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HOUSE BILL NO. 1028

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice
on January 23, 2006)

(Patrons Prior to Substitute—Delegates Hurt and Griffith [HB 414])

A BILL to amend and reenact §§ 19.2-159 and 19.2-163.03 of the Code of Virginia, relating to determination of indigency; appointment of counsel.

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-159 and 19.2-163.03 of the Code of Virginia are amended and reenacted as follows:

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

A. 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.

B. 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.

C. 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 couns-

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61 and I hereby request the court to appoint counsel for me."

62 (signature of accused)

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

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

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

72 D. Except in jurisdictions having a public defender, counsel appointed by the court for representation
73 of the accused shall be selected by a fair system of rotation among members of the bar practicing before
74 the court whose names are on the list maintained by the Indigent Defense Commission pursuant to
75 § 19.2-163.01. *Nothing in this section shall prevent a court, in its discretion, from appointing an*
76 *attorney who has demonstrated, in the opinion of the court, the requisite level of training and*
77 *experience. An appointment pursuant to this subsection of counsel whose name is not on the list*
78 *maintained by the Indigent Defense Commission shall not form the basis for a claim of error at trial, on*
79 *appeal, or in any habeas corpus proceeding.*

80 § 19.2-163.03. Qualifications for court-appointed counsel.

81 A. In accordance with § 19.2-163.01, to initially qualify to serve as counsel appointed pursuant to
82 § 19.2-159 for an indigent defendant charged with a misdemeanor, the attorney shall be a member in
83 good standing of the Virginia State Bar, and (i) if an active member of the Virginia State Bar for less
84 than one year, have completed six hours of MCLE-approved continuing legal education developed by
85 the Indigent Defense Commission, or (ii) if an active member of the Virginia State Bar for one year or
86 more, either complete the six hours of approved continuing legal education developed by the
87 Commission, or certify to the Commission that he has represented, in a district court within the past
88 year, four or more defendants charged with misdemeanors.

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

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

115 D. After initially qualifying, an attorney shall maintain his eligibility for certification by completing
116 biennially thereafter six hours of MCLE-approved continuing legal education, certified by the
117 Commission. In addition, to maintain eligibility to accept court appointments under subdivision B 2 of
118 § 16.1-266, an attorney shall complete biennially thereafter four additional hours of MCLE-approved
119 continuing legal education on representing juveniles, certified by the Commission.

120 E. The Commission or the court before which a matter is pending, may, in its discretion, waive the

121 requirements set out in this section for individuals who otherwise demonstrate their level of training and
122 experience. *A waiver of such requirements pursuant to this subsection shall not form the basis for a*
123 *claim of error at trial, on appeal, or in any habeas corpus proceeding.*