

Virginia Indigent Defense Commission 2005 Annual Report Executive Summary

I. Virginia Indigent Defense Commission

A. Introduction

The Virginia Indigent Defense Commission (“VaIDC”) is an independent state agency under the judicial branch of government charged with carrying out the Commonwealth’s constitutional obligation to provide attorneys for indigent people accused of crimes. Commission clients are charged with crimes that carry a potential penalty of incarceration or death. In such cases, Virginia courts appoint public defender offices and effective July 1, 2005, members of the private bar certified by the VaIDC to provide legal representation.

B. Virginia Code § 19.2-163.01 – Statutory Mandates

The 2004 legislation that created the VaIDC sets forth several statutory mandates. Many of these mandates relate to the new responsibility of certifying public defenders and members of the private bar who are appointed by the courts to represent indigent defendants. The VaIDC developed a core curriculum for initial certification training courses and began conducting certification training programs throughout the Commonwealth. Many lawyers were able to waive the certification training requirements due to previous criminal trial work in Virginia’s courts. Certification trainings and the statutory certification standards were publicized through articles in *Virginia Lawyers Weekly* newspaper, the *Voice* newspaper, the *Virginia Lawyer* magazine, by the Virginia Trial Lawyers Association and the Virginia Bar Association. Currently, the VaIDC has certified 1,559 attorneys. Working with the Virginia State Bar, VaIDC will develop standards of practice and conduct for court appointed attorneys and guidelines for removing attorneys from the certified court-appointed attorney list. In furtherance of this process, VaIDC has gathered information from other jurisdictions as well as nationally recognized standards of practice.

C. VaIDC FY05 Training Initiatives

During FY05, VaIDC enhanced the training and development opportunities provided to public defenders, investigators, sentencing advocates, support staff and members of the private bar. The VaIDC also sent attorneys and support staff to a number of non-VaIDC training programs both within and outside of Virginia. A summary of the training programs attended by VaIDC employees and private bar members during FY05 is contained in the full text of the 2005 VaIDC Annual Report.

D. VaIDC Appropriated Funds

The General Assembly appropriated to the VaIDC general funds in the amount of \$31,363,168 as its base budget for FY05. For the public defender offices, 90% of the budget is allocated to personnel and rent costs, leaving little for the ongoing costs of training, operating and litigation expenses. The administrative office prepares budgets for each of the public and capital defender offices and the administrative office. Budgets are then presented to VaIDC members for approval.

II. The State of Indigent Defense in Virginia

A. Introduction

In January 2004, the American Bar Association report, A Comprehensive Review of Indigent Defense in Virginia prepared by the Spangenberg Group was released. Although the 2004 General Assembly began the process of addressing some of its findings, the report still provides a good overview of the ongoing challenges of reforming Virginia's indigent defense delivery system. According to Spangenberg, Virginia continues to inadequately protect the rights of poor people accused of committing crimes, perpetuates the disparity in pay between court-appointed counsel and GAL counsel and sanctions unreasonably low court appointed attorney fee caps while consistently under funding the statutorily established fee caps.

B. Virginia's National Ranking – Court-Appointed Attorney Fees

Virginia's ranking amongst the 50 states in terms of compensation allowed for court-appointed counsel continues to be among the lowest in the nation. Current data indicates that Virginia ranks 49th. Mississippi ranks the lowest with a \$1,000 cap on non-capital felony charges.

C. Virginians Speak out on Indigent Defense Representation

At the request of the Virginia Indigent Defense Coalition ("VIDC"), a non-profit organization established to educate the public, state and local officials on indigent defense issues, Virginia Commonwealth University's Center for Public Policy conducted a statewide public opinion poll to address the issue of providing legal representation to people who cannot afford counsel. According to the *Commonwealth Poll* results, a majority of Virginians favor providing legal representation to people who cannot afford a lawyer and strongly believe that the amount of money spent for legal representation makes a difference in the quality of representation.

D. Appellate Representation by Indigent Defense Counsel

During FY05 it was discovered that appellate issues and entire appeals were being defaulted at an alarming rate. To address these issues, the VaIDC contacted David R. Rosenfeld, Esq., a recognized expert on legal ethics and professional responsibility, who agreed to assess the appellate deficiencies on a pro bono basis. Several recommendations were implemented by the VaIDC; an Appellate Procedure Manual has been written and distributed to all public defender offices, an Appellate Trial Checklist for the Court of Appeals and the Supreme Court of Virginia has been distributed with the manual, the VaIDC's current Case Management System has been updated to accurately capture appellate data and all VaIDC attorneys have completed mandatory appellate procedure training.

To address the procedural concerns of appellate reinstatement, the VaIDC proposed HB 2628, Reinstatement of Defaulted Appeals to the 2005 General Assembly and VaIDC member Delegate Dave Albo sponsored the bill. The new statute, Va. Code § 8.01-654, which became effective July 1, 2005, allows an appellant to petition the appellate courts to reinstate the right to appeal upon dismissal due to appellant counsel's failure to make timely filings.

E. Representation of Juveniles

In response to the American Bar Association’s Juvenile Justice Center’s report, *Virginia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* and the request of many Virginia juvenile defenders, the 2004 General Assembly amended Va. Code § 16.1-266 to require courts to appoint counsel prior to the initial detention hearing. The statute was further amended in 2005 to require that any child facing commitment to the Department of Juvenile Justice must be allowed to consult with an attorney prior to waiving his or her constitutional right to counsel.

The American Bar Association’s report also enumerated other problems including a lack of training for juvenile defenders. In direct response to the report and priorities established by the Virginia Department of Criminal Justice Services, the VaIDC secured grant funds and conducted regional detention advocacy workshops for public defenders and members of the private bar.

F. Public Defender Office Caseloads

FY05 saw a drop in most public defender office caseloads, although they still exceed national standards. Virginia State Bar, Legal Ethics Opinion 1798 discusses the need for prosecutors’ caseloads to be controlled. However, the Ethics Committee also opined 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.” 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.”

The 2005 General Assembly amended Va. Code § 19.2-163.0 A (7) to require the VaIDC to annually report public defender caseload data to the General Assembly. On November 9, 2004, the VaIDC adopted a resolution to facilitate the legislative mandate, to adhere to Legal Ethics Opinion 1798, and the letter of Virginia State Bar counsel. The resolution directs the staff of the VaIDC 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 directs that until caseload limits with adequate funding can be enacted on an agency wide level, public defenders are to monitor caseloads within their offices.

G. Salary and Resource Parity

To fully address the state of indigent defense in Virginia, the VaIDC conducted a comparative analysis of the salaries paid to VaIDC employees, Commonwealth’s Attorneys’ employees, Executive Branch employees and private sector employees. The analysis clearly demonstrates that salaries throughout the VaIDC are significantly lower than those of organizations with which it competes for employees. To help to alleviate these salary inequities, the VaIDC will seek an appropriation of \$1.8 million to increase all VaIDC salaries by 7% in FY07. This will serve as an initial step to help the VaIDC move toward parity with Commonwealth’s Attorneys and enable us to be competitive in relevant labor markets.

H. Information Technology Advancements

In FY05, VaIDC achieved full implementation of agency-wide desktop Internet access through a wide area network. In addition, over 250 outmoded computers and other equipment items were replaced with current technology. After negotiating a very competitive rate, the VaIDC entered a three-year contract with Thomson/Westlaw in May 2005 to provide internet-based legal research capability for all VaIDC attorneys and investigators. The VaIDC has also contracted with VIPNet to upgrade its current web site so that it can serve as a valuable communication tool to be used by VaIDC staff, court personnel, private attorneys and the public.

I. New Public Defender Offices

The 2004 General Assembly authorized the creation of four new public defender offices; Arlington/Falls Church, Hampton, Chesapeake, and Newport News. In October 2004, the public defenders for Arlington, Hampton, and Chesapeake were hired. The Newport News Public Defender assumed her duties on January 10, 2005. Chesapeake, fully staffed with 18.5 FTE at the time, moved into permanent office space in February 2005. The Hampton Office of the Public Defender moved into its permanent space in April 2005. With the help of the Newport News Housing Authority, permanent office space for the Newport News Office of the Public Defender has been located and a December 1, 2005 move in date has been set. The search for permanent office space in Arlington is ongoing, however, the Arlington public defender is currently accepting court appointments while operating out of temporary office space. We are committed to locating permanent space before the end of the calendar year.

III. Future Plans and Conclusion

The coming year for the VaIDC will be filled with challenges. January 2006 will usher in not only a new year, but also a new Executive Director to lead the agency forward. In September 2005, the Commission hired a Deputy Executive Director to oversee the assigned counsel process and to provide much needed public defender leadership. Efforts toward integration of the court-appointed and public defender systems into one agency that will provide the support, training, and oversight that both systems require will continue. We will continue to enhance the agency's information technology and data-gathering processes to fulfill our statutory obligation to develop, promulgate, publicize, and enforce standards of practice and conduct for all indigent defense attorneys. The VaIDC will also continue to provide high quality, certification training for new and less experienced attorneys while still providing advanced training for more experienced attorneys.

The creation of the Virginia Indigent Defense Commission was a major advance toward indigent defense reform. Efforts to educate the public, state and local officials, and members of Virginia's criminal justice system must continue as we work to ensure a fair, just, and reliable criminal justice system for all regardless of the their station in life.