

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

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The General Assembly amended Virginia Code § 19.2-163, effective July 1, 2007, to allow attorneys appointed to represent indigent defendants in criminal matters to seek waivers of the statutory fee caps. Introduced as companion bills by Delegate Lacey E. Putney and Senator Kenneth W. Stolle, the new law permits a court to grant a waiver when the effort expended by the attorney, the time reasonably necessary for the representation, the novelty and difficulty of the issues, or other circumstances warrant such a waiver. To receive compensation for the representation, including any waiver, court-appointed counsel must submit a detailed accounting of the time expended for the representation within thirty days of the completion of the proceedings.

The amended statute sets forth two separate levels of waivers beyond the statutory fee caps. The court has discretion to grant both levels of waivers subject to guidelines issued by the executive secretary of the Supreme Court of Virginia. The first level allows the court that heard the case to grant a waiver up to a certain supplemental amount depending upon the type of charge and the court hearing the case. The specific waiver amounts permitted under this first-level waiver are listed in Table 1 under "Supplemental Statutory Waiver Amount." The second-level waiver has no cap; however, it requires approval by both the presiding judge and the chief judge of the circuit court or district court that heard the case.

The General Assembly appropriated \$8.2 million for these waivers. If at any time the funds allocated for the waivers are exhausted, the executive secretary of the Supreme Court is required to certify that

fact to the courts, and no additional waivers may be approved. Every court across the state has been provided with a budget estimate for its portion of the \$8.2 million. These guideline budget estimates have been developed based on past expenditures from the Criminal Fund by each court. The percentage of the Criminal Fund used by each particular court has been multiplied by the \$8.2 million to determine the estimated amount for each court. Monthly reports of expenditures for waivers will be provided to each court. The Executive Secretary's Office has estimated that the \$8.2 million appropriated is sufficient to allow first-level waivers in approximately 20 percent to 25 percent of cases where counsel has been appointed.

In order to develop the guidelines that courts are to consider in deciding whether to grant waivers, a working group was established that consisted of judges from circuit, general district and juvenile and domestic relations district courts; commonwealth's attorneys; the executive director of the Indigent Defense Commission; attorneys in private practice who serve as court-appointed counsel; and staff from the Office of the Executive Secretary. To provide guidance to courts and attorneys, the working group recommended the guidelines set forth in Table 2.

To apply for a waiver, an attorney must complete both Form DC-40, LIST OF ALLOWANCES (revised effective 7/07) and new Form DC-40(A), APPLICATION OF AUTHORIZATION FOR WAIVER OF FEE CAP, and submit them to the court with an attorney time sheet. (See pages 34 and 35 for copies of Forms DC-40 and DC-40(A)). A separate Form DC-40(A) must be submitted for each charge for which the attor-

SCV Executive Secretary to Oversee Waivers



Karl R. Hade, executive secretary of the Supreme Court of Virginia since 2005, heads the office that is implementing collection of court-appointed fee data and payment of fee-cap waivers under newly amended Virginia Code § 19.2-163. He holds a bachelor's degree in biology and a master's in business administration from the University of Richmond.

ney is seeking a waiver. The reason for the request for waiver must be explained on Form DC-40(A), and an attorney time sheet must be included. A sample attorney time sheet is available online at www.courts.state.va.us/news/ctappt_counsel/ctappt_counsel_time_sheet.pdf; however, any time sheet that provides a detailed accounting of hours spent on the case is acceptable.

Form DC-40(A), which provides space for the judge to explain the basis for approving the request for waiver, will be retained in the court's file with the attorney time sheet. Revised Form DC-40, LIST OF ALLOWANCES, on which the court will specify whether any waiver has been authorized and the amount allowed, will be submitted by the court to the Office of the Executive Secretary for payment.

Revised Form DC-40 permits only one charge to be listed per block; accordingly, only three charges may be listed per form. This change and other revisions to Form DC-40 were made to ensure that the executive secretary is able to comply with the new quarterly reporting requirement added to § 19.2-163. The executive secretary must report to the governor, members of the House Appropriations Committee and members of the Senate Finance Committee on the number and category of offenses charged involving adult and juvenile offenders where counsel is appointed. These reports must also include the amounts paid for waivers of the statutory fee caps. Additional changes to Form DC-40 include requiring greater specificity as to the charged offense and requiring attorneys to specify actual hours spent on each charge, even if a waiver is not requested. This information is essential to accurately project the cost of funding any increase to or elimination of the statutory fee caps.

Requests for waivers should be filed in the court in which the case was concluded. There is no appeal process available if an application for waiver of fee cap is denied. In any case where a waiver has been requested, the defendant will only be assessed attorney's fees equal to the statutory fee cap for the applicable charge.

Questions about the waiver process and forms should be addressed to any district or circuit court clerk's office.

More information, including answers to frequently-asked questions, is available at www.courts.state.va.us/news/2007_0626_waivers_of_statutory_fee_caps.html.

Table 1: Fee and waiver amounts for court-appointed counsel pursuant to § 19.2-163, effective July 1, 2007.

Court	Charge	Statutory Fee	Supplemental Statutory Waiver Amount	Fee for Additional Waiver
District	Misdemeanor	\$120	Up to \$120	Discretion of Court
J&DR District	Delinquency	\$120	Up to \$120	Discretion of Court
District	Felony, Class III-VI resolved in district court	\$445	Up to \$155	Discretion of Court
District	Felony, Class II resolved in district court	\$1,235	Up to \$850	Discretion of Court
Circuit	Misdemeanor	\$158	Not Available	Discretion of Court
Circuit	Felony, Class III-VI	\$445	Up to \$155	Discretion of Court
Circuit	Felony, Class II	\$1,235	Up to \$850	Discretion of Court

Table 2: Statutory Criteria for Fee Cap Waiver Guidelines, including examples of "exceptional case" factors, promulgated by the Office of the Executive Secretary pursuant to § 19.2-163.

Statutory Criteria for Fee Cap Waiver Guidelines

1. Representation required additional time and effort.
2. Representation presented novel and difficult issues.
3. Representation involved other circumstances warranting a waiver.

Examples of "exceptional case" factors to be considered for fee cap waivers (including but not limited to the following):

- Single-charge representation (especially misdemeanor and juvenile cases).
- Juvenile charged with an offense that would be a felony if committed by an adult.
- Jury trials, including misdemeanors.
- Extensive travel required during representation.
- Juvenile certification/transfer hearings where Juvenile and Domestic Relations District Court jurisdiction retained.
- Issues requiring extensive legal research.
- Matters involving DNA and other scientific evidence.
- Multiple defendant, victim, or "spree" cases.
- Complex fraud cases.
- Representation of a client requiring the services of an interpreter.
- Representation of a client with serious mental health issues, or accessibility challenges.
- Insanity defense.
- Complex investigation, considering number and accessibility of witnesses interviewed, record collection, document organization and use of investigative, expert or other services.
- Matters involving unusually long and complex pretrial hearings, trial, or sentencing hearing.
- Serving as advisory counsel to pro se defendant during felony trial.
- Change-of-venue cases.

See sample forms on pages 34–35.

LIST OF ALLOWANCES

Commonwealth of Virginia

VENDOR INVOICE NO.

VENDOR REFERENCE
(MAXIMUM 23 CHARACTERS)

.....
CITY OR COUNTY

.....
VENDOR F.I.N. OR SOCIAL SECURITY NUMBER

.....
PAY TO THE ORDER OF: FIRM, CO., INDIVIDUAL

.....
ADDRESS

.....
CITY, STATE, ZIP

[] General District Court [] Traffic [] Criminal
[] Juvenile & Domestic Relations District Court [] Circuit Court

CERTIFICATE OF ALLOWANCE FOR PAYMENT

Said account has been duly examined by the undersigned and it appearing to be correct and unpaid, the account is hereby certified to the Supreme Court of Virginia for payment.

_____/_____/_____
CLERK/DEPUTY CLERK DATE

SEE INSTRUCTIONS ON REVERSE

Defendant's Name	Case Number	Original Code § Charged	Chart of Allowances Code §
Trial/Service Date: / /	Specify case type: ___ Adult ___ Juvenile	For district court felony, was case certified? ___ Yes ___ No	
For adult criminal and juvenile delinquency cases, specify offense type or equivalent: ___ Misdemeanor ___ Felony (Class 1) ___ Felony (Class 2) ___ Felony (Class 3-6) ___ Felony (unclassified, punish. by more than 20 yrs.) ___ Felony (unclassified, punish. by 20 yrs. or less)		For non-delinquency juvenile court cases, specify type of representation: _____	
Calculate total time spent for charge and expenses claimed. Itemize expenses and include receipt for any over \$20. List expenses: _____	Time: Total in court: Hrs. ___ Min. ___ \$ _____ Total out of court: Hrs. ___ Min. ___ \$ _____ Total Expenses: \$ _____ Waiver amount requested: \$ _____ Total amount claimed: \$ _____	AMOUNT ALLOWED (PER JUDGE APPROVAL) Fee amount \$ _____ Waiver amount \$ _____ TOTAL: \$ _____	

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Trial/Service Date: / /	Specify case type: ___ Adult ___ Juvenile	For district court felony, was case certified? ___ Yes ___ No	
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I certify that the above claim for fees and/or expenses is true and accurate and that no compensation for the time or services set forth has previously been received.

_____/_____/_____
VENDOR'S SIGNATURE DATE VSB MEMBER NUMBER

AMOUNT CERTIFIED FOR PAYMENT \$ _____

I have reviewed the foregoing information and authorize the amount allowed to the vendor named above.

_____/_____/_____
JUDGE Date

_____/_____/_____
CHIEF JUDGE Date

APPLICATION AND AUTHORIZATION FOR WAIVER OF FEE CAP

COMMONWEALTH OF VIRGINIA

Case No.

Vendor Invoice No.

General District Court Circuit Court
 Juvenile and Domestic Relations District Court

.....
 CITY OR COUNTY

.....
 PRESIDING JUDGE

.....
 DEFENDANT'S NAME

.....
 DATE OF APPOINTMENT

.....
 CHARGE AT TIME OF APPOINTMENT (CODE SECTION)

.....
 DATE CASE CONCLUDED

.....
 COUNSEL'S NAME ADDRESS CITY STATE ZIP

PLEASE CHECK ALL THAT APPLY:

- On the basis of the factors below, I request that the Court waive the otherwise applicable statutory fee cap and authorize supplemental compensation in the amount of \$ (See instructions on reverse for supplemental statutory waiver amount which can be requested.)
- On the basis of the factors below, I also request that the presiding judge and the chief judge authorize a fee for additional waiver in the amount of \$

Please explain in detail the basis for your request for waiver of the fee cap (Attach Form DC-40, LIST OF ALLOWANCES and Attorney Time Sheet):

My representation of this client on this charge required additional time and effort:

My representation of this client on this charge presented novel and difficult issues:

My representation of this client on this charge involved the following circumstances which warrant a waiver:

I certify that the above claim for fees is true and that no compensation for these services has previously been received.

.....
 DATE COUNSEL SIGNATURE VSB MEMBER NUMBER

TO BE COMPLETED BY PRESIDING JUDGE AND/OR CHIEF JUDGE

I authorize supplemental statutory waiver compensation in the amount of \$ for the following reason(s):

Supplemental statutory waiver request is denied.

.....
 JUDGE DATE

I authorize a fee for additional waiver in the amount of \$ for the following reason(s):

Request for a fee for additional waiver is denied.

.....
 PRESIDING JUDGE DATE CHIEF JUDGE DATE
 (Whether approved or denied)