


11-1-2007

## Has a New Day Dawned for Indigent Defense in Virginia?

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### Recommended Citation

Robert E. Shepherd Jr., *Has a New Day Dawned for Indigent Defense in Virginia?*, 42 U. Rich. L. Rev. 85 (2007).  
Available at: <https://scholarship.richmond.edu/lawreview/vol42/iss2/2>

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# FOREWORD

## HAS A NEW DAY DAWNED FOR INDIGENT DEFENSE IN VIRGINIA?

*Robert E. Shepherd, Jr. \**

It is a distinct honor for me to write this foreword to the *University of Richmond Law Review's 2007 Annual Survey of Virginia Law*. I have contributed articles to the *Annual Survey* for a number of years, and I am acutely aware of the significant efforts contributed by the authors and student staff members to the high quality and comprehensive nature of the issue. I have also learned from personal experience and numerous comments how valuable the *Annual Survey* is to the bench and the bar in the Commonwealth, and how much they appreciate the work of the authors and the *Law Review* staff members. Additionally, it is a high privilege to join the company of Governor Mark Warner, Justice Elizabeth Lacy, and Attorney General Robert McDonnell, all previous authors of the foreword.

In this foreword, I have chosen to focus my attention on what I believe may be a historic watershed moment in the often dismal history of Virginia's efforts to provide an effective and fair system of indigent defense services to those persons charged with crimes who cannot afford retained defense counsel. Indigent defense has been a vexatious problem in the recent history of the Commonwealth. Numerous efforts to improve the system have either foundered on the shoals of competing demands for the resources of the state or failed because of the lack of a vocal constituency to support this critical issue. Indeed, in the exhaustive study done

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for the American Bar Association by The Spangenberg Group in January of 2004, *A Comprehensive Review of Indigent Defense in Virginia*, the authors identify a number of reports and studies addressing indigent defense problems in Virginia since 1971.<sup>1</sup> Recent events give some hope, however, that there will be a brighter future providing an efficient, effective, and fair system of legal services for indigent defendants in the state.

First, the organized bar has stepped forward in a major way to advocate for greater resources for indigent defense and for a more effective system of delivering defense services. During its 2006 annual meeting, the Indigent Defense Task Force of the Virginia State Bar, chaired by Alex Levay, Jr., moved to secure a legislative commitment “to remove or substantially alter” the nonwaivable caps on fees paid to court-appointed lawyers.<sup>2</sup> To educate the public and the General Assembly on issues of indigent defense, the Virginia Bar Association, the Virginia Trial Lawyers Association, and the National Association of Criminal Defense Lawyers likewise developed a special focus on indigent defense in the Commonwealth by helping to establish the Virginia Indigent Defense Coalition, now known as the Virginia Fair Trial Project, under the able leadership of Betsy Edwards.<sup>3</sup>

Second, the Virginia General Assembly passed Senate Joint Resolution 43 and House Joint Resolution 94 in 2002, requesting that the Virginia State Crime Commission study the potential creation of an indigent defense commission and establish a study committee to address that proposal.<sup>4</sup> The Crime Commission responded to the recommendations of the study committee by urging the establishment of the Virginia Indigent Defense Commission and proposing legislation to reconfigure the Public Defender Commission as the Virginia Indigent Defense Commission.<sup>5</sup> The

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1. ABA STANDING COM<sup>1</sup>. ON LEGAL AID & INDIGENT DEFENDANTS, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA, at i, 88, app. at 1–9 (2004), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf>.

2. Alex N. Levay, Jr., Indigent Defense Task Force, 68 VA. STATE BAR ANN. REP. 42 (2005–2006), available at [http://www.vsb.org/docs/68ann\\_report.pdf](http://www.vsb.org/docs/68ann_report.pdf).

3. Betsy Wells Edwards, *Virginia Fair Trial Project Continues Indigent Defense Reform Efforts*, VIRGINIA LAWYER, June–July 2007, at 30, 30. The project has also enlisted other lay groups, such as Virginia CURE, the Virginia Interfaith Center for Public Policy, and the Virginia League of Women Voters. *Id.*

4. S.J. Res. 43, Va. Gen. Assembly (Reg. Sess. 2002); H.J. Res 94, Va. Gen. Assembly (Reg. Sess. 2002).

5. FINAL REPORT OF THE VIRGINIA STATE CRIME COMM. STUDYING INDIGENT

Virginia Indigent Defense Commission has taken over supervision of indigent defense in the Commonwealth, both through the management of the public defender system and through the oversight of court-appointed counsel.<sup>6</sup> Meanwhile, the Crime Commission has remained involved in the effort to improve indigent defense in Virginia.

Finally, the Governor, the Attorney General, and the Chief Justice of the Supreme Court of Virginia have placed the weight of their offices behind the effort to reform indigent defense, especially to improve compensation for court-appointed lawyers for indigent criminal defendants. Chief Justice Hassell's commitment to the issue, as well as that of his predecessor, Senior Justice Carrico, has been strong and public. Indeed, the *2007 State of the Judiciary Address* was very explicit in acknowledging that "[f]or at least a decade, the [s]upreme [c]ourt has worked hard to improve compensation for court-appointed counsel who represent indigent criminal defendants."<sup>7</sup> In addition, the *Final Report of the Commission on Virginia Courts in the 21st Century: To Benefit All, To Exclude None* made several recommendations regarding indigent defense, while acknowledging that "[e]ffective access to justice for indigent criminal defendants depends upon a system of qualified public defenders and court-appointed counsel to serve a growing number of indigent defendants" and noting that "Virginia currently ranks 50th among the states in compensation for court-appointed counsel."<sup>8</sup> Governor Timothy Kaine made a substantial commitment to the cause of adequate compensation of court-appointed lawyers in his item veto message of the appropriations bill for the 2006-2008 biennium when he stated:

Given the concern about adequate compensation levels for court-appointed attorneys providing criminal indigent defense in the Commonwealth, the Governor shall continue to dialogue and share information with the Supreme Court, Indigent Defense Commission,

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DEFENSE, S. Doc. No. 13, at 1-2 (2004); see VA. CODE ANN. §§ 19.2-163.01 to -163.03 (Cum. Supp. 2007).

6. See VA. CODE ANN. §§ 19.2-163.01, -163.03 (Cum. Supp. 2007).

7. The Hon. Leroy Rountree Hassell, Sr., Chief Justice, Supreme Court of Va., 2007 Virginia State of the Judiciary Address, [http://www.courts.state.va.us/scv/state\\_of\\_the\\_judiciary\\_address.html](http://www.courts.state.va.us/scv/state_of_the_judiciary_address.html) (last visited Oct. 29, 2007).

8. COMM'N ON VA. COURTS IN THE 21ST CENTURY: TO BENEFIT ALL, TO EXCLUDE NONE; FINAL REPORT 9-10 (2007), available at [http://www.courts.state.va.us/futures\\_commission/reports/final\\_report.pdf](http://www.courts.state.va.us/futures_commission/reports/final_report.pdf). Recommendations specifically addressing indigent defense are located in the Appendix. *Id.* at app. 8-12.

Attorney General, and Chairmen of the House and Senate Courts of Justice Committees to consider the appropriate funding levels for court-appointed attorneys.<sup>9</sup>

Attorney General Robert McDonnell expressed a similar commitment to improving indigent defense when he delivered the luncheon address at the Virginia State Bar's 37th Criminal Law Seminar in Williamsburg, Virginia, on February 9, 2007.

All three of these distinguished leaders made their verbal commitments manifest by assigning key members of their staff to a Stakeholder's Group on indigent defense. The influence of the Stakeholder's Group became clear during the 2007 session of the Virginia General Assembly. Senate Bill 1168, introduced by Senator Kenneth Stolle, and House Bill 2361, introduced by Delegate Lacey Putney, were proposed in order to amend court-appointed counsel compensation.<sup>10</sup> Senator Stolle and Delegate Putney are key members of the Senate Finance Committee and House Appropriations Committee, respectively. Both bills passed, but with committee substitutes that somewhat watered down the original bills.<sup>11</sup> Thus, the final version of the bills at the end of the session were less than the advocates wished or hoped for. The Governor and the Attorney General, however, continued with their efforts. Governor Kaine, with the support of Attorney General McDonnell, submitted recommended amendments to the bills for action at the Veto Session of the General Assembly on April 4, 2007, and those amendments were adopted in large part.<sup>12</sup>

The legislation that ultimately came out of the veto session improved substantially upon the final General Assembly bills. The

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9. Act of June 30, 2006, ch. 3, 2006 Va. Acts 1.

10. S.B. 1168, Va. Gen. Assembly (Reg. Sess. 2007); H.B. 2361, Va. Gen. Assembly (Reg. Sess. 2007).

11. Compare S.B. 1168, Va. Gen. Assembly (Reg. Sess. 2007), and H.B. 2361, Va. Gen. Assembly (Reg. Sess. 2007), with Act of Apr. 10, 2007, ch. 946, 2007 Va. Acts 2657 (codified as amended at VA. CODE ANN. § 19.2-163 (Cum. Supp. 2007)), and Act of Apr. 10, 2007, ch. 938, 2007 Va. Acts 2640 (codified as amended at VA. CODE ANN. § 19.2-163 (Cum. Supp. 2007)).

12. The Governor's recommended amendments are available online at <http://leg1.state.va.us/cgi-bin/legp504.exe?071+amd+SB1168AG> for Senate Bill 1168 and <http://leg1.state.va.us/cgi-bin/legp504.exe?071+amd+HB2361AG> for House Bill 2361. The Senate and House's adoption history of the Governor's recommendations can be found at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=071&typ=bil&val=sb1168> and <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=071&typ=bil&val=HB2361>, respectively. See also Act of Apr. 10, 2007, ch. 946, 2007 Va. Acts 2657 (codified as amended at VA. CODE ANN. § 19.2-163 (Cum. Supp. 2007)); Act of Apr. 10, 2007, ch. 938, 2007 Va. Acts 2640 (codified as amended at VA. CODE ANN. § 19.2-163 (Cum. Supp. 2007)).

amendments to the earlier final products were specifically requested by the Attorney General and made the cap waiver process applicable to second-tier juvenile felonies and to all misdemeanors, both of which were absent from the legislature's final bill.<sup>13</sup> For the first time, the Virginia Code contains provisions for waiver of the fee caps<sup>14</sup> and \$8.2 million of new waiver funding.<sup>15</sup> Upon the application of the court-appointed lawyer and the approval of the trial court, the statute provides a "first" waiver up to a particular increased cap, consisting of: (1) an additional \$120 for misdemeanors and juvenile delinquency cases (current fee cap \$120) for a total of \$240; (2) an additional \$155 for lower and mid-level felonies (current fee cap \$445) for a total of \$600; and (3) an additional \$850 for high level felonies (current fee cap \$1235) for a total of \$2085.<sup>16</sup> Most significantly, however, the Virginia Code now provides an unlimited waiver, pursuant to the approval of the chief judge of the circuit or district court, and in accordance with guidelines to be issued by the Supreme Court of Virginia.<sup>17</sup> Virginia Code section 19.2-163 also contains the original requirement that court-appointed lawyers keep and provide their time and expenses in detail according to the supreme court's guidelines, and directs the court to track the hours worked, waivers requested, and amounts paid.<sup>18</sup> This record keeping can help form the basis for future advances in indigent defense funding and structure.

Virginia State Bar Criminal Law Section Chair John Lichtenstein, who served as a member of the Stakeholder's Group, which was involved in steering the legislation through the process, recounted the final stages in the legislative process in his chairman's letter in the section newsletter:

The story of the final version was evolving as late as the night before the veto session, when there were clear indications of legislative concern—not over the cost of waiver for juvenile cases—but rather con-

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13. Act of Apr. 10, 2007, ch. 938, 2007 Va. Acts 2640 (codified as amended at VA. CODE ANN. § 19.2-163 (Cum. Supp. 2007)); Act of Apr. 10, 2007, ch. 946, 2007 Va. Acts 2657 (codified as amended at VA. CODE ANN. § 19.2-163 (Cum. Supp. 2007)).

14. VA. CODE ANN. § 19.2-163 (Cum. Supp. 2007).

15. Katya N. Herndon, *How to Request a Fee-Cap Waiver: Court-Appointed Counsel Representing Indigent Defendants in Criminal Matters May Now Seek Waivers of the Statutory Fee Caps*, VIRGINIA LAWYER, June–July 2007, at 32, 32.

16. VA. CODE ANN. § 19.2-163 (Cum. Supp. 2007).

17. *Id.*

18. *Id.*

cerning the cost of increasing the fee cap for juvenile felonies which was expected to consume \$3 million of the total \$8.2 million allotted by the legislation for waivers.

A compromise was crafted which secured the application of waiver for juvenile felonies and all misdemeanors. In return, an agreement was reached to remove for now the fee cap increase for juvenile felonies. This is not acceptable to us as a permanent position but this final move allowed the statute to include misdemeanor appeal and juvenile felony waiver along with the original waiver provisions from the legislature's final bill. *Given that our most important goal was to secure in the final statute as many substantive waiver aspects as possible, and to work future advances from that more established position, this was a very positive way to end this year's process.*<sup>19</sup>

The Stakeholder's Group is committed to continuing the pursuit of a more effective criminal defense fee structure in the Commonwealth. The effort now assumes a critical administrative and implementation stage because the Office of the Executive Secretary of the Supreme Court has issued guidelines governing the approval of waivers, the mechanism for allocating funds from an obviously inadequate pot of money, and the collection and dissemination of the statutorily required new data.<sup>20</sup>

The final legislation brings statutory authority to the process of cap waivers for all felonies and misdemeanors in district and circuit courts. The historic bipartisan unity of Governor Kaine and Attorney General McDonnell, and the advocacy of Chief Justice Hassell, created leadership that prevented much opposition and ultimately allowed success in the final measure. Many legislators understood the urgency of the need; Senator Ken Stolle, Delegate David Albo, and many others were instrumental to the passage of this legislation. While funding in the bill is substantial compared to previous legislation, it is still insufficient to adequately cover the estimated amount requested through fee waiver applications.

In addition to the significant first step taken in adjusting court-appointed counsel fees, the General Assembly's action in creating the Virginia Indigent Defense Commission in 2004 to provide overall supervision of indigent defense in the Commonwealth continues to bear fruit. Despite a shaky period early in the life of the Commission, it has taken its statutory charge seriously by invest-

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19. John E. Lichtenstein, *Chairman's Letter*, V.S.B. CRIM. L. SEC. NEWS, Apr. 2007, at 2, 3.

20. See Herndon, *supra* note 15, at 32.

ing considerable effort into the education and certification of lawyers for indigent defendants and in promulgating standards of practice for such lawyers.<sup>21</sup> With the General Assembly's support and direction, the Commission has developed qualification requirements for court-appointed attorneys and has instituted training programs to help satisfy those requirements.<sup>22</sup> More recently, the Commission has developed Standards of Practice for Indigent Defense Counsel, effective April 1, 2007, to govern the performance of defense lawyers in criminal and juvenile cases in the Commonwealth.<sup>23</sup> The standards consist of three parts: standards of practice for indigent defense counsel in non-capital criminal cases at the trial level; standards for appellate criminal defense representation; and standards of practice for juvenile defense counsel.<sup>24</sup> The legislation creating the Commission not only mandates the development of standards, but also provides for the development of "guidelines for the removal of an attorney from the official list of those qualified to receive court appointments."<sup>25</sup> The promulgation of the standards and the development of an enforcement process to monitor compliance with them will undoubtedly have a major impact on the representation of indigent criminal defendants in Virginia.

The actions of the 2007 Virginia General Assembly Session and the Virginia Indigent Defense Commission do not mean that the millennium has arrived for indigent defense in Virginia. It does, however, signal the dawning of a new stage in ensuring equal justice for indigent defendants in the criminal justice system. The challenge will be to maintain the momentum of 2007, especially in the face of reported shortfalls in revenues in the years to come. It is also critical for court-appointed lawyers to keep accurate records and to seek waivers of the fee caps when such are justified so that data are available to the dedicated advocates in the future.

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21. See VA. CODE ANN. § 19.2-163.01 (Cum. Supp. 2007).

22. *Id.* § 19.2-163.03 (Cum. Supp. 2007).

23. See generally VA. INDIGENT DEF. COMM'N, STANDARDS OF PRACTICE FOR INDIGENT DEFENSE COUNSEL, <http://www.indigentdefense.virginia.gov/Final%20Draft--Complete%20Standards%20070612.pdf>.

24. *Id.* at 2, 32, 40.

25. VA. CODE ANN. § 19.2-163.01(A)(4) (Cum. Supp. 2007).



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