

# VIRGINIA ACTS OF ASSEMBLY -- 2004 SESSION

## CHAPTER 921

*An Act to amend and reenact §§ 16.1-266, 19.2-159, 19.2-163.7, 19.2-163.8 and 53.1-124 of the Code of Virginia, to amend the Code of Virginia by adding in Chapter 10 of Title 19.2 an article numbered 3.1, consisting of sections numbered 19.2-163.01 through 19.2-163.04, and 19.2-163.4:1, and to repeal §§ 19.2-163.1, 19.2-163.2 and 19.2-163.6 of the Code of Virginia, relating to public defenders.*

[H 1056]

Approved April 15, 2004

### **Be it enacted by the General Assembly of Virginia:**

**1. That §§ 16.1-266, 19.2-159, 19.2-163.7, 19.2-163.8 and 53.1-124 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding in Chapter 10 of Title 19.2 an article numbered 3.1, consisting of sections numbered 19.2-163.01 through 19.2-163.04, and 19.2-163.4:1 as follows:**

§ 16.1-266. Appointment of counsel and guardian ad litem.

A. Prior to the hearing by the court of any case involving a child who is alleged to be abused or neglected or who is the subject of an entrustment agreement or a petition seeking termination of residual parental rights or who is otherwise before the court pursuant to subdivision A 4 of § 16.1-241 or § 63.2-1230, the court shall appoint a discreet and competent attorney-at-law as guardian ad litem to represent the child pursuant to § 16.1-266.1.

B. Prior to the detention review hearing or the adjudicatory or transfer hearing by the court of any case involving a child who is alleged to be in need of services, in need of supervision or delinquent, such child and his parent, guardian, legal custodian or other person standing in loco parentis shall be informed by a judge, clerk or probation officer of the child's right to counsel and of the liability of the parent, guardian, legal custodian or other person standing in loco parentis for the costs of such legal services pursuant to § 16.1-267 and be given an opportunity to:

1. Obtain and employ counsel of the child's own choice; or
2. If the court determines that the child is indigent within the contemplation of the law pursuant to the guidelines set forth in § 19.2-159 and his parent, guardian, legal custodian or other person standing in loco parentis does not retain an attorney for the child, a statement of indigence substantially in the form provided by § 19.2-159 and a financial statement shall be executed by such child, and the court shall appoint an attorney-at-law *from the list maintained by the Indigent Defense Commission pursuant to § 19.2-163.01* to represent him; or

3. Waive the right to representation by an attorney, if the court finds the child and the parent, guardian, legal custodian or other person standing in loco parentis of the child consent, in writing, to such waiver and that the interests of the child and the parent, guardian, legal custodian or other person standing in loco parentis in the proceeding are not adverse. Such written waiver shall be in accordance with law and shall be filed with the court records of the case.

C. A judge, clerk or probation officer shall inform the parent or guardian of his right to counsel prior to the adjudicatory hearing of a petition in which a child is alleged to be abused or neglected or at risk of abuse or neglect as provided in subdivision A 2 a of § 16.1-241 and prior to a hearing at which a parent could be subjected to the loss of residual parental rights. In addition, prior to the hearing by the court of any case involving any other adult charged with abuse or neglect of a child, this adult shall be informed of his right to counsel. This adult and the parent or guardian shall be given an opportunity to:

1. Obtain and employ counsel of the parent's, guardian's or other adult's own choice; or
2. If the court determines that the parent, guardian or other adult is indigent within the contemplation of the law pursuant to the guidelines set forth in § 19.2-159, a statement substantially in the form provided by § 19.2-159 and a financial statement shall be executed by such parent, guardian or other adult and the court shall appoint an attorney-at-law to represent him; or
3. Waive the right to representation by an attorney in accordance with the provisions of § 19.2-160.

If the identity or location of a parent or guardian is not reasonably ascertainable or a parent or guardian fails to appear, the court shall consider appointing an attorney-at-law to represent the interests of the absent parent or guardian, and the hearing may be held.

Prior to a hearing at which a child is the subject of an initial foster care plan filed pursuant to § 16.1-281, a foster care review hearing pursuant to § 16.1-282 and a permanency planning hearing pursuant to § 16.1-282.1, the court shall consider appointing counsel to represent the child's parent or guardian.

D. In those cases described in subsections A, B and C which in the discretion of the court require counsel or a guardian ad litem to represent the child or children or the parent or guardian or other adult

party in addition to the representation provided in those subsections, a discreet and competent attorney-at-law may be appointed by the court as counsel or a guardian ad litem.

E. In all other cases which in the discretion of the court require counsel or a guardian ad litem, or both, to represent the child or children or the parent or guardian, discreet and competent attorneys-at-law may be appointed by the court. However, in cases where the custody of a child or children is the subject of controversy or requires determination and each of the parents or other persons claiming a right to custody is represented by counsel, the court shall not appoint counsel or a guardian ad litem to represent the interests of the child or children unless the court finds, at any stage in the proceedings in a specific case, that the interests of the child or children are not otherwise adequately represented.

F. Any state or local agency, department, authority or institution and any school, hospital, physician or other health or mental health care provider shall permit a guardian ad litem appointed pursuant to this section to inspect and copy, without the consent of the child or his parents, any records relating to the child whom the guardian represents upon presentation by him of a copy of the court order appointing him or a court order specifically allowing him such access. Upon request therefor by the guardian ad litem made at least 72 hours in advance, a mental health care provider shall make himself available to conduct a review and interpretation of the child's treatment records which are specifically related to the investigation. Such a request may be made in lieu of or in addition to inspection and copying of the records.

§ 19.2-159. Determination of indigency; guidelines; statement of indigence; appointment of counsel.

If the accused shall claim that he is indigent, and the charge against him is a criminal offense which may be punishable by death or confinement in the state correctional facility or jail, subject to the provisions of § 19.2-160, the court shall determine from oral examination of the accused or other competent evidence whether or not the accused is indigent within the contemplation of law pursuant to the guidelines set forth in this section.

In making its finding, the court shall determine whether or not the accused is a current recipient of a state or federally funded public assistance program for the indigent. If the accused is a current recipient of such a program and does not waive his right to counsel or retain counsel on his own behalf, he shall be presumed eligible for the appointment of counsel. This presumption shall be rebuttable where the court finds that a more thorough examination of the financial resources of the defendant is necessary. If the accused shall claim to be indigent and is not presumptively eligible under the provisions of this section, then a thorough examination of the financial resources of the accused shall be made with consideration given to the following:

1. The net income of the accused, which shall include his total salary and wages minus deductions required by law. The court also shall take into account income and amenities from other sources including but not limited to social security funds, union funds, veteran's benefits, other regular support from an absent family member, public or private employee pensions, dividends, interests, rents, estates, trusts, or gifts.

2. All assets of the accused which are convertible into cash within a reasonable period of time without causing substantial hardship or jeopardizing the ability of the accused to maintain home and employment. Assets shall include all cash on hand as well as in checking and savings accounts, stocks, bonds, certificates of deposit, and tax refunds. All personal property owned by the accused which is readily convertible into cash shall be considered, except property exempt from attachment. Any real estate owned by the accused shall be considered in terms of the amounts which could be raised by a loan on the property. For purposes of eligibility determination, the income, assets, and expenses of the spouse, if any, who is a member of the accused's household, shall be considered, unless the spouse was the victim of the offense or offenses allegedly committed by the accused.

3. Any exceptional expenses of the accused and his family which would, in all probability, prohibit him from being able to secure private counsel. Such items shall include but not be limited to costs for medical care, family support obligations, and child care payments.

The available funds of the accused shall be calculated as the sum of his total income and assets less the exceptional expenses as provided in paragraph 3 above. If the accused does not waive his right to counsel or retain counsel on his own behalf, counsel shall be appointed for the accused if his available funds are equal to or below 125% *percent* of the federal poverty income guidelines prescribed for the size of the household of the accused by the federal Department of Health and Human Services. The Supreme Court of Virginia shall be responsible for distributing to all courts the annual updates of the federal poverty income guidelines made by the Department.

If the available funds of the accused exceed 125% *percent* of the federal poverty income guidelines and the accused fails to employ counsel and does not waive his right to counsel, the court may, in exceptional circumstances, and where the ends of justice so require, appoint an attorney to represent the accused. However, in making such appointments, the court shall state in writing its reasons for so doing. The written statement by the court shall be included in the permanent record of the case.

If the court determines that the accused is indigent as contemplated by law pursuant to the guidelines set forth in this section, the court shall provide the accused with a statement which shall contain the following:

"I have been advised this . . . . . day of . . . . ., 20. . ., by the (name of court) court of my right to representation by counsel in the trial of the charge pending against me; I certify that I am without means to employ counsel and I hereby request the court to appoint counsel for me." ..... (signature of accused)

The court shall also require the accused to complete a written financial statement to support the claim of indigency and to permit the court to determine whether or not the accused is indigent within the contemplation of law. The accused shall execute the said statements under oath, and the said court shall appoint competent counsel to represent the accused in the proceeding against him, including an appeal, if any, until relieved or replaced by other counsel.

The executed statements by the accused and the order of appointment of counsel shall be filed with and become a part of the record of such proceeding.

All other instances in which the appointment of counsel is required for an indigent shall be made in accordance with the guidelines prescribed in this section.

Except in jurisdictions having a public defender pursuant to Article 4 (§ 19.2-163.1 et seq.) of Chapter 40 of Title 19.2, counsel appointed by the court for representation of the accused shall be selected by a fair system of rotation among members of the bar practicing before the court whose practice regularly includes representation of persons accused of crimes and who have indicated their willingness to accept such appointments names are on the list maintained by the Indigent Defense Commission pursuant to § 19.2-163.01.

#### Article 3.1.

##### *Virginia Indigent Defense Commission.*

§ 19.2-163.01. *Virginia Indigent Defense Commission established; powers and duties.*

A. *The Virginia Indigent Defense Commission (hereinafter Indigent Defense Commission or Commission) is established. The Commission shall have the following powers and duties:*

1. *To publicize and enforce the qualification standards for attorneys seeking eligibility to serve as court-appointed counsel for indigent defendants pursuant to § 19.2-159.*

2. *To 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.*

3. *To 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 and to 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. In establishing and updating the list, the Commission shall consider all relevant factors, including but not limited to, the attorney's background, experience, and training and the Commission's assessment of whether the attorney is competent to provide quality legal representation.*

4. *To establish official standards of practice for court-appointed counsel to follow in representing their clients, and guidelines for the removal of an attorney from the official list of those qualified to receive court appointments and to notify the Office of the Executive Secretary of the Supreme Court of any attorney whose name has been removed from the list.*

5. *To 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; and to establish standards of practice for public defenders.*

6. *To establish and thereafter maintain, in conjunction with the Virginia State Bar, the Supreme Court and the Virginia State Crime Commission, standards of conduct for indigent defense counsel in Virginia.*

7. *To establish appropriate caseload limits for public defender offices.*

8. *To maintain all public defender and regional capital defender offices established by the General Assembly.*

9. *To hire and employ and, at its pleasure, remove an executive director, counsel, and such other persons as it deems necessary, and to authorize the executive director to appoint for each of the above offices a public defender or capital defender, as the case may be, who shall devote his full time to his duties and not engage in the private practice of law.*

10. *To authorize the public defender or capital defender to employ such assistants as authorized by the Commission.*

11. *To authorize the public defender or capital defender to employ such staff, including secretarial and investigative personnel, as may be necessary to carry out the duties imposed upon the public defender office.*

12. *To authorize the public defender or capital defender to secure such office space as needed, to purchase or rent office equipment, to purchase supplies and to incur such expenses as are necessary to carry out the duties imposed upon him.*

13. *To receive 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.*

14. To require and ensure that each public defender office collects and maintains caseload data and fields in a case management database on an annual basis.

15. To report annually on or before October 1 to the Virginia State Crime Commission, the House and Senate Committees for Courts of Justice, the House Committee on Appropriations, and the Senate Committee on Finance on the state of indigent criminal defense in the Commonwealth, including Virginia's ranking amongst the 50 states in terms of pay allowed for court-appointed counsel appointed pursuant to § 19.2-159 or subdivision B 2 of § 16.1-266.

B. The executive director shall, with the approval of the Commission, fix the compensation of each public defender and all other personnel in each public defender office.

§ 19.2-163.02. Membership of Indigent Defense Commission; expenses.

A. The Virginia Indigent Defense Commission shall consist of 12 members, including the chairmen of the House and Senate Committees for Courts of Justice; the chairman of the Virginia State Crime Commission; the Executive Secretary of the Supreme Court or his designee; two attorneys officially designated by the Virginia State Bar; two persons appointed by the Governor; two persons appointed by the Speaker of the House of Delegates; and two persons appointed by the Senate Committee on Privileges and Elections. At least one of the appointments made by the Governor, one of the appointments made by the Speaker, and one of the appointments made by the Senate Committee on Privileges and Elections, shall be an attorney in private practice with a demonstrated interest in indigent defense issues. Persons who are appointed by virtue of their office shall hold terms coincident with their terms of office. All other appointments shall be for terms of three years.

The Commission shall elect a chairman and a vice chairman from among its membership. A majority of the members shall constitute a quorum. The Commission shall meet at least four times each year. The meetings of the Commission shall be held at the call of the chairman or whenever the majority of the members so request.

Members shall be paid reasonable and necessary expenses incurred in the performance of their duties. Legislative members shall receive compensation as provided in § 30-19.12 and nonlegislative citizen members shall receive compensation for their services as provided in §§ 2.2-2813 and 2.2-2825.

§ 19.2-163.03. Qualifications for court-appointed counsel.

A. In accordance with § 19.2-163.01, to initially qualify to serve as counsel appointed pursuant to § 19.2-159 for an indigent defendant charged with a misdemeanor, the attorney shall be a member in good standing of the Virginia State Bar, and (i) if an active member of the Virginia State Bar for less than one year, have completed six hours of MCLE-approved continuing legal education developed by the Indigent Defense Commission, or (ii) if an active member of the Virginia State Bar for one year or more, either complete the six hours of approved continuing legal education developed by the Commission, or certify to the Commission that he has represented, in a district court within the past year, four or more defendants charged with misdemeanors.

B. To initially qualify to serve as counsel appointed pursuant to § 19.2-159 for an indigent defendant charged with a felony, the attorney shall (i) be a member in good standing of the Virginia State Bar, (ii) have completed the six hours of MCLE-approved continuing legal education developed by the Commission, and (iii) certify that he has participated as either lead counsel or cocounsel in four felony cases, originating in district court, from their beginning through to their final resolution, including appeals, if any. If the attorney has been an active member of the Virginia State Bar for more than one year and certifies that he has participated, within the past year, as lead counsel in four felony cases, originating in district court, through to their final resolution, including appeals, if any, the requirement to complete six hours of continuing legal education and the requirement to participate as cocounsel shall be waived. If the attorney has been an active member of the Virginia State Bar for more than one year and certifies that he has participated, within the past five years, as lead counsel in five felony cases, originating in district court, through to their final resolution, including appeals, if any, the requirement to participate as either lead counsel or cocounsel in four felony cases within the past year shall be waived.

C. To initially qualify to serve as appointed counsel in a juvenile and domestic relations district court pursuant to subdivision B 2 of § 16.1-266, the attorney shall (i) be a member in good standing of the Virginia State Bar, (ii) have completed the six hours of MCLE-approved continuing legal education developed by the Commission, (iii) have completed four additional hours of MCLE-approved continuing legal education on representing juveniles developed by the Commission, and (iv) certify that he has participated as either lead counsel or cocounsel in four cases involving juveniles in a juvenile and domestic relations district court. If the attorney has been an active member of the Virginia State Bar for more than one year and certifies that he has, within the past year, been lead counsel in four cases involving juveniles in juvenile and domestic relations district court, the requirement to complete the 10 hours of continuing legal education shall be waived. If the attorney has been an active member of the Virginia State Bar for more than one year and certifies that he has participated, within the past five years in five cases involving juveniles in a juvenile and domestic relations district court, the requirement to participate as either lead counsel or cocounsel in four juvenile cases shall be waived.

D. After initially qualifying, an attorney shall maintain his eligibility for certification by completing

biennially thereafter six hours of MCLE-approved continuing legal education, certified by the Commission. In addition, to maintain eligibility to accept court appointments under subdivision B 2 of § 16.1-266, an attorney shall complete biennially thereafter four additional hours of MCLE-approved continuing legal education on representing juveniles, certified by the Commission.

E. The Commission may, in its discretion, waive the requirements set out in this section for individuals who otherwise demonstrate their level of training and experience.

§ 19.2-163.04. Public Defender offices.

Public defender offices are established in:

- a. The City of Virginia Beach;
- b. The City of Petersburg;
- c. The Cities of Buena Vista, Lexington, Staunton and Waynesboro and the Counties of Augusta and Rockbridge;
- d. The City of Roanoke;
- e. The City of Portsmouth;
- f. The City of Richmond;
- g. The Counties of Clarke, Frederick, Page, Shenandoah and Warren, and the City of Winchester;
- h. The City and County of Fairfax;
- i. The City of Alexandria;
- j. The City of Radford and the Counties of Bland, Pulaski and Wythe;
- k. The Counties of Fauquier, Loudoun and Rappahannock;
- l. The City of Suffolk;
- m. The City of Franklin and the Counties of Isle of Wight and Southampton;
- n. The City of Bedford and the County of Bedford;
- o. The City of Danville;
- p. The Counties of Halifax, Lunenburg and Mecklenburg;
- q. The City of Fredericksburg and the Counties of King George, Stafford and Spotsylvania;
- r. The City of Lynchburg;
- s. The City of Martinsville and the Counties of Henry and Patrick;
- t. The City of Charlottesville and the County of Albemarle; and
- u. The City of Norfolk.

§ 19.2-163.4:1. Repayment of representation costs by convicted persons.

In any case in which an attorney from a public defender or capital defender office represents an indigent person charged with an offense and such person is convicted, the sum that would have been allowed a court-appointed attorney as compensation and as reasonable expenses shall be taxed against the person defended as a part of the costs of the prosecution, and, if collected, shall be paid to the Commonwealth or, if payment was made to the Commonwealth by a locality for defense of a local ordinance violation, to the appropriate county, city or town. An abstract of such costs shall be docketed in the judgment lien docket and execution book of the court.

§ 19.2-163.7. Counsel in capital cases.

In any case in which an indigent defendant is charged with a capital offense, the judge of the circuit court, upon request for the appointment of counsel, shall appoint one or more attorneys from the list or lists established by the Supreme Court and the ~~Public Defender~~ Indigent Defense Commission pursuant to ~~§ 19.2-163.8~~ to represent the defendant at trial and, if the defendant is sentenced to death, on appeal. In all cases after July 1, 2004, where counsel is to be appointed under this section, one of the attorneys appointed shall be from a capital defense unit maintained by the ~~Public Defender~~ Indigent Defense Commission; this section shall be construed in conformity with the provisions of § 19.2-163.4. If the sentence of death is affirmed on appeal, the court shall, within ~~thirty~~ 30 days after the decision of the Supreme Court of Virginia, appoint counsel from the same list, or such other list as the Supreme Court and the Commission may establish, to represent an indigent prisoner under sentence of death in a state habeas corpus proceeding. The Attorney General shall have no standing to object to the appointment of counsel for the petitioner.

§ 19.2-163.8. List of qualified attorneys.

A. The Supreme Court and the ~~Public Defender~~ Indigent Defense Commission, in conjunction with the Virginia State Bar, shall adopt standards for attorneys admitted to practice law in Virginia who are qualified to represent defendants charged with capital murder or sentenced to death, which take into consideration, to the extent practicable, the following criteria: (i) license or permission to practice law in Virginia; (ii) general background in criminal litigation; (iii) demonstrated experience in felony practice at trial and appeal; (iv) experience in death penalty litigation; (v) familiarity with the requisite court system; (vi) current training in death penalty litigation; (vii) current training in the analysis and introduction of forensic evidence, including deoxyribonucleic acid (DNA) testing and the evidence of a DNA profile comparison to prove or disprove the identity of any person; and (viii) demonstrated proficiency and commitment to quality representation.

B. The Supreme Court and the ~~Public Defender~~ Indigent Defense Commission shall maintain a list ~~or~~ lists of attorneys admitted to practice law in Virginia who are qualified to represent defendants charged

with capital murder or sentenced to death. In establishing such a list ~~or lists~~, the Court and the Commission shall consider all relevant factors, including but not limited to, the attorney's background, experience, and training and the Court's and the Commission's assessment of whether the attorney is competent to provide quality legal representation.

C. Notwithstanding the requirements of § 19.2-163.7, the judge of the circuit court may appoint counsel who is not included on the list ~~or lists~~, but who otherwise qualifies under the standards established and maintained by the Court and the Commission.

D. Noncompliance with the requirements of this article shall not form the basis for a claim of error at trial, on appeal, or in any habeas corpus proceeding. The performance of habeas corpus counsel appointed pursuant to this article shall not form a basis for relief in any subsequent habeas corpus proceeding.

E. ~~By January 1, 2002,~~ The Supreme Court and the ~~Public Defender~~ *Indigent Defense* Commission shall, in conjunction with the Virginia State Bar, promulgate and thereafter maintain standards for the qualifications of counsel who shall be considered eligible to be placed on the list of qualified attorneys.

F. ~~The provisions of this article, with the exception of subsection E, shall not become effective until July 1, 1992.~~

§ 53.1-124. Sheriffs and jail superintendents to report to the courts.

A. If requested by the judge, the sheriffs of all local jails and the jail superintendents of all regional jails of this Commonwealth shall, on the first day of each term of the circuit court, make written reports to the judge thereof, to the attorney for the Commonwealth, and to city attorneys whose duties include prosecuting certain cases, showing the number of prisoners in jail on that day. The report shall show the name, date of commitment, offense and sentence of each prisoner. The judge of such court, after examining the report, shall enter an order directing the clerk to file the same in the clerk's office of such court.

B. If requested by the chief judge of the circuit court, general district court or juvenile and domestic relations district court, the sheriffs of all local jails and the jail superintendents of all regional jails of the Commonwealth shall report semimonthly to the circuit court, general district court, and juvenile and domestic relations district court, to the attorney for the Commonwealth, and to the public defender, if any, as established in Article 4 (~~§ 19.2-163.1 et seq.~~) *3.1 (§ 19.2-163.01 et seq.)* of Chapter 10 of Title 19.2, showing the number of prisoners in jail on that day awaiting trial. The report shall include the name, offense, date of commitment to jail, and amount of bail established.

C. If requested by the judge, the sheriffs of all local jails and the jail superintendents of all regional jails shall report weekly to the juvenile and domestic relations district court located within that county, city or region concerning the identity and number of juveniles kept in their jails and the length of time such juveniles have been incarcerated therein.

**2. That the persons responsible for appointing members to the Virginia Indigent Defense Commission may, by agreement, make the initial appointments for such lengths of time as to allow the appointment terms to be staggered.**

**3. That §§ 19.2-163.1, 19.2-163.2 and 19.2-163.6 of the Code of Virginia are repealed.**

**4. That § 19.2-163.03 shall become effective July 1, 2005, only if funds are appropriated by the General Assembly to carry out the purposes of that section.**