. Adjustments are made to the initial budgets as necessary during the course of the year to account for (1) savings due to personnel turnover and vacancy rates and (2) increases to satisfy unbudgeted needs of the office, when funds are available. These supplemental funds become available when the administrative office can pool savings from the various offices or when carry-forward funds are available. The administrative office, with approval of the Commission then redistributes the pooled savings on an as-needed basis to pay for one-time purchases for which the offices have little or no funds budgeted.

**7. VIRGINIA CODE 19.2-163.01(B) – Commission shall adopt Rules and Procedures for the conduct of its business.**

During 2006, the Auditor of Public Accounts (APA), the department of Planning and Budget, the Joint Legislative Audit and Review Commission and the Internal Revenue Service each conducted audits of the VaIDC. The audit proceedings were conducted over several



months and demanded many hours of administrative office staff time. None of these audits produced significant findings.

The Auditor of Public Accounts found no violations of Commonwealth policies, but did recommend that the Commission adopt policies and procedures relating to its daily operations and the conduct of its business. As a result of the APA's recommendation and the approval of legislation amending § 19.2-163.01(B) to require such policies and procedures, the Commission formed a committee to develop and recommend revisions and additions to the existing office policies and procedures. Staff provided a status update on the progress of the working group and requested input as to several policies from the Commission members at the September 2006 meeting with the goal of adopting the revised policies and procedures at its November 2006 meeting.

In drafting the policies and procedures, the staff reviewed policies of other agencies, including the Office of the Attorney General, the Department of Human Resource Management, and the Supreme Court of Virginia in addition to policies of a few colleges and universities. The proposed policies include topic areas relating to the Fair Labor Standards Act, harassment, use of leave time, discipline, termination, grievance procedures, travel reimbursement, and computer protocols.

## **II. THE STATE OF INDIGENT DEFENSE IN VIRGINIA**

### **A. INTRODUCTION**

In January 2004, the American Bar Association (ABA) released its report entitled, A Comprehensive Review of Indigent Defense in Virginia<sup>4</sup>. The 2004 General Assembly began the process of addressing some of the report's findings, however the report continues to provide

a useful overview some of the challenges in reforming Virginia's indigent defense delivery system including:

1. Due to funding and resource constraints, court-appointed attorneys and public defenders make very limited use of expert witnesses and court-appointed lawyers make very little use of investigator services that are essential to proper representation of clients in many cases.<sup>5</sup>
2. Until the FY07-08 Budget was adopted, statutory fee caps for court-appointed counsel, had not been fully funded.<sup>6</sup>
3. The low statutory fee caps act as a disincentive to many assigned counsel, keeping many of them from doing the work necessary to provide meaningful and effective representation to their indigent clients.<sup>7</sup>
4. The disparity in pay between court-appointed counsel representing parents in abuse and neglect cases and Guardians ad Litem (GALs) who represent the best interests of children, and<sup>8</sup>
5. The public defender system is over-burdened and underfunded.<sup>9</sup>

## **B. VIRGINIA'S NATIONAL RANKING - COURT-APPOINTED ATTORNEY FEES**

The Supreme Court of Virginia continues to set the maximum hourly rate at which court appointed counsel are paid.<sup>10</sup> The current maximum rate is \$90 per hour for both in-court and out-of-court work. The legislature limits the funds available to pay court appointed counsel at the hourly rate through substantive law and through the legislature's power to appropriate funds. The Supreme Court, determines the maximum rate paid to court appointed counsel for indigent defense representation, based on the legislature's appropriated amounts.

The statutory caps may not be waived or exceeded. Regardless of the number of hours an attorney devotes to defending a charge, the maximum that he or she will receive can be no more than the amount authorized by the Supreme Court and funded by the legislature.

Pursuant to Virginia Code § 19.2-163.01(15), this Report must address "Virginia's ranking amongst the 50 states in terms of pay allowed for court-appointed counsel." Numerous

reports, including the 2005 ABA report, have noted that Virginia's caps place its fees among the lowest in the nation.<sup>11</sup> The report further indicated that Virginia ranked 49<sup>th</sup> in the nation based on its compensation for court-appointed counsel.<sup>12</sup> At the time of the report, the only state that had a lower rate of compensation was Mississippi, which placed a \$1,000 cap on non-capital felony charges.<sup>13</sup> In 2003 and 2004, Virginia was ranked 48<sup>th</sup> in the nation<sup>14</sup> with Mississippi and Maryland having lower compensation rates.

There have been no new studies conducted in which an attempt is made to rank states by their court appointed compensation rates. However, there are several efforts underway to examine the ranking issue as doubts of Virginia's status as 50<sup>th</sup> in the nation have arisen. Comparisons from state to state are difficult as the structure and funding of the systems nationwide vary widely. For example, some states pay by the case, others by the charge. Some states fully fund public defender and court appointed work, others have a combination of funding from the state and local levels. At least one state provides an office allowance to attorneys performing indigent defense work.

The General Assembly appropriated funds for FY 06-07 which are intended to fully fund the current maximum statutory fee cap of \$120 for any charge in district court, \$158 for misdemeanors in circuit court, \$445 for felonies punishable by 20 years in prison or less, and \$1,235 for felonies punishable by more than 20 years of prison.<sup>15</sup> The Supreme Court will determine how the General Assembly's appropriated funds will be allocated consistent with the statute. If the General Assembly's appropriation cannot fully fund the statutory caps, the appropriation shall be applied first to fully fund the statutory caps for the most serious non-capital felonies, and then to other statutory caps in declining order of severity. Based on the analysis and findings in the 2004 ABA report, Virginia's ranking will not have improved solely

as a result of the appropriation to fully fund the statutory fee caps. As stated above, the conclusion that Virginia ranked last in the nation is being questioned and examined. However, in the category of serious felonies for which the punishment can be 20 years to life in prison, Virginia ranks 50<sup>th</sup> by any measure.

Results from the Virginia Commonwealth University's Center for Public Policy's 2004 statewide public opinion poll indicated that a majority of Virginians favor providing legal representation to people who cannot afford a lawyer. According to the poll, Virginians strongly believe that the amount of money spent for legal representation greatly impacts the quality of representation, and that the quality of legal representation influences the outcome of a case. Finally, the results indicated that Virginians support a quality indigent defense delivery system.

### **C. PUBLIC DEFENDER OFFICE CASELOADS**

**VIRGINIA CODE § 19.2-163.01A(7) - Periodically review and report to the Virginia State Crime Commission, the House and the Senate Committees for Courts of Justice, the House Committee on Appropriations, and the Senate Committee on Finance on the caseload handled by each public defender office.**

FY06 saw an increase in the number of cases handled by the public defender offices for a total of 93,505 cases compared to 87,487 cases in FY05. **(Appendix B, VaIDC FY06 Caseload Data and Appendix E VaIDC FY03, FY04 and FY05)** A Department of Planning and Budget report suggested caseload limits for public defender offices; however, caseload limits have never been promulgated or enforced within public defender offices.

The VaIDC enabling legislation recognized a need to control caseloads and required the VaIDC to “establish appropriate caseload limits for public defender offices.” Virginia Code §19.2-163.01(7). In response to the legislation, a committee of public defenders began working to submit recommendations to the Commission. However, the 2005 General Assembly session

amended the statute to instead require the VaIDC to annually report public defender caseload data.

The Virginia State Bar's recent ethics opinions focused on the problem of high caseloads.<sup>16</sup> Virginia State Bar Legal Ethics Opinion 1798 acknowledged the need to control prosecutors' caseloads. However, the Opinion also noted that "excessive caseloads for public defenders and court-appointed counsel raise the same ethical problems [as for prosecutors] if each client's case cannot be attended to with reasonable diligence and competence."<sup>17</sup> Similarly, on July 19, 2004, James M. McCauley, Ethics Counsel for the Virginia State Bar, issued an informal letter opinion stating that, "[t]he acceptance of an overwhelming caseload may result in an ethical breach, leaving the defense attorney exposed to disciplinary action." (**Appendix C.1., Virginia State Bar Ethic's Counsel Opinion Letter**)

In May 2006, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 06-441, Ethical Obligation of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation. The conclusions contained in the ABA Opinion echo those in McCauley's opinion letter. (**Appendix C.2., American Bar Association's Formal Opinion 06-441**)

To facilitate the legislative mandate, on November 9, 2004 the VaIDC adopted a resolution regarding the ongoing issues of public defender caseloads. (**Appendix D, VaIDC Resolution**) The resolution directed VaIDC staff to develop a process for presenting caseload related policy and fiscal issues to the General Assembly and to report its findings to the VaIDC prior to the 2006 General Assembly. It further required public defenders to monitor caseloads within their offices until the VaIDC could work with the General Assembly to develop and enact caseload limits with adequate funding at an agency wide level. Public defenders must take all

necessary and reasonable steps to limit caseloads so that each attorney may fulfill his or her ethical duty of competency consistent with the opinion of the Virginia State Bar's Standing Committee on Legal Ethics Opinion 1798 issued July 19, 2004 and the ABA's Formal Opinion 06-441.

The VaIDC is investigating options for conducting an in-depth and specific review and analysis of Virginia's public defender system that can be used by the VaIDC to make recommendations for public defender caseloads that allow the VAIDC to serve as many clients as possible without its attorneys violating their ethical duties.

#### **D. VaIDC FY06 CASELOAD DATA**

The FY06 caseload data revealed that public defender offices handled 93,505 cases, each having an average of approximately 1.8 charges. The offices handled 87,487 cases in FY05, 87,714 cases in FY 04, and 86,450 cases in FY 03. (**Appendix B and Appendix E, VaIDC FY03, FY04, FY05 and FY06 Caseload Data**)

In 2006, VaIDC staff began to compile information on the methods of caseload management being utilized by the Public Defender Offices in order to meet their ethical responsibilities. Additionally, the staff is collecting and analyzing data to determine average caseloads in the Public Defender offices and the various factors affecting the number of cases handled by each office, including, but not limited to, vacancy and turnover, geography, and nature and type of cases.

#### **E. SALARIES OF COMMISSION EMPLOYEES**

The General Assembly presently funds the VaIDC for 514 FTE positions. Turnover among VaIDC staff has averaged 20% per year, presenting significant cost and client

representation problems. While field offices try to fill vacancies as quickly as possible, VaIDC salaries and the availability of comparable positions with more competitive salaries and improved work load conditions within our jurisdictions detract qualified candidates from indigent defense employment.

To address this problem, VaIDC surveyed employees who resigned over the past three years. Employees overwhelmingly listed low compensation as their reason for leaving indigent defense service. The majority of respondents indicated that they enjoyed the work and would have preferred to continue their careers as public defenders and/or support staff but could not afford to do so. A 2004 compensation study conducted by the Mercer Consulting Group for the VaIDC verified these statements. **(Appendix F VaIDC Compensation Study Attachment 1)**

The Mercer Group's study compared VaIDC salaries with similar positions in Commonwealth's Attorney's offices in each jurisdiction served by a public defender office. Commonwealth's Attorney's offices are one of the VaIDC's chief competitors for attorneys and legal secretaries. The study confirmed that salaries for positions in the Commonwealth's Attorney offices are higher than those salaries for comparable positions in public defender offices. **(Appendix F VaIDC Compensation Study Attachment 2)**

The study also compared Virginia's public defender office salaries with those of public defender offices in several nearby states and found VaIDC salaries are significantly lower than their counterparts in other states further illustrating the non-competitiveness of VaIDC salaries. (The study adjusted the resulting figures for cost of living differences.) **(Appendix F VaIDC Compensation Study Attachment 3)**

The study reviewed VaIDC administrative office position salary ranges and compared them against similar positions in the Executive Branch. This comparison revealed that if VaIDC

were part of the Executive Branch, administrative support salaries would be in the lowest quartile of the respective ranges. **(Appendix F VaIDC Compensation Study Attachment 4)**

Finally, the study compared VaIDC's administrative positions to comparable positions in the Richmond market and found the VaIDC's compensation rates to be significantly lower.

*Mercer Consulting Group's 2004 Study.* **(Appendix F VaIDC Compensation Study Attachment 4)** These analyses clearly demonstrate that salaries throughout the VaIDC remain significantly lower than those of organizations with which it competes for employees.

The VaIDC requested an appropriation of \$1.8 million to increase all VaIDC salaries by 7.0% for FY07 to alleviate its high, costly annual turnover. The General Assembly did not include the appropriation in the new budget. However, during its May 2006 meeting the VaIDC approved two proposals by the Executive Director, which had been discussed with and recommended by the APA. The proposals were an attempt to slow the high rates of turnover and vacancy within the Public Defender offices. The proposals were 1) a Retention Bonus Program and 2) an increase to entry level salaries across the board.

#### Retention Bonus Program

In the late 1990's the Commonwealth of Virginia developed and implemented within its policies retention bonuses. Employees and the agency they are employed by enter into a retention agreement. The agency awards bonuses to employees who have worked for the agency for at least a specified period of time and who have performed in a satisfactory manner. By accepting the bonus, the employee expressly agrees to continue to work for the agency for a specified period of time. Any employee who fails to meet this requirement must repay the entire retention bonus. The Commonwealth Debt Recovery system is used to enforce payment. Several agencies have employed this program in an effort to address staffing shortfalls.



Three proposals for a Retention Bonus Program for the payment of retention bonuses as a percentage of the annual salary were submitted to the VAIDC for consideration. The costs of the proposals ranged from \$1.1 million to \$1.5 million. The Commission expressed the desire to do the most for the employees with the lowest compensation. As a result, each proposal provided higher retention bonus percentage amounts for support staff. The VaIDC approved the Retention Bonus Program which provided 9% retention bonuses for support staff positions and 7% retention bonuses for attorney positions. However, the VaIDC placed a cap of \$7,500 on the amount that any individual employee could receive. Only employees who had been employed by the agency for at least six months were eligible.

Each employee's performance had to be rated at least as "meets expectations" or "satisfactory" for a period of 6 months or more immediately preceding the award of the retention bonus. Employees who agreed to accept the retention bonuses were required to sign a formal agreement which provided requirements for satisfactory performance, duration of required continued employment, and repayment if the terms were not met.

The VaIDC did not adopt the Retention Bonus Program as an ongoing program. One time funds from turnover and vacancy savings were utilized. The VaIDC will annually review the Program in light of available funding and the needs of the agency.

#### Entry Level Salaries

The Chief Public Defenders and the VaIDC subcommittees on Policy and Procedure, Personnel, and Training reviewed a proposal to restructure entry level salaries. Seven variations of the plan were presented providing for different funding levels. Each of the groups endorsed the same plan, which the VaIDC later approved.

The loss of employees and the VaIDC's inability to immediately fill their positions results in a turnover and vacancy savings of funds appropriated by the General Assembly for employee salaries. The VAIDC's consistent annual average turnover rate of approximately 20% (including a 23% rate for attorney positions) resulted from fiscal year to fiscal year in the carrying forward of a surplus of funds intended for employee salaries. The VaIDC approved a very conservative increase of its personnel budget to 103%. According to the Auditor of Public Accounts, many agencies budget turnover and vacancy savings for the purpose of increasing personnel budgets.

The VaIDC hopes that this plan will reduce turnover and help recruit qualified candidates to fill any vacancies more expediently. The plan affects all entry level salaries to varying degrees, with an emphasis on impacting the positions which experience the highest turnover and the longest vacancy periods, as well as positions that historically have experienced the greatest difficulty in attracting qualified applicants.

The VaIDC hopes that these initiatives will stabilize indigent defense employment retention in the short term and help with future recruitment.

#### **F. VaIDC WEB SITE**

In March 2005, the VaIDC entered discussions with VIPNet, a subsidiary of the Virginia Information Technology Agency (VITA) charged with assisting state agencies and local governments to web enable their business processes. After gathering input from public defender offices, administrative staff and VIPNet project managers, VaIDC contracted with VIPNet to upgrade the current web site to serve as a valuable communication tool for VaIDC staff, court personnel, private attorneys, and the public. Revisions are being made to the current site with the goal to have all of the changes made by the end of 2006.

### **G. NEW PUBLIC DEFENDER OFFICES**

The General Assembly has not approved any new Public Defender Offices for the current fiscal year. All authorized offices are open and accepting cases.

### **H. EXISTING PUBLIC DEFENDER OFFICE RELOCATION EFFORTS**

The VaIDC relocated several public defender offices and its administrative office during FY06 due to growing staff, unsafe working conditions, and Executive Order 75 requirements, which reduced the Commonwealth's office space standards to 210 square feet per full-time employee. There have been many positive effects associated with the relocations. Office morale has improved, clients seem to have more confidence in their assigned counsel, and the communities' perception of the public defender offices in these locations has improved dramatically. The VaIDC will relocate several other offices during FY07.

## **III. Future Plans and Conclusion**

The coming year presents many challenges for the VaIDC. The VaIDC must continue its integration of the court-appointed and public defender systems into one agency to provide the support, training, and oversight that both systems require.

The VaIDC will continue to develop, promulgate, publicize, and enforce standards of practice and report caseload data. Additionally, the VaIDC will continue to provide high quality, certification training for new and lesser-experienced attorneys and advanced training for more experienced attorneys.

Virginians deserve a balanced criminal justice system that protects fairness, public safety and the truth. The American Bar Association and the Virginia State Bar's 10 Principles of a

Public Defense Delivery System, as well as other national standards require that we continue to work toward the following:

- Reformation of the private bar fee caps,
- Parity of salary and resources between public defenders, court appointed counsel and prosecutors,
- Increased resources for trial skills training for all new attorneys,
- Funding the infrastructure necessary to enforce practice standards,
- Information technology resources necessary for managing the VaIDC and for properly equipping its public defender offices, and
- Caseloads that do not violate the ethical responsibilities of attorneys.<sup>18</sup>

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<sup>1</sup> U.S. Const. Amend. VI

<sup>2</sup> Senate Document No. 11 (2003)

<sup>3</sup> Senate Document No. 13 (2004)

<sup>4</sup> American Bar Association, A Comprehensive Review of Indigent Defense in Virginia, (2004)

<sup>5</sup> Id. at 82

<sup>6</sup> Id. at 86

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id. at 87

<sup>10</sup> Court-Appointed Counsel-Public Defender Procedures and Guidelines Manual 25 (Supreme Court of Virginia July 2004)

<sup>11</sup> ABA, Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview, The Spangenberg Group (August 2005)

<sup>12</sup> Id. at 9

<sup>13</sup> Id.

<sup>14</sup> ABA, Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview, The Spangenberg Group (August 2003)

<sup>15</sup> Va. Code § 19.2-163

<sup>16</sup> Virginia State Bar, Legal Ethics Opinion 1798

<sup>17</sup> Id. at n.2

<sup>18</sup> ABA, 10 Principles of Public Defense Delivery System, (February 5, 2002)

APPENDIX A

VAIDC COURT APPOINTED ATTORNEY CERTIFICATION TRAINING CURRICULUM

# INDIGENT DEFENSE CERTIFICATION TRAINING FOR COURT APPOINTED LAWYERS

## PROGRAM OUTLINE

### DAY 1

#### REPRESENTING ADULT CLIENTS IN MISDEMEANOR AND FELONY CASES

(6- 1 Hour Sessions)

#### 9:00 – 10:00: Initial Client Interview

*Preparation:* Obtain charging document  
Review charge and penalty statutes  
Consult relevant guidelines forms (if a felony)

*Objectives:* Build rapport and inspire confidence [discuss interview techniques and how to respond to questions challenging competence or dedication of the attorney when challenged by client]

Explain client confidentiality

Obtain the following necessary information:

Contact Information  
Bond Information  
Citizenship/Alien Status Information  
Relevant information concerning the offense  
Background information needed to calculate guidelines  
Details concerning arrest/seizure of evidence/statements to police for motions preparation  
Background information for mitigation (substance abuse/mental health history)  
Names and Addresses of Witnesses

Educate the defendant about the relevant law pertaining to his/her case

Explain what will happen in court

How and whether to raise competency/sanity issues

Advise defendant of steps he/she can take pretrial to advance his/her case

\*\*\*\* *In the case of juveniles, be aware of developmental issues as they affect competency and criminal responsibility*

#### 10:00 – 11:00: Pretrial Preparation

Obtain Discovery  
Conduct Factual Investigation  
Develop a theory of the defense (Fact based) and a case strategy (Legal)  
File Appropriate Pretrial Motions  
Assess the Strength of the Case  
Consider possible sentencing alternatives or pleas that meet client objectives  
Discuss possible pleas with prosecutor  
Keep Client Advised  
Subpoena Witnesses  
Prepare Witnesses to Testify

#### 11:00 – 11:15: Break

#### 11:15 – 12:15: Litigation Skills

Refresher on the Rules of Evidence

Form of Questions  
Bases for Objection (hearsay, competency, etc.)  
Techniques for Direct and Cross examination  
Laying Foundations  
Impeachment  
Motions to Exclude  
Evidentiary Hearings  
Qualifying Experts/Attacking Expert Qualifications

**12:15 – 1:15: Misdemeanor Practice in the General District Court & JDR Court (adults)**

Procedures in GDC --Subpoenas, Discovery, Motions  
Investigate local diversion programs and alternative sentencing options (consider having client pre-qualified or enrolled before court date)  
Common Misdemeanor Defenses (self defense, trespass defenses, etc.)  
Determine collateral consequences of convictions as they affect immigration, employment, etc.  
Accord and Satisfaction  
How to negotiate plea agreements with prosecutors  
Appeals  
Felonies: preliminary hearings  
Guidelines preparation in aid of plea negotiations

**1:15 – 2:30 Lunch (Provided)**

**2:30 – 3:30: Practice in Traffic Court**

Obtaining Client's driving transcript and other relevant documents from DMV  
Review of Traffic Statutes  
Investigate Diversion Programs  
Mandatory Minimums  
Review of Traffic Defenses  
Sentencing Alternatives and Programs for Traffic Offenders  
Collateral Consequences of Conviction  
Negotiating Pleas with Prosecutors  
De Novo Appeal

**3:30 – 4:30: Practice in Circuit Court**

Bond Appeals  
De Novo Appeal Trials B Judge or Jury (Bi-furcated)  
Discovery Motions  
Pre-trial Motions (in limine, to suppress, on other statutory or Constitutional grounds)  
Burdens of Proof in Motions Practice  
Preserving Appellate Issues at Trial  
Sentencing Alternatives  
Plea Negotiations  
Sentencing Trials and Hearings  
Appeals and Motions to Reconsider Sentence  
Probation Violation Hearings

**INDIGENT DEFENSE CERTIFICATION TRAINING FOR COURT APPOINTED LAWYERS  
Day 2**

**JUVENILE CASES  
(4 – 1 HOUR SEGMENTS)**

- 8:30 – 9:30: Overview of the Juvenile Court**  
Background of the Court  
Special Issues Concerning Juveniles (developmental issues, competency issues, Issues of criminal responsibility)  
Statutes applicable only to juveniles (transfer statutes)  
Diversion Options  
Sentencing Options  
Role of the Attorney (contra Guardian ad litem)  
Client 's Right of Confidentiality  
Identify Treatment and Sentencing Options
- 9:30 – 10:30: Client Interview and Pretrial Preparation**  
Develop trust relationship with client  
Advise client of attorney client privilege  
Educate the client as to what to expect in court  
Advise client as to how to prepare for court and how to act in court  
Obtain family, school, social services, and any medical or psychological records  
Speak with client 's counselors at school or at court services  
Detention Advocacy (including review of new statutory requirements)  
Obtain Discovery  
Conduct Factual Investigation  
Identify Mitigating Factors  
Assess the Case and Devise Strategy  
Consider Possible Collateral Consequences (i.e., future effects on guidelines, Immigration status)  
Discuss Plea Offer with Prosecutor  
File and Argue Pretrial Motions (including for release)
- 10:30 – 10:45: Break**
- 10:45 – 11:45: Adjudication**  
Prepare client and witnesses for trial  
Record proceedings in the event of an appeal  
Have a cogent theory of the defense (legal and/or factual)  
Subpoena all necessary witnesses  
Have sentencing witnesses and arguments prepared
- 11:45 – 12:45: Disposition**  
Learn all possible dispositional alternatives available  
Obtain records from prior cases  
Call witnesses for mitigation  
Meet with court services to discuss options beneficial to the client and the dispo. recommendation  
Prepare client to address the court  
Explore alternative sentencing options  
Appeal



**FY06 ANNUAL REPORT: SORTED BY TOTAL CASES**

OFFICE	TOTAL CASES	TOTAL FELONIES	TOTAL MISD	ACTUAL ATTNYS	CASES/A CT. ATTY	BUDGET ATTY	CASES/BU D. ATTY
Richmond	<b>10,005</b>	5,047	4,935	24.4	410	26	385
VA Beach	<b>9,917</b>	3,498	6,384	21.1	470	22	451
Norfolk	<b>7,022</b>	3,155	3,815	21.3	330	22	319
Fredericksbt	<b>6,591</b>	2,566	3,942	12.8	515	14	471
Fairfax	<b>4,877</b>	2,625	2,249	17.7	276	21.5	227
Roanoke	<b>4,632</b>	2,270	2,358	9.3	498	10	463
Newport Ne	<b>4,539</b>	1,524	3,003	12.3	369	15	303
Portsmouth	<b>4,145</b>	1,942	2,046	14	296	15	276
Staunton	<b>3,827</b>	1,441	2,385	7.2	532	7.5	510
Leesburg	<b>3,653</b>	1,385	2,246	10.1	362	12	304
Hampton	<b>3,639</b>	1,972	1,665	11.1	328	13	280
Chesapeake	<b>3,592</b>	1,829	1,656	8.8	408	11.5	312
Alexandria	<b>3,254</b>	1,199	2,047	9.7	335	11	296
Lynchburg	<b>2,943</b>	872	2,070	6	491	8	368
Winchester	<b>2,793</b>	1,150	1,637	6.4	436	9	310
Halifax	<b>2,458</b>	849	1,596	5.1	482	6	410
Charlottesvi	<b>2,286</b>	860	1,415	6.6	346	7	327
Martinsville	<b>2,238</b>	980	1,246	4.4	509	6	373
Petersburg	<b>2,237</b>	948	1,285	6.4	350	7	320
Pulaski	<b>2,010</b>	911	1,099	5.5	365	6	335
Danville	<b>1,933</b>	809	1,111	3.9	496	5	387
Franklin	<b>1,459</b>	697	748	4.7	310	5	292
Suffolk	<b>1,342</b>	758	583	6	224	7	192
Arlington	<b>1,211</b>	466	742	8.6	141	14.5	84
Bedford	<b>902</b>	345	557	2.4	376	3	301
COMMISS	<b>93,505</b>	40,098	52,820	245.8	380	284	329

## Excessive Workloads Create Ethical Issues for Court Appointed Counsel and Public Defenders

James M. McCauley, Ethics Counsel  
July 19, 2004

In *Strickland v. Washington*, 466 U.S. 668, 686 (1984) the Supreme Court of the United States said that the Sixth Amendment right to counsel is the right to *effective assistance of counsel*. Over a nine-month period, the Spangenberg Group conducted a comprehensive, in-depth study of Virginia's indigent defense system, comprised of public defenders and court-appointed counsel. In February 2004, the Group released its report entitled "A Comprehensive Review of Indigent Defense in Virginia." The report reveals that Virginia's indigent defense system fails to adequately protect the rights of poor people who are accused of committing crimes.

The report cites two primary factors that contribute to this finding: (1) no oversight structure to monitor the system; and (2) inadequate resources, i.e, compensation paid to defense counsel. As to the latter factor, according to the report, Virginia spends an average of only \$245 per case. This figure includes average expenses paid by the state to both public defenders and court appointed counsel. According to the report, Virginia's indigent defense lawyers are likely the lowest paid in the country. Assuming that an attorney spends only minimal time preparing a defense, court-appointed counsel cannot even recover compensation sufficient to meet their overhead expenses. In effect, with respect to court-appointed representation, the state has abdicated its constitutional mandate to provide competent counsel and has shifted the burden to the private bar. While lawyers are expected to provide *pro bono* legal services to the poor, the state and federal constitutions require the state, not the private bar, to provide the indigent with adequate representation in criminal cases.

Hopefully the General Assembly's recent creation of an indigent defense commission will address the first problem. An effective oversight structure, coupled with practical recommendations for improvement of Virginia's system, is a step forward. As things now stand, according to the report: "The deeply flawed system puts lawyers at substantial risk of violating professional rules of conduct when representing indigent defendants." The report states further that "substandard practice has become the accepted norm in Virginia's indigent defense system."

Virginia's non-waiveable fee caps in felony and misdemeanor cases (\$112 for misdemeanors punishable by confinement; \$1,096 for a felony charge punishable by more than 20 years of confinement; and \$395 for all other non-capital felony cases) create a significant disincentive for court appointed lawyers to prepare adequately for effective representation of indigent defendants. According to the report, Virginia has the lowest statutory caps for court-appointed counsel in the country, thus strongly discouraging counsel from spending all but a few hours on circuit court cases and even less on general district court matters.

Far exceeding national standards, oppressive caseloads in public defenders' offices preclude adequate representation. Dedicated but hopelessly overwhelmed public defenders interviewed by the group candidly admitted that as a result of their excessive caseloads:



- Jail visits are reserved for only the most serious cases.
- Continuances are needed and requested because there is no time to work on cases.
- Indigent defendants often do not see their attorney for the first time until their first appearance in court.
- There is no time for investigation and research.
- There is no time to interview officers, visit the crime scene, run checks on prior criminal records, request medical records, file motions, call employers, churches and community groups, talk to witnesses, etc.
- Preparation begins one day before court appearance.

Public defenders and court-appointed counsel are held to the same standards of zealousness, loyalty, competence and integrity as privately retained lawyers. *Cuyler v. Sullivan*, 446 U.S. 335, 342-45 (1980), *remanded* 631 F.2d 14 (3d Cir. 1980) *remanded*, 530 F.Supp. 1353 (E.D. Pa. 1982); *Polk County v. Dodson*, 454 U.S. 312, 321 (1981); *Evitts v. Lucey*, 469 U.S. 387, 395-96 (1985) *reh'g denied* 470 U.S. 1065 (1985); ABA Stds., The Defense Function Std. 4.12 (h) (“Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.”).

At a bare minimum, competent representation of defendants requires a lawyer to promptly investigate the facts, spot legal issues, conduct necessary research, negotiate with the prosecution and meet with the client. This preparation is all out-of-court work and takes time. The Spangenberg Report raises serious concern that even this minimal amount of work is lacking in most or many cases.

Overwhelming caseloads, especially for public defenders, contribute to the perception by many that “assembly-line” justice is all one can expect. Effective assistance of counsel means “that the lawyer not only possesses adequate skill and knowledge, but also that he has the time to and resources to apply his skill and knowledge to the task of defending each of his individual clients.” *State v. Peart*, 621 So.2d 780, 789 (La. 1993). An overwhelming caseload is not a defense in a disciplinary action based upon neglect of a client’s matter. *In re Conduct of Loew*, 642 P.2d 1174 (Or. 1982).

Public defenders cannot undertake a caseload so overwhelming that they become incapable of rendering effective assistance of counsel to any of their clients. Defense counsel should not carry such a workload that it interferes with the rendering of quality representation or endangers the client’s interest in the speedy disposition of criminal charges, or may lead to a breach of the lawyer’s ethical obligations. ABA Stds., The Defense Function Std. 4-1.3 (e). *See also* Principle 5 of *ABA Ten Principles* (adopted by the VSB Council in February 2004):

**Defense counsel’s workload is controlled to permit the rendering of quality representation.** Counsel’s workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.



As noted in a footnote to Principle 5 regarding caseloads, the annual caseload limits per attorney are:

- 150 felonies
- 400 misdemeanors
- 200 juvenile
- 200 mental health, or
- 25 appeals

Public defenders interviewed by the Spangenberg Group reported caseloads far exceeding these national guidelines which, by anyone's standards, are demanding. One public defender had 250 cases pending just at the time he was interviewed. Another public defender reported that she had closed 372 cases just in the first six months of 2003. These caseloads grossly exceed nationally accepted norms.

The acceptance of an overwhelming caseload may result in an ethical breach, leaving the defense attorney exposed to disciplinary action. Rule 1.1 requires an attorney to provide competent representation for his client; the rule defines "competent" as including "the legal knowledge, skill thoroughness and preparation reasonably necessary for the representation." Further pertinent clarification is found in Comment 5 to Rule 1.1; "adequate preparation" is presented as an aspect of the duty of competence.

Rule 1.3 requires an attorney to perform his legal services with diligence and promptness. Comment 1 to that rule notes that a lawyer should control his work load, "so that each matter can be handled adequately." Also, Comment 2 to that rule explains that the duty of diligence includes *timely* performance of the legal work. As expressed in that comment, a "client's interests often can be adversely affected by the passage of time or the change of conditions."

The language of Rules 1.1 and 1.3 includes no exceptions; there is no language creating a different standard for court-appointed counsel or public defenders. The "Scope" section for the Rules of Professional Conduct states that the rules "apply to all lawyers, whether practicing in the private or public sector." The general duties of competence and diligence apply equally to all attorneys licensed to practice in Virginia, including public defenders and court-appointed counsel.

When public defenders or court-appointed counsel have such a large caseload that they cannot provide effective assistance to their clients, they are obligated to seek a remedy for the benefit of their clients and the integrity of the system. *State v. Peart*, 621 So.2d 780, 791 (La. 1993); *Zarabis v. Bradshaw*, 912 P.2d 5, 8 (Ariz. 1996) (Contract attorney raised colorable questions concerning her ability to provide adequate representation to indigent defendants under her case load, and her request for hiatus in appointments should not have been summarily denied, in suit challenging superior court's system for providing representation to indigent defendants).

Diligent representation, as required by Rule 1.3, means that the lawyer has to act promptly to protect the rights of the accused. ABA Stds., The Defense Function Std. 4-3.6 (a) states:



Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused or his or her rights at the earliest opportunity and take all necessary action to vindicate those rights. Defense counsel should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for a change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

If the lawyer cannot act promptly and diligently, he or she should not take the case or should seek leave to withdraw. *See Lane v. Richards*, 957 F.2d 363, 364-65 (7<sup>th</sup> Cir. 1992) *cert. denied* \_\_\_ U.S. \_\_\_ (1993):

This is a woeful performance by the State of Indiana—by a lawyer who has done nothing on her client’s behalf for more than five years, by a judge who has allowed the case to grow a beard, by a prosecutor who at oral argument told us that all of this is really in Lane’s best interest, by a disciplinary body that sees no evil when lawyers deceive their clients about the attention given to their claims. We appreciate the Public Defender’s problem: too many clients, not enough lawyers. As the legislature sets the number of lawyers available, the number of cases per lawyer is beyond the control of the office. But inadequate resources do not justify misleading prisoners about what lies in store. A lawyer who cannot provide zealous representation must withdraw, not lead the client to believe that relief is just around the corner.

According to the National Legal Aid and Defender Association, the chief executive officer of an agency providing public defense services is ethically prohibited from accepting a number of cases that exceeds the capacity of the agency’s attorneys to provide competent quality representation in every case. NLADA Ethics Op. 03-01 (Apr. 2003). What constitutes “competent quality representation?” The opinion states that the elements of “competent quality representation” are the national performance standards set out in the NLADA Performance Guidelines for Criminal Defense Representation and the ABA Defense Function Standards. When confronted with a prospective assignment of cases that overload the agency and exceeds its capacity, the defense agency is ethically required to decline appointment to any and all excess cases.

Among the basic components of competent representation under the ABA and NLADA standards are:

- Timely preparation and prompt action to protect the rights of the accused;
- Thoroughness in preparation, including research to discover readily ascertainable law, at risk of professional discipline;
- Independent investigation of the facts of the case;
- Establishment of a client-attorney relationship based on trust and honesty and not merely fact gathering;



- Regular and timely attorney client communication to support informed decision making and prompt and thorough investigation;
- Pre-trial discovery, i.e., failure to request exculpatory evidence from the prosecution violates the right of the accused to effective representation of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 368-69 (1986);
- Retention of experts and forensic services where appropriate;
- Exploring and advocating alternative dispositions;
- Competent discharge of all responsibilities at all stages of in-court representation;
- Effective sentencing advocacy, including familiarity with all sentencing guidelines and alternatives and presence at all pre-sentence investigation interviews;
- Appellate representation, including explaining all rights, consequences, grounds and taking all steps necessary to preserve and protect issues for appeal (there are additional duties for appellate counsel under ABA Defense Function Std. 4-8.3, including reviewing the entire record, considering all potential guilt or penalty issues, conducting research, and presenting all pleadings in the interest of the client); and
- Maintaining competence through continuing legal education (see also Principle 9 of the ABA's Ten Principles, approved and adopted by the Virginia State Bar Council at its February 2004 meeting).

The duty to decline excess cases that exceed the defender's capacity is based upon the ethical prohibition against accepting cases which cannot be handled "competently, promptly and to completion." Rule 1.1 and 1.16 (a)(1). In addition, a lawyer has a conflict of interest if he takes on too many cases if the representation of a client may be materially limited by the lawyer's responsibility to another client. Rule 1.7. For example, in *People v. Johnson*, 606 P.2d 738, 744 (Cal. 1980), the court found that the public defender's waiver of a client's speedy trial rights because of the demands imposed by other cases "is not a matter of strategy at all: it is an attempt to resolve a conflict of interest by preferring one client over another."

The Wisconsin bar supports the view that defense counsel must decline appointment to excess cases:

When faced with a workload of cases that makes it impossible for a lawyer to prepare adequately for cases, and to represent clients competently, the staff lawyer should, except in extreme or urgent cases, decline new matters and should continue representation in pending matters only to the extent that the duty of competent, non-neglectful representation can be fulfilled.

Wisconsin Formal Op. E-84-11 (1984).

The Arizona Supreme Court, in *State v. Joe U. Smith*, 140 Ariz. 355, 681 P.2d. 1374 (1984), evaluated the Mohave County bid system for obtaining indigent defense counsel. The court held that the system raised a rebuttable inference of inadequate assistance of defense counsel and violated the due process rights of criminal defendants. The court reminded counsel that "accepting more cases than can be properly handled may result not only in reversals for failing to adequately represent clients, but in disciplinary action for



violation of the Code of Professional Responsibility.” *Smith, supra* at 140 Ariz. 363, 681 P.2d at 1382.

The Virginia State Bar’s Standing Committee on Legal Ethics has recently released its advisory opinion concerning prosecutors accepting more cases than they can competently handle. In Legal Ethics Opinion 1798, issued June 30, 2004, the committee opines that a Commonwealth’s Attorney who operates with a caseload so overly large as to preclude competent, diligent representation in each case is in violation of the ethics rules. Further, the opinion states that it is unethical under Rule 5.1 for a supervising attorney to assign an impermissibly large caseload to a subordinate attorney in the office.

Obviously, Legal Ethics Opinion 1798 applies with equal force to public defenders and court-appointed counsel as no principled distinction can be drawn between prosecutors and defense counsel on the issue of taking too many cases

### **Conclusion**

The bench, bar, legislature and the public cannot accept a substandard system that violates the constitutional rights of an indigent defendant to effective representation or which places an attorney at substantial risk of violating his or her ethical duties. Poor compensation and excessive caseloads are not proper defenses to a disciplinary action against an attorney who has neglected a client’s matter. Until the systemic problems are addressed, however, attorneys who represent indigent defendants must be mindful of the ethical requirements that attach when they accept appointment to the defense of an indigent’s criminal case. The ethical requirements apply no matter how overloaded and underpaid defense counsel may be at the time of appointment. Lawyers who accept more cases when they know or reasonably should know that they have insufficient time or resources to provide competent and diligent representation assume the risk that they may be held accountable in a disciplinary proceeding.

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 06-441**

**May 13, 2006**

## **Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation**

*All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. If the court denies the lawyer's motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant.*

*Lawyer supervisors, including heads of public defenders' offices and those within such offices having intermediate managerial responsibilities, must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct. To that end, lawyer supervisors must, working closely with the lawyers they supervise, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently handled by the individual lawyers.*

In this opinion,<sup>1</sup> we consider the ethical responsibilities of lawyers, whether employed in the capacity of public defenders or otherwise, who represent indigent persons charged with criminal offenses, when the lawyers' workloads prevent them from providing competent and diligent representa-

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1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2003. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in the individual jurisdictions are controlling.



tion to all their clients. Excessive workloads present issues for both those who represent indigent defendants and the lawyers who supervise them.<sup>2</sup>

**Ethical responsibilities of a public defender<sup>3</sup> in regard to individual workload**

Persons charged with crimes have a constitutional right to the effective assistance of counsel.<sup>4</sup> Generally, if a person charged with a crime is unable to afford a lawyer, he is constitutionally entitled to have a lawyer appointed to represent him.<sup>5</sup> The states have attempted to satisfy this constitutional mandate through various methods, such as establishment of public defender, court appointment, and contract systems.<sup>6</sup> Because these systems have been created to provide representation for a virtually unlimited number of indigent criminal defendants, the lawyers employed to provide representation generally are limited in their ability to control the number of clients they are assigned. Measures have been adopted in some jurisdictions in attempts to control workloads,<sup>7</sup> including the establishment of procedures for assigning cases to lawyers outside public defenders' offices when the cases could not properly be directed to a public defender, either because of a conflict of interest or for other reasons.

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2. For additional discussion of the problems presented by excessive caseloads for public defenders, see "Gideon's Broken Promise: American's Continuing Quest For Equal Justice," prepared by the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants 29 (ABA 2004), available at <http://www.abanet.org/legal-services/sclaid/defender/brokenpromise/fullreport.pdf> (last visited June 21, 2006).

3. The term "public defender" as used here means both a lawyer employed in a public defender's office and any other lawyer who represents, pursuant to court appointment or government contract, indigent persons charged with criminal offenses.

4. U.S. CONST. amends. VI & XIV.

5. The United States Supreme Court has interpreted the Sixth Amendment to require the appointment of counsel in any state and federal criminal prosecution that, regardless of whether for a misdemeanor or felony, leads or may lead to imprisonment for any period of time. See generally, *Alabama v. Shelton*, 535 U.S. 654, 662 (2002); *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984); *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 30-31 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938).

6. Most states deliver indigent defense services using a public defender's office (eighteen states) or a combination of public defender, assigned counsel, and contract defender (another twenty-nine states), according to the Spangenberg Group, which developed a report on behalf of the ABA Standing Committee on Legal Aid and Indigent Defendants. See The Spangenberg Group, "Statewide Indigent Defense Systems: 2005," available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/statewideinddefsystems2005.pdf> (last visited June 21, 2006).

7. See generally, National Symposium on Indigent Defense 2000, *Redefining Leadership for Equal Justice, A Conference Report* (U.S. Dep't of Justice, Bureau of Justice Assistance, Wash. D.C.) 3 (June 29-30, 2000), available at <http://www.ojp.usdoj.gov/indigentdefense/symposium.pdf> (last visited June 21, 2006) (common problem in indigent defense delivery systems is that "lawyers often have unmanageable caseloads (700 or more in a year)").

Model Rules of Professional Conduct 1.1, 1.2(a), 1.3, and 1.4 require lawyers to provide competent representation, abide by certain client decisions, exercise diligence, and communicate with the client concerning the subject of representation.<sup>8</sup> These obligations include, but are not limited to, the responsibilities to keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; communicate effectively on behalf of and with clients; control workload so each matter can be handled competently; and, if a lawyer is not experienced with or knowledgeable about a specific area of the law, either associate with counsel who is knowledgeable in the area or educate herself about the area. The Rules provide no exception for lawyers who represent indigent persons charged with crimes.<sup>9</sup>

8. Rule 1.1(a) provides that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Rule 1.2(a) states:

[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Rule 1.3 states that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”

Rule 1.4(a) and (b) states:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

9. See ABA Formal Opinion Op. 347 (Dec. 1, 1981) (Ethical Obligations of Lawyers to Clients of Legal Services Offices When Those Offices Lose Funding), in FORMAL AND INFORMAL ETHICS OPINIONS, FORMAL OPINIONS 316-348, INFORMAL OPINIONS 1285-1495 at 139 (ABA 1985) (duties owed to existing clients include duty of adequate preparation and a duty of competent representation); ABA Informal Op. 1359 (June 4, 1976) (Use of Waiting Lists or Priorities by Legal Service Officer), *id.* at 237 (same); ABA Informal Op. 1428 (Sept. 12, 1979) (Lawyer-Client Relationship Between the Individual and Legal Services Office: Duty of Office Toward Client When Attorney Representing Him (Her) Leaves the Office and Withdraws from the Case), *id.* at 326 (all lawyers, including legal services lawyers, are subject to mandatory duties owed by lawyers to existing clients, including duty of adequate preparation

Comment 2 to Rule 1.3 states that a lawyer's workload "must be controlled so that each matter may be handled competently."<sup>10</sup> The Rules do not prescribe a formula to be used in determining whether a particular workload is excessive. National standards as to numerical caseload limits have been cited by the American Bar Association.<sup>11</sup> Although such standards may be considered, they are not the sole factor in determining if a workload is excessive. Such a determination depends not only on the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer's experience and ability, and the lawyer's nonrepresentational duties.<sup>12</sup> If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation.<sup>13</sup>

A lawyer's primary ethical duty is owed to existing clients.<sup>14</sup> Therefore, a

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and competent representation). *See also* South Carolina Bar Ethics Adv. Op. 04-12 (Nov. 12, 2004) (all lawyers, including public defenders, have ethical obligation not to undertake caseload that leads to violation of professional conduct rules).

The applicability of Rules 1.1, 1.3, and 1.4 to public defenders and/or prosecutors has been recognized by ethics advisory committees in at least one other state. *See* Va. Legal Eth. Op. 1798 (Aug. 3, 2004) (duties of competence and diligence contained within rules of professional conduct apply equally to all lawyers, including prosecutors).

10. Principle 5 of *The Ten Principles of a Public Defense Delivery System* specifically addresses the workload of criminal defense lawyers:

*Defense counsel's workload is controlled to permit the rendering of quality representation.* Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.

Report to the ABA House of Delegates No. 107 (adopted Feb. 5, 2002), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf> (last visited June 21, 2006) (emphasis in original).

11. *Id.*

12. *Id.* *See also* Attorney Grievance Comm'n of Maryland v. Ficker, 706 A.2d 1045, 1051-52 (1998) (supervising lawyer violated Rule 5.1 by assigning too many cases to supervised lawyer, assigning cases day before trial, and assigning cases too complex for supervised lawyer's level of experience and ability).

13. Rule 1.16(a) states that "a lawyer shall not represent a client or, where representation has begun, shall withdraw from the representation of a client if the representation will result in violation of the Model Rules of Professional Conduct or other law."

14. *See* ABA Formal Opinion Op. 96-399 (Jan. 18, 1996) (Ethical Obligations of Lawyers Whose Employers Receive Funds from the Legal Services Corporation to their Existing and Future Clients When Such Funding is Reduced and When Remaining Funding is Subject to Restrictive Conditions), in *FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998* at 369 (ABA 2000); ABA Formal Opinion Op. 347, *supra* note 9.

lawyer must decline to accept new cases, rather than withdraw from existing cases, if the acceptance of a new case will result in her workload becoming excessive. When an existing workload does become excessive, the lawyer must reduce it to the extent that what remains to be done can be handled in full compliance with the Rules.

When a lawyer receives appointments directly from the court rather than as a member of a public defender's office or law firm that receives the appointment, she should take appropriate action if she believes that her workload will become, or already is, excessive. Such action may include the following:

- requesting that the court refrain from assigning the lawyer any new cases until such time as the lawyer's existing caseload has been reduced to a level that she is able to accept new cases and provide competent legal representation; and
- if the excessive workload cannot be resolved simply through the court's not assigning new cases, the lawyer should file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.<sup>15</sup>

If the lawyer has sought court permission to withdraw from the representation and that permission has been denied, the lawyer must take all feasible steps to assure that the client receives competent representation.

When a lawyer receives appointments as a member of a public defender's office or law firm, the appropriate action to be taken by the lawyer to reduce an excessive workload might include, with approval of the lawyer's supervisor:

- transferring non-representational responsibilities within the office, including managerial responsibilities, to others;
- refusing new cases;<sup>16</sup> and
- transferring current case(s) to another lawyer whose workload will allow for the transfer of the case(s).<sup>17</sup>

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15. Whenever a lawyer seeks to withdraw from a representation the client should be notified, even if court rules do not require such notification. *See* Rule 1.4.

16. It should be noted that a public defender's attempt to avoid appointment or to withdraw from a case must be based on valid legal grounds. Rule 6.2(a) provides, in pertinent part, that "[a] lawyer *shall not seek to avoid* appointment by a tribunal to represent a person *except for good cause*, such as representing the client is likely to result in violation of the Rules of Professional Conduct or other law." (Emphasis added). Therefore, a public defender should not claim an excessive workload in an attempt to avoid new cases or to withdraw from current cases unless good cause objectively exists.

17. It is important to note that, for purposes of the Model Rules, a public defender's office, much like a legal services office, is considered to be the equivalent of a law firm. *See* Rule 1.0(c). Unless a court specifically names an individual lawyer within a public defender's office to represent an indigent defendant, the public defender's office should be considered as a firm assigned to represent the client; responsibility for handling the case falls upon the office as a whole. *See* ABA Informal Op. 1428, *supra* note 9 (legal services agency should be considered firm retained by client; responsibility for handling caseload of departing legal services lawyer falls upon office as whole rather than upon lawyer who is departing). Therefore, cases may ethically be reassigned within a public defender's office.

If the supervisor fails to provide appropriate assistance or relief, the lawyer should continue to advance up the chain of command within the office until either relief is obtained or the lawyer has reached and requested assistance or relief from the head of the public defender's office.

In presenting these options, the Committee recognizes that whether a public defender's workload is excessive often is a difficult judgment requiring evaluation of factors such as the complexity of the lawyer's cases and other factors.<sup>18</sup> When a public defender consults her supervisor and the supervisor makes a conscientious effort to deal with workload issues, the supervisor's resolution ordinarily will constitute a "reasonable resolution of an arguable question of professional duty" as discussed in Rule 5.2(b).<sup>19</sup> In those cases where the supervisor's resolution is not reasonable, however, the public defender must take further action.<sup>20</sup>

Such further action might include:

- if relief is not obtained from the head of the public defender's office, appealing to the governing board, if any, of the public defender's office;<sup>21</sup> and
- if the lawyer is still not able to obtain relief,<sup>22</sup> filing a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.<sup>23</sup>

If the public defender is not allowed to withdraw from representation, she must obey the court's order while taking all steps reasonably feasible to insure that her client receives competent and diligent representation.<sup>24</sup>

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18. See note 12, *supra*, and accompanying text.

19. See Comment [2].

20. See, e.g., *Atty. Grievance Comm'n of Maryland v. Kahn*, 431 A.2d 1336, 1352 (1981) ("Obviously, the high ethical standards and professional obligations of an attorney may never be breached because an attorney's employer may direct such a course of action on pain of dismissal. . . .")

21. See Michigan Bar Committee on Prof. & Jud. Eth. Op. RI-252 (Mar. 1, 1996) (in context of civil legal services agency, if subordinate lawyer receives no relief from excessive workload from lawyer supervisor, she should, under Rule 1.13(b) and (c), take the matter to legal services board for resolution).

22. Rule 5.2 makes clear that subordinate lawyers are not insulated from violating the Rules of Professional Conduct and suffering the consequences merely because they acted in accordance with a supervisory lawyer's advice or direction unless it was in regard to "an arguable question of professional duty."

23. A public defender filing a motion to withdraw under these circumstances should provide the court with information necessary to justify the withdrawal, while being mindful of the obligations not to disclose confidential information or information as to strategy or other matters that may prejudice the client. See Rule 1.16 cmt. 3.

24. Notwithstanding the lawyer's duty in this circumstance to continue in the representation and to make every attempt to render the client competent representation, the lawyer nevertheless may pursue any available means of review of the court's order. See *Iowa Supreme Court Bd. of Prof. Ethics & Conduct v. Hughes*, 557 N.W.2d 890, 894

**Ethical responsibility of a lawyer who supervises a public defender**

Rule 5.1 provides that lawyers who have managerial authority, including those with intermediate managerial responsibilities, over the professional work of a firm or public sector legal agency or department shall make reasonable efforts to ensure that the other lawyers in the agency or department conform to the Rules of Professional Conduct. Rule 5.1 requires that lawyers having direct supervisory authority take reasonable steps to ensure that lawyers in the office they supervise are acting diligently in regard to all legal matters entrusted to them, communicating appropriately with the clients on whose cases they are working, and providing competent representation to their clients. As an essential first step, the supervisor must monitor the workloads of subordinate lawyers to ensure that the workload of each lawyer is appropriate. This involves consideration of the type and complexity of cases being handled by each lawyer; the experience and ability of each lawyer; the resources available to support her, and any non-representational responsibilities assigned to the subordinate lawyers.

If any subordinate lawyer's workload is found to be excessive, the supervisor should take whatever additional steps are necessary to ensure that the subordinate lawyer is able to meet her ethical obligations in regard to the representation of her clients. These might include the following:

- transferring the lawyer's non-representational responsibilities, including managerial responsibilities, to others in the office;
- transferring case(s) to another lawyer or other lawyers whose workload will allow them to provide competent representation;<sup>25</sup>
- if there are no other lawyers within the office who can take over the cases from which the individual lawyer needs to withdraw, supporting the lawyer's efforts to withdraw from the representation of the client;<sup>26</sup> and finally,
- if the court will not allow the lawyer to withdraw from representation, providing the lawyer with whatever additional resources can be made available to assist her in continuing to represent the client(s) in a manner consistent with the Rules of Professional Conduct.

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(Iowa 1996) ("ignoring a court order is simply not an appropriate step to test the validity of the order under our Code of Professional Responsibility"); Utah Bar Eth. Adv. Op. 107 (Feb. 15, 1992) (if grounds exist to decline court appointment, lawyer should not disobey order but should seek review by appeal or other available procedure).

25. See note 17, *supra*.

26. See *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So.2d 1130, 1138-39 (Fla. 1990) (in context of inadequate funding, court stated that if "the backlog of cases in the public defender's office is so excessive that there is no possible way he can timely handle those cases, it is his responsibility to move the court to withdraw"); see also *In re Order on Motions to Withdraw Filed by Tenth Circuit Public Defender*, 612 So.2d 597 (Fla. App. 1992) (en banc) (public defender's office entitled to withdraw due to excessive caseload from representing defendants in one hundred forty-three cases).

When a supervised lawyer's workload is excessive and, notwithstanding any other efforts made by her supervisor to address the problem, it is obviously incumbent upon the supervisor to assign no additional cases to the lawyer, and, if the lawyer's cases come by assignment from the court, to support the lawyer's efforts to have no new cases assigned to her by the court until such time as she can adequately fulfill her ethical responsibilities to her existing clients.

In dealing with workload issues, supervisors frequently must balance competing demands for scarce resources. As Comment [2] to Rule 5.2 observes, if the question of whether a lawyer's workload is too great is "reasonably arguable," the supervisor of the lawyer has the authority to decide the question. In the final analysis, however, each client is entitled to competent and diligent representation. If a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, under Rule 5.1(c),<sup>27</sup> the supervisor himself is responsible for the subordinate's violation of the Rules of Professional Conduct.<sup>28</sup>

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27. Rule 5.1(c) states:

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

See also Rules 1.16 (a) and 8.4 (a).

28. See, e.g., *Attorney Grievance Comm'n of Maryland v. Ficker*, 706 A.2d at 1052, *supra* note 12); *Va. Legal Ethics Op. 1798 supra* note 9 (lawyer supervisor who assigns caseload that is so large as to prevent lawyer from ethically representing clients would violate Rule 5.1); *American Council of Chief Defenders, Nat'l Legal Aid and Defender Ass'n Eth. Op. 03-01* (April 2003), available at <http://www.nlada.org/DMS/Documents/1082573112.32/ACCD%20Ethics%20opinion%20on%20Workloads.pdf> (last visited June 21, 2006) ("chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case... When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases."); *Wisconsin State Bar Prof. Ethics Comm. Op. E-91-3* (1991) (assigning caseload that exceeds recognized maximum caseload standards, and that would not allow subordinate public defender to conform to rules of professional conduct, "could result in a violation of disciplinary standards"); *Ariz. Op. No. 90-10* (Sept. 17, 1990) ("when a Public Defender has knowledge that subordinate lawyers, because of their caseloads, cannot comply with their duties of diligence and competence, the Public Defender must take action."); *Wisconsin State Bar Prof. Ethics Comm. Op. E-84-11* (1984) (supervisors in public defender's office may not ethically increase workloads of subordinate lawyers to point where subordinate lawyer cannot, even at personal sacrifice, handle each of her clients' matters competently and in non-neglectful manner).



**Conclusion**

The obligations of competence, diligence, and communication under the Rules apply equally to every lawyer. All lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently. If a lawyer's workload is such that the lawyer is unable to provide competent and diligent representation to existing or potential clients, the lawyer should not accept new clients. If the problem of an excessive workload cannot be resolved through the non-acceptance of new clients or by other available measures, the lawyer should move to withdraw as counsel in existing cases to the extent necessary to bring the workload down to a manageable level, while at all times attempting to limit the prejudice to any client from whose case the lawyer has withdrawn. If permission of a court is required to withdraw from representation and permission is refused, the lawyer's obligations under the Rules remain: the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to provide competent and diligent representation to the defendant.

Supervisors, including the head of a public defender's office and those within such an office having intermediate managerial responsibilities, must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct. To that end, supervisors must, working with the lawyers they supervise, monitor the workload of the subordinate lawyers to ensure that the workloads are not allowed to exceed that which may be handled by the individual lawyers. If a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, the supervisor is responsible for the subordinate's violation of the Rules of Professional Conduct.



APPENDIX D  
VAIDC RESOLUTION

VIRGINIA INDIGENT DEFENSE COMMISSION  
Approved November 9, 2004

WHEREAS, Virginia Code §19.2-163.01(7) requires the Virginia Indigent Defense Commission to establish appropriate caseload limits in Public Defenders offices; and

WHEREAS, the assessment of indigent defense in Virginia published by the American Bar Association in January 2004 identifies the unreasonably low and unwaiveable fee caps imposed by Virginia Code §19.2-163 as a factor that contributes to Virginia's provision of substandard indigent defense; and

WHEREAS, the creation of caseload limits and the abolition of the fee caps will require the appropriation and expenditure of considerable fiscal resources; and

WHEREAS, successful implementation of these measures requires consideration of economic impact, ethical mandates, and professional standards, it is hereby RESOLVED:

- 1) That the Virginia Indigent Defense Commission directs its staff to develop a process for presenting these policy and fiscal issues to the General Assembly and to report its findings to the Commission prior to the convening of the 2006 General Assembly; and

2) That until caseload limits with adequate funding can be enacted at the agency-wide level, the Commission directs the public defenders to monitor caseloads within their respective offices and to take all reasonable steps necessary to limit caseloads so that each attorney may fulfill his or her ethical duty of competency consistent with the opinion of The Virginia State Bar's Standing Committee on Legal Ethics' Opinion #1798, and Virginia State Bar Ethics Counsel James M. McCauley's letter opinion, issued July 19, 2004.

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	A	B	C	D	E	F	G	H	I	J	K	L
1	FY03 ANNUAL REPORT: CASES BY OFFICE											
2	OFFICE		CASES /A		CASES /J		SUB TOTAL		TOTAL	APPEAL	CAPITAL	TOTAL
3			FEL	MISD	FEL	MISD	FEL	MISD				CASES
4	ALL	OFFICES	31662	45311	2345	6245	34007	51556	85563	880	7	86450
5	APP				(Allocated to the lower court jurisdiction)					157		
6	ALE		1142	1861	34	95	1176	1956	3132	15	0	3147
7	BED		288	565	16	102	304	667	971	1	0	972
8	CHA		1074	1550	85	294	1159	1844	3003	13	0	3016
9		Albemarle	385	418	38	143	423	561	984	0	0	984
10		Charlottesville	689	1132	47	151	736	1283	2019	0	0	2019
11	DAN		704	547	32	246	736	793	1529	41	0	1570
12	FAI		2726	5050	65	363	2791	5413	8204	44	0	8248
13	FRA		554	710	52	70	606	780	1386	12	0	1398
14		Franklin	110	250	13	22	123	272	395	0	0	395
15		Isle of Wight	214	263	30	35	244	298	542	2	0	544
16		Southampton	230	197	9	13	239	210	449	3	0	452
17	FRE		2025	3666	143	637	2168	4303	6471	32	0	6503
18		Fredericksburg	568	746	22	171	590	917	1507	13	0	1520
19		King George	115	279	5	50	120	329	449	2	0	451
20		Spotsylvania	571	960	54	205	625	1165	1790	7	0	1797
21		Stafford	771	1681	62	211	833	1892	2725	10	0	2735
22	HAL		810	1122	53	130	863	1252	2115	17	2	2134
23		Halifax	353	485	13	60	366	545	911	17	2	930
24		Lunenburg	108	141	15	24	123	165	288	0	0	288
25		Mecklenburg	349	496	25	46	374	542	916	0	0	916
26	LEE		1488	1938	86	404	1574	2342	3916	19	2	3937
27		Fauquier	371	515	17	39	388	554	942	0	0	942
28		Loudoun	1008	1284	66	362	1074	1646	2720	8	0	2728
29		Rappahannock	30	51	1	1	31	52	83	0	1	84
30		Warrenton	79	88	2	2	81	90	171	11	1	183

	A	B	C	D	E	F	G	H	I	J	K	L
1	FY03 ANNUAL REPORT: CASES BY OFFICE											
2	OFFICE		CASES /A		CASES /J		SUB	TOTAL	TOTAL	APPEAL	CAPITAL	TOTAL
3			FEL	MISD	FEL	MISD	FEL	MISD				CASES
4	ALL	OFFICES	31662	45311	2345	6245	34007	51556	85563	880	7	86450
31	LYN		865	1404	40	125	905	1529	2434	41	0	2475
32	MAR		912	908	55	64	967	972	1939	16	0	1955
33		Henry	445	522	25	36	470	558	1028	8	0	1036
34		Martinsville	340	275	22	22	362	297	659	6	0	665
35		Patrick	127	111	8	6	135	117	252	2	0	254
36	NOR		2266	2876	297	467	2563	3343	5906	82	1	5989
37	PET		939	1086	77	130	1016	1216	2232	15	0	2247
38	POR		1675	3639	149	269	1824	3908	5732	281	0	6013
39	PUL		989	1207	30	184	1019	1391	2410	5	0	2415
40		Bland	29	44	2	4	31	48	79	0	0	79
41		Pulaski	509	533	15	79	524	612	1136	0	0	1136
42		Radford	136	296	4	13	140	309	449	0	0	449
43		Wythe	315	334	9	88	324	422	746	0	0	746
44	RIC		5092	5429	395	761	5487	6190	11677	70	0	11747
45		Adult	4577	4187	0	0	4577	4187	8764	70	0	8834
46		Juvenile	515	1242	395	761	910	2003	2913	0	0	2913
47	ROA		1922	2112	118	253	2040	2365	4405	20	0	4425
48	STA		1146	1601	93	475	1239	2076	3315	34	2	3351
49		Augusta	342	527	33	209	375	736	1111	0	0	1111
50		Buena Vista	27	44	3	8	30	52	82	0	0	82
51		Lexington					0	0	0	0	0	0
52		Rockbridge	104	154	4	35	108	189	297	0	0	297
53		Staunton	329	483	37	154	366	637	1003	0	2	1005
54		Waynesboro	344	393	16	69	360	462	822	0	0	822
55	SUF		819	872	71	74	890	946	1836	45	0	1881
56	VIR		2924	5359	354	886	3278	6245	9523	55	0	9578

	A	B	C	D	E	F	G	H	I	J	K	L
1	FY03 ANNUAL REPORT: CASES BY OFFICE											
2	OFFICE		CASES /A		CASES /J		SUB	TOTAL	TOTAL	APPEAL	CAPITAL	TOTAL
3			FEL	MISD	FEL	MISD	FEL	MISD				CASES
4	ALL	OFFICES	31662	45311	2345	6245	34007	51556	85563	880	7	86450
57	WIN		1302	1809	100	216	1402	2025	3427	22	0	3449
58		Clarke	66	89	8	3	74	92	166	1	0	167
59		Frederick	261	404	33	42	294	446	740	1	0	741
60		Page	114	184	13	16	127	200	327	9	0	336
61		Shenandoah	180	261	15	86	195	347	542	1	0	543
62		Warren	64	97	5	9	69	106	175	6	0	181
63		Winchester	617	774	26	60	643	834	1477	4	0	1481

	A	B	AG	AU
1				
2	OFFICE		ATTYS	TTL CASE/
3			(ACT)	ACT
4	ALL	OFFICES	199.7	432.9
5	APP			
6	ALE		10.8	292.7
7	BED		2.5	395.1
8	CHA		7.0	430.9
9		Albemarle		
10		Charlottesville		
11	DAN		3.8	409.9
12	FAI		20.7	398.6
13	FRA		4.0	349.5
14		Franklin		
15		Isle of Wight		
16		Southampton		
17	FRE		11.8	549.7
18		Fredericksburg		
19		King George		
20		Spotsylvania		
21		Stafford		
22	HAL		6.0	358.1
23		Halifax		
24		Lunenburg		
25		Mecklenburg		
26	LEE		9.8	403.8
27		Fauquier		
28		Loudoun		
29		Rappahannock		
30		Warrenton		

	A	B	AG	AU
1				
2	OFFICE		ATTYS	TTL CASE/
3			(ACT)	ACT
4	ALL	OFFICES	199.7	432.9
31	LYN		7.9	312.5
32	MAR		5.0	391.0
33		Henry		
34		Martinsville		
35		Patrick		
36	NOR		11.7	510.6
37	PET		6.0	374.5
38	POR		13.8	434.8
39	PUL		4.9	490.9
40		Bland		
41		Pulaski		
42		Radford		
43		Wythe		
44	RIC		24.5	478.7
45		Adult		
46		Juvenile		
47	ROA		10.0	444.3
48	STA		6.5	515.5
49		Augusta		
50		Buena Vista		
51		Lexington		
52		Rockbridge		
53		Staunton		
54		Waynesboro		
55	SUF		5.9	316.7
56	VIR		20.4	469.0



	A	B	AG	AU
1				
2	OFFICE		ATTYS	TTL CASE/
3			(ACT)	ACT
4	ALL	OFFICES	199.7	432.9
57	WIN		6.7	517.1
58		Clarke		
59		Frederick		
60		Page		
61		Shenandoah		
62		Warren		
63		Winchester		

**FY04 ANNUAL REPORT: CASES BY OFFICE**

OFFICE	TOTAL CASES	FELONY	MISD	APPEAL	TOTAL ADULT	JUV FEL	JUV MISD	JUV APPEAL	TTL JUV	TOTAL CASES	AUTH ATTNY	CASES/ ATTNY
Alexandria	3049	1064	1843	7	2914	35	100	0	135	3049	10.5	290
Bedford	856	301	506	2	809	9	38	0	47	856	2.25	380
Charlottesville	2918	1008	1476	29	2513	89	314	2	405	2918	6.5	449
Charlottesville	1755	561	980	13	1554	42	159	0	201	1755		
Albermarle	1163	447	496	16	959	47	155	2	204	1163		
Danville	1756	783	706	19	1508	39	209	0	248	1756	3.75	468
Fairfax	8452	2587	5058	5	7650	107	694	1	802	8452	20.75	407
Franklin	1433	585	699	32	1316	54	63	0	117	1433	3.75	382
Franklin	366	123	216	0	339	12	15	0	27	366		
Isle of Wright	591	232	294	5	531	25	35	0	60	591		
Southampton	476	230	189	27	446	17	13	0	30	476		
Fredericksburg	6963	2172	4042	33	6247	146	569	1	716	6963	11.5	605
Fredericksburg	1476	539	758	8	1305	23	148	0	171	1476		
King George	408	117	262	3	382	7	19	0	26	408		
Spotsylvania	2159	632	1246	4	1882	68	209	0	277	2159		
Stafford	2920	884	1776	18	2678	48	193	1	242	2920		
Halifax	2338	805	1297	30	2132	37	168	1	206	2338	5.75	407
Halifax	1130	377	644	19	1040	10	80	0	90	1130		
Lunenburg	352	123	196	6	325	7	19	1	27	352		
Mecklenburg	856	305	457	5	767	20	69	0	89	856		
Leesburg	3343	1289	1597	8	2894	92	357	0	449	3343	9.5	352
Leesburg	2257	839	1024	8	1871	73	313	0	386	2257		
Warrenton	152	57	86	0	143	4	5	0	9	152		
Fauquier	872	368	451	0	819	14	39	0	53	872		
Rappahannock	62	25	36	0	61	1	0	0	1	62		
Lynchburg	2623	906	1530	33	2469	33	121	0	154	2623	7.5	350
Martinsville	1887	863	893	21	1777	36	74	0	110	1887	4.75	397
Henry County	937	429	463	8	900	14	23	0	37	937		
Martinsville	684	303	310	9	622	20	42	0	62	684		
Patrick County	266	131	120	4	255	2	9	0	11	266		
Norfolk	7949	2977	3918	117	7012	387	550	0	937	7949	18.25	436

**FY04 ANNUAL REPORT: CASES BY OFFICE**

OFFICE	TOTAL CASES	FELONY	MISD	APPEAL	TOTAL ADULT	JUV FEL	JUV MISD	JUV APPEAL	TTL JUV	TOTAL CASES	AUTH ATTNY	CASES/ ATTNY
Petersburg	2639	1044	1363	15	2422	59	158	0	217	2639	5.75	459
Portsmouth	6319	1575	4118	153	5846	137	334	2	473	6319	13.25	477
Pulaski	2552	1095	1245	1	2341	31	180	0	211	2552	5.75	444
Bland	82	28	53	0	81	0	1	0	1	82		
Pulaski	1162	537	545	0	1082	12	68	0	80	1162		
Radford	433	145	270	0	415	3	15	0	18	433		
Wytheville	875	385	377	1	763	16	96	0	112	875		
Richmond	9891	4697	4063	26	8786	408	697	0	1105	9891	24.25	408
Ric/Adt	8045	4283	3736	26	8045	0	0	0	0	8045		
Ric/Juv	1846	414	327	0	741	408	697	0	1105	1846		
Roanoke	4188	2012	1890	9	3911	81	196	0	277	4188	9.5	441
Staunton	3354	1072	1784	23	2879	58	417	0	475	3354	6	559
Augusta County	1072	327	553	2	882	25	165	0	190	1072		
Buena Vista	82	28	48	0	76	0	6	0	6	82		
Rockbridge County	241	83	139	0	222	5	14	0	19	241		
Staunton	1170	365	611	20	996	12	162	0	174	1170		
Waynesboro	789	269	433	1	703	16	70	0	86	789		
Suffolk	1706	733	831	4	1568	55	83	0	138	1706	6.5	262
VA Beach	10070	3083	5624	20	8727	388	955	0	1343	10070	20.25	497
Winchester	3428	1305	1844	28	3177	68	183	0	251	3428	6.5	527
Winchester	1468	601	816	6	1423	16	29	0	45	1468		
Clarke County	137	63	63	0	126	4	7	0	11	137		
Frederick County	823	308	447	9	764	28	31	0	59	823		
Page	310	105	174	8	287	6	17	0	23	310		
Shenandoah	595	193	291	1	485	14	96	0	110	595		
Warren	95	35	53	4	92	0	3	0	3	95		
COMMISSION	87714	31956	46327	615	78898	2349	6460	7	8816	87714	202.5	433

FY05 ANNUAL REPORT: CASES BY OFFICE

OFFICE	TOTAL CASES	CAPITAL	FELONY	MISD	APPEAL	TTL ADULT	JUV. FEL.	JUV. MISD.	JUV. APPEAL	TTL JUV.	TTL ATTY	CASES/ ATTY
Alexandria	3177	0	1048	1938	14	3000	50	121	6	177	11	289
Arlington	0	0	0	0	0	0	0	0	0	0	14.5	0
Bedford	758	0	290	464	1	755	1	2	0	3	3	253
Charlottesville	2474	0	935	1219	14	2168	59	245	2	306	7	353
Charlottesville	1411	0	532	732	8	1272	31	108	0	139		
Albermarle	1063	0	403	487	6	896	28	137	2	167		
Chesapeake	1811	0	1053	584	35	1672	58	79	2	139	11.5	157
Danville	1442	1	698	509	44	1252	31	159	0	190	4	361
Fairfax	6492	0	2713	2991	2	5706	222	564	0	786	21	309
Franklin	1302	0	553	650	9	1212	42	47	1	90	4	326
Franklin	321	0	118	183	0	301	8	12	0	20		
Isle of Wright	606	0	238	315	4	557	20	29	0	49		
Southampton	375	0	197	152	5	354	14	6	1	21		
Fredricksburg	6650	2	2230	3677	52	5961	147	540	2	689	13	512
Fredricksburg	1467	1	606	688	13	1308	29	129	1	159		
King George	442	0	129	266	6	401	8	33	0	41		
Spotsylvania	2109	0	689	1139	11	1839	60	210	0	270		
Stafford	2632	1	806	1584	22	2413	50	168	1	219		
Halifax	2222	0	735	1246	18	1999	43	179	1	223	6	370
Halifax	1106	0	359	653	7	1019	21	66	0	87		
Lunenburg	301	0	95	167	4	266	6	28	1	35		
Mecklenburg	815	0	281	426	7	714	16	85	0	101		
Hampton	1058	0	536	383	0	919	40	99	0	139	13	81
Leesburg	3324	1	1229	1609	16	2855	83	386	0	469	12	277
Leesburg	2098	0	760	930	11	1701	60	337	0	397		
Fauquier	990	1	378	550	0	929	17	44	0	61		
Rappahannock	67	0	25	38	1	64	2	1	0	3		
Warrenton	169	0	66	91	4	161	4	4	0	8		
Lynchburg	2847	0	943	1741	3	2687	51	109	0	160	8	356

FY05 ANNUAL REPORT: CASES BY OFFICE

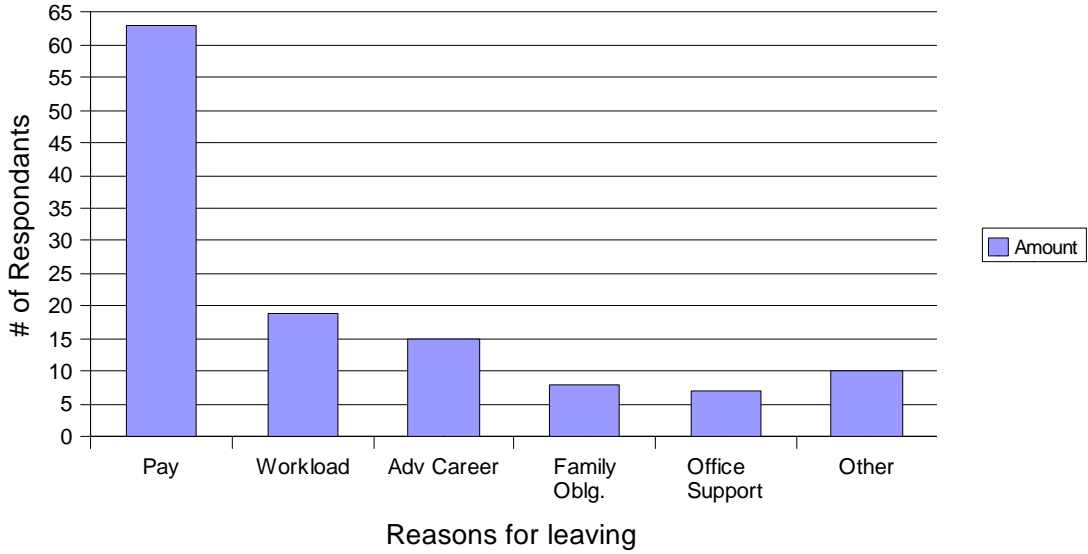
OFFICE	TOTAL CASES	CAPITAL	FELONY	MISD	APPEAL	TTL ADULT	JUV. FEL.	JUV. MISD.	JUV. APPEAL	TTL JUV.	TTL ATTY	CASES/ ATTY
Martinsville	2116	0	943	1027	13	1983	35	98	0	133	5	423
Henry County	1032	0	440	527	5	972	16	44	0	60		
Martinsville	790	0	356	370	6	732	14	44	0	58		
Patrick County	294	0	147	130	2	279	5	10	0	15		
Newport News	476	0	50	324	0	374	29	73	0	102	15	32
Norfolk	7123	0	2833	3335	17	6185	242	651	45	938	21	339
Petersburg	2475	0	977	1282	10	2269	66	140	0	206	6	413
Portsmouth	5317	0	1718	3136	98	4952	100	262	3	365	14	380
Pulaski	2331	0	936	1211	2	2149	32	150	0	182	6	389
Bland	61	0	26	29	0	55	4	2	0	6		
Pulaski	1083	0	406	579	0	985	15	83	0	98		
Radford	342	0	133	196	0	329	5	8	0	13		
Wytheville	845	0	371	407	2	780	8	57	0	65		
Richmond	11490	0	5412	5125	44	10581	356	553	0	909	25	460
Richmond	10142	0	5009	5086	44	10139	2	1	0	3		
Richmond Juv.	1348	0	403	39	0	442	354	552	0	906		
Roanoke	3705	0	1854	1563	1	3418	109	177	1	287	10	371
Staunton	4094	0	1401	2247	27	3649	56	389	0	445	6.5	630
Augusta County	1284	0	437	647	0	1084	27	173	0	200		
Buena Vista	135	0	39	90	0	129	1	5	0	6		
Lexington	1	0	0	1	0	1	0	0	0	0		
Rockbridge County	460	0	136	302	0	438	2	20	0	22		
Staunton	1290	0	408	727	0	1135	15	140	0	155		
Waynesboro	924	0	381	480	1	862	11	51	0	62		
Suffolk	1814	1	670	964	33	1668	68	78	0	146	7	259
VA Beach	9759	0	2932	5371	43	8346	299	1111	3	1413	21	465
Winchester	3097	0	1055	1786	1	2842	66	189	0	255	8	387
Clarke County	200	0	62	102	0	164	9	27	0	36		
Frederick County	787	0	246	475	0	721	20	46	0	66		
Winchester	1495	0	566	852	1	1419	27	49	0	76		

FY05 ANNUAL REPORT: CASES BY OFFICE												
OFFICE	TOTAL CASES	CAPITAL	FELONY	MISD	APPEAL	TTL ADULT	JUV. FEL.	JUV. MISD.	JUV. APPEAL	TTL JUV.	TTL ATTY	CASES/ ATTY
Page	268	0	72	181	0	253	7	8	0	15		
Shenadoah	347	0	109	176	0	285	3	59	0	62		
Appellate	133				86							4
COMMISSION	87487	5	33744	44382	583	78602	2285	6401	66	8752	276.5	316

Attachment #1

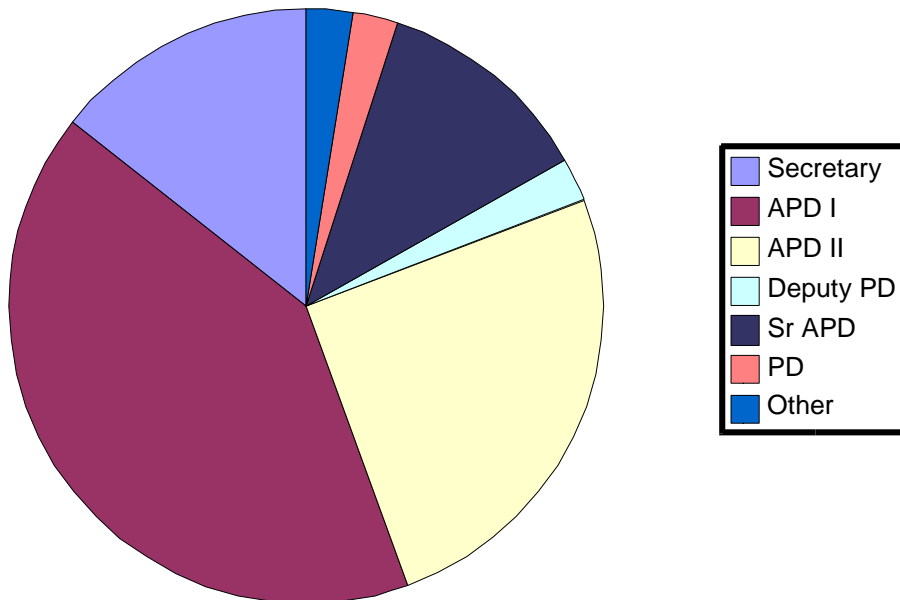
**EXIT INTERVIEW RESPONSES – TERMINATED EMPLOYEES\  
July, 2002 – June, 2005**

**Reasons for Leaving ValDC**



NOTE: 84 respondents, several gave multiple reasons for leaving

**Responses by Position**



Attachment #2

**Average Salaries-Public Defenders & Commonwealth's Attorneys  
July, 2005**

	<u>PDO</u>	<u>CAO</u>	<u>Difference \$</u>	<u>Difference %</u>
Secretary I	\$ 22,853	\$ 29,891	\$ 7,038	24%
Secretary II	\$ 26,543	\$ 36,030	\$ 9,487	26%
APD I	\$ 39,493	\$ 53,917	\$ 14,424	27%
APD II	\$ 47,577	\$ 61,599	\$ 14,022	23%
Sr APD	\$ 53,996	\$ 68,199	\$ 14,203	21%
Deputy	\$ 64,409	\$ 82,917	\$ 18,508	22%
PD	\$ 89,537	\$ 119,189	\$ 29,652	25%

Commonwealth's Attorney data obtained from the VA Compensation Board



Attachment #3

**ValDC Starting Salaries  
Compared  
With Other States' Public Defenders\***

<b>Non-NOVA</b>	<b>VA IDC</b>	<b>Out of State**</b>	<b>Difference \$</b>	<b>Difference %</b>
<b>Sec I</b>	\$20,737	\$24,888	\$4,151	16.7%
<b>Sec II</b>	\$22,669	\$28,062	\$5,393	19.2%
<b>APD I</b>	\$38,691	\$48,534	\$9,843	20.3%
<b>APD II</b>	\$46,236	\$53,685	\$7,449	12.5%
<b>Sr APD</b>	\$50,546	\$59,533	\$8,987	15.1%
<b>Deputy PD</b>	\$55,256	\$70,393	\$15,137	21.5%
<b>PD</b>	\$77,837	\$86,088	\$8,251	9.6%

\*\*Adjusted to Cost Of Living in Richmond VA

<b>NOVA</b>	<b>VA IDC</b>	<b>Out of State**</b>	<b>Difference \$</b>	<b>Difference %</b>
<b>Sec I</b>	\$22,669	\$34,973	\$12,304	35.2%
<b>Sec II</b>	\$27,092	\$40,261	\$13,169	32.7%
<b>APD I</b>	\$42,296	\$70,449	\$28,153	40.0%
<b>APD II</b>	\$50,546	\$78,018	\$27,472	35.2%
<b>Sr APD</b>	\$55,256	\$83,703	\$28,447	34.0%
<b>Deputy PD</b>	\$60,404	\$98,139	\$37,735	38.5%
<b>PD</b>	\$86,268	\$108,956	\$22,688	20.8%

\*\*Adjusted to Cost Of Living in Fairfax, VA

\*Compensation information for public defender systems in DC, CT, DE, MD, NC, GA, TN, WV and MO

Attachment #4

**ValDC Administrative Staff Salary Comparison - 8/05**

**Comparison with Executive Branch  
Position Groups**

<u>ValDC Position</u>	<u>Salary</u>	<u>Exec Branch Position</u>	<u>Pay Band</u>	<u>Salary Range</u>		<u>Percentile</u>
Secretary II	\$22,669	Admin/Office Spec II	2	\$18,026	\$36,995	24%
Procurement Officer I	\$22,669	Admin/Office Spec III	3	\$21,543	\$44,213	5%
Accounting Tech	\$25,525	Admin/Office Spec III	3	\$21,543	\$44,213	18%
H.R. Administrator	\$27,092	Admin/Office Spec III	3	\$21,543	\$44,213	24%
Training Administrator	\$36,831	Trainer & Instructor I	3	\$21,543	\$44,213	67%
Accountant #2	\$26,772	Financial Specialist	4	\$28,143	\$57,759	-5%
Office Manager	\$27,092	Gen'l Admin Supv I	4	\$28,143	\$57,759	-4%
Payroll Tech	\$27,894	Financial Specialist	4	\$28,143	\$57,759	-1%
Accountant #1	\$28,834	Financial Specialist	4	\$28,143	\$57,759	2%
Procurement Officer II	\$30,948	Procurement Officer I	4	\$28,143	\$57,759	9%
Data Analyst	\$33,000	Policy/Plan Spec I	4	\$28,143	\$57,759	16%
Computer Supp Spec	\$38,000	I. T. Specialist I	4	\$28,143	\$57,759	33%
Lease Administrator	\$38,692	Land/Prop Mgmt Agent II	4	\$28,143	\$57,759	36%
Benefits Administrator	\$38,606	H.R. Analyst I	4	\$28,143	\$57,759	35%
Sr Systems Eng	\$55,530	I. T. Specialist II	5	\$36,766	\$75,456	48%

**Comparison with Richmond Private Sector**

<u>ValDC Position</u>	<u>Salary</u>	<u>Private Sector Avg*</u>	<u>Diff</u>
Secretary II	\$22,669	\$27,000	-16%
Training Administrator	\$36,831	\$42,000	-12%
H.R. Administrator	\$27,092	\$36,000	-25%
Accounting Tech	\$25,525	\$28,000	-9%
Payroll Tech	\$27,894	\$32,000	-13%
Procurement Officer I	\$22,669	\$29,000	-22%
Procurement Officer II	\$30,948	\$41,000	-25%
Lease Administrator	\$38,692	N/A	
Data Analyst	\$33,000	\$43,000	-23%
Computer Supp Spec	\$38,000	\$37,000	3%
Accountant #1	\$28,834	\$38,000	-24%
Accountant #2	\$26,772	\$38,000	-30%
Office Manager	\$27,092	\$43,000	-37%
Benefits Administrator	\$38,606	\$45,000	-14%
Sr Systems Eng	\$55,530	\$65,000	-15%

\*Based on 2004 Mercer Consulting Group Study