

## INDIGENT DEFENSE TASK FORCE

*Alex N Levay Jr., chair*

July 1, 2007, marked the first time in Virginia history that an attorney who represents the indigent could ask the court in a criminal case to consider the time he or she actually spends on the case when determining court-appointed counsel's compensation.

This newly created fee-cap waiver system is the product of decades of work and lobbying to reform how our society treats the poor who are involved in the criminal justice system. This reform was an implicit recognition that it is wrong to have a system where counsel is not remunerated for his or her time when they represent the poor. It also demonstrates that caps on compensation that cover only a couple of hours on a case do not afford equal justice under the law. We should all be proud that Virginia has made a principled decision regarding this seminal matter, and that the commonwealth's action will have far-reaching implications for our less fortunate.

There is still a great deal of work to be done, however. The money budgeted to provide for the waivers is thought to be approximately one quarter of what is needed. It is hoped that when a shortfall becomes evident in terms of real numbers and elected officials can more accurately project what funding is necessary, additional increases will be forthcoming.

The Virginia Indigent Defense Commission (IDC) has made great strides after a somewhat rocky start three years ago. Public defender offices have seen technology upgrades, increases in salary, better and more frequent training, additional staff, and a recognition that it is the quality and not the quantity of representation that is the most important goal of any public defender office.

The IDC has also created standards of practice that will be applicable to all attorneys who represent the indigent — appointed counsel as well as public defenders. These standards are rigorous and commensurate with an expectation of quality representation. In addition, a caseload study has begun and an enforcement mechanism for the standards of practice is under development. The goal for the caseload study is to ensure that public defenders are capable of meeting their ethical obligation of zealous representation — something that is impossible if they are overwhelmed by the number of cases they are working on. The scope of the enforcement mechanism is limited to ensuring that names of only qualified counsel appear on the court-appointed lists; is not intended to provide fodder for ethics complaints or legal malpractice actions.

The Indigent Defense Task Force and Criminal Law Section of the Virginia State Bar have been actively involved in the many improvements that have taken place. The VSB has been a strong advocate for change. Its representatives have worked with the Court under the leadership of Chief Justice Leroy R. Hassell Sr. to direct attention to the need for reform. The VSB and the Court have cosponsored training initiatives such as the Advanced Criminal Law Seminar on May 4, 2007, in Richmond and Abingdon. These annual programs are provided at no charge and include nationally renowned speakers.

Despite this momentous progress, criminal defense in Virginia is still very much "trial by ambush." While our civil colleagues can issue interrogatories, requests for documents, and conduct depositions, Rule 3A:11 has no provision for obtaining the statements of witnesses, police reports, and other information vital to the proper preparation and evaluation of a case. Indigent defendants suffer the most under these deficient rules of discovery because their counsel do not have the time or resources to conduct their own investigations. This has been lessened somewhat by the state allotting a limited number of investigators in public defender offices, but court-appointed counsel are forced to lobby the court for even minimal investigative services.

This substandard process in which public defenders and court-appointed counsel must continually request and haphazardly receive expert witness assistance chronically puts indigent defendants at a disadvantage. An indigent defendant's attorney must file a motion, explain to the court and the commonwealth why an expert or investigator is necessary, and then typically be given strict limitations on the expert or investigator's services. Accordingly, reforms such as ex parte applications for expert witnesses and investigative services, as well as changes to the rules of discovery, will be a primary focus for the Indigent Defense Task Force in the immediate future.

There are too many people who helped to bring about the progress that was long overdue, to recognize them individually in this report. The beauty of working on this issue is that the work is done for the good of the people and because it is the right thing to do. When your cause is just, progress is the only thanks you need.

## **Appointed counsel legislation**

Pertinent final legislation from the 2007 Virginia General Assembly Session includes the following provisions:

1. \$8.2 million in the final budget, specifically allocated to pay for fee waivers
2. A first-round waiver up to an additional cap on all charges that is approved by the trial judge
  - An additional \$120 for misdemeanors and juvenile delinquency cases (current fee cap \$120) for a total of \$240
  - An additional \$155 for lower and mid-level felonies (current fee cap \$445) for a total of \$600
  - An additional \$850 for high level felonies (current fee cap \$1235) for a total of \$2,085
3. An unlimited waiver beyond the additional fee caps that can be granted by the chief judge in the circuit or district court, subject to guidelines issued by the Supreme Court of Virginia
4. A requirement that all court-appointed attorneys submit a detailed accounting of the time expended for that representation
5. Supreme Court tracking of hours worked, waivers requested and amounts paid.

During the past three years, the General Assembly has appropriated nearly \$17 million to increase court-appointed fees (\$2.4 million in 2005, \$6.3 million in 2006 and \$8.2 million in 2007). Over that period, it has approved increases of \$7.8 million for public defenders. These increases have greatly helped Virginia's underfunded indigent defense system, but much work remains to be done.

## **Improvements in public and capital defender offices**

At the close of the 2007 General Assembly Session, funding for state public and capital defender offices increased by \$3.7 million. This increase tops a steady progression of new funding for defender offices over the past several years. We hope the cumulative effect will be one of retiring the low pay scales that have led to high turnover in recent years. This year's additional funding should allow the agency to fill twenty-six additional positions and provide a 13 percent raise for all employees in November 2007. Starting salaries for public defenders will increase from \$42,600 to \$48,183. The 13 percent reflects a 9 percent raise in base salary for public defenders and administrative and support personnel combined with a 4 percent across the board increase for all state employees from other funding sources.

The pending salary increases for lawyers and support staff will help narrow the pay gap with prosecutors' offices; but it won't entirely eliminate it. Nevertheless, the additional positions, including increases for capital defender offices will help spread out the workload and improve the quality of service.

The significant pay increase (24 percent in base salary) for capital defenders will help reduce recruitment and retention problems in these very demanding jobs. Additional positions in the administrative office will help staff the enforcement mechanism for standards of practice that went into effect April 1, 2007.

There are twenty-five public defender offices in Virginia and four regional capital defender offices. They handle more than half of the indigent defense cases in the state. All other indigent defendants are represented by court-appointed attorneys — lawyers in private practice who take court-appointed criminal cases.

