



Indigent Criminal Defense and Commonwealth's Attorneys

Study resolution

- Determine the adequacy of legal representation provided to indigent defendants
- Determine how many commonwealth's attorneys, court-appointed attorneys, and public defenders the state needs
- Assess court-appointed attorney, public defender, and commonwealth's attorney compensation
- Evaluate potential changes to pretrial process

Commission study resolution approved November 7, 2022.

Research activities

- Conducted comprehensive analysis of court outcomes by the type of attorney providing representation
- Quantified the number of private attorneys serving as court-appointed defense counsel and assessed state compensation for court-appointed attorneys
- Reviewed public defender and commonwealth's attorney staffing and salaries
- Surveyed public defenders, court-appointed attorneys, and judges

In brief

Court-appointed attorneys and public defenders generally provide effective counsel to indigent defendants.

Fewer attorneys are willing to serve in court-appointed defense role, especially in certain parts of the state, primarily because of low payment from the state.

More commonwealth's attorney positions would help offices more effectively handle their workload.

Public defender workload has increased, and many public defender positions have been vacant, exacerbating workload concerns; but recent recruiting efforts have helped.

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Adequate prosecution & defense essential for an adversarial legal system and court efficiency

- Prosecutors and defense attorneys each play a vital role in the adversarial legal system
 - vigorous prosecution and defense, overseen by an impartial judge, will result in fair and just outcomes across criminal cases
- System needs enough prosecutors and defense attorneys with the time and ability to represent the state's and defendants' interests

State has constitutional obligation to provide attorneys to indigent criminal defendants

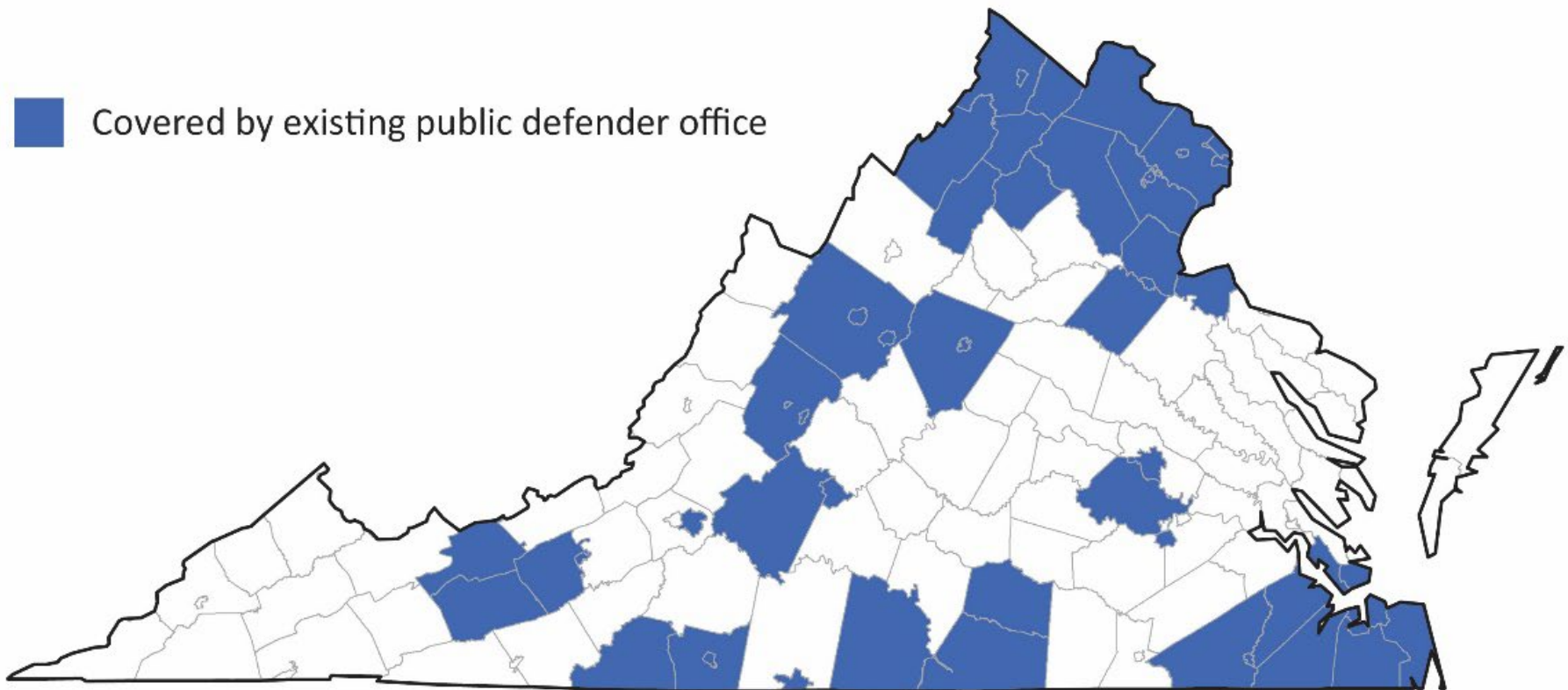
- U.S. Constitution guarantees the right to an attorney for every person accused of a crime whose life or liberty is at stake
- When individuals cannot afford their own attorney, the government must provide them an attorney
- Statute defines process to determine indigency and eligibility for a publicly provided defense

Virginia has a hybrid system to provide attorneys to indigent criminal defendants

- State relies on 2,000 private attorneys who the court can appoint when there is
 - no public defender office
 - a conflict of interest
 - specialization necessary to “attain the ends of justice”
- State has 28 public defender offices
 - Overseen by the Virginia Indigent Defense Commission
 - 430 public defender attorney positions statewide
- State spent \$127M on indigent defense (FY23)*

*Public defenders received an additional \$3.8M in local funds to supplement state salaries.

State's 28 public defender offices serve 56 localities



Virginia has 120 commonwealth's attorney offices

- Act as the state's prosecutors and are elected constitutional officers
- Prosecute felony indictments and have discretion to prosecute misdemeanors
- Perform other state and local duties, such as community outreach, training and advice to local officials, public records requests
- Received \$84M from the state and more than \$50M in local funding (FY23)

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Indigent defendants are entitled to effective representation by their state-provided attorney

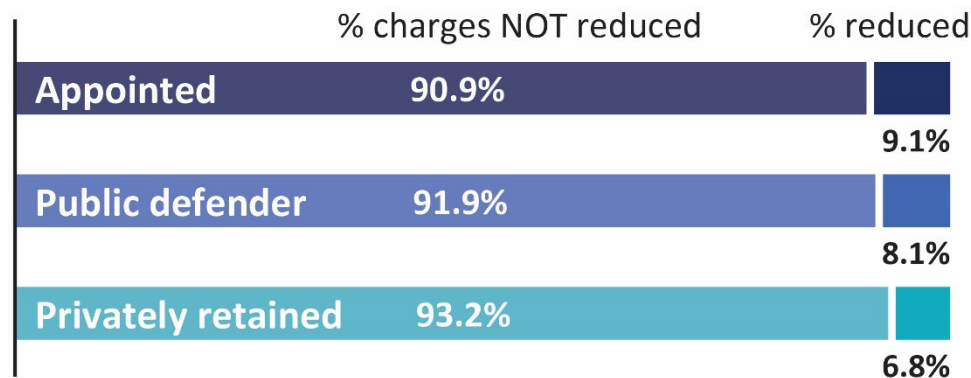
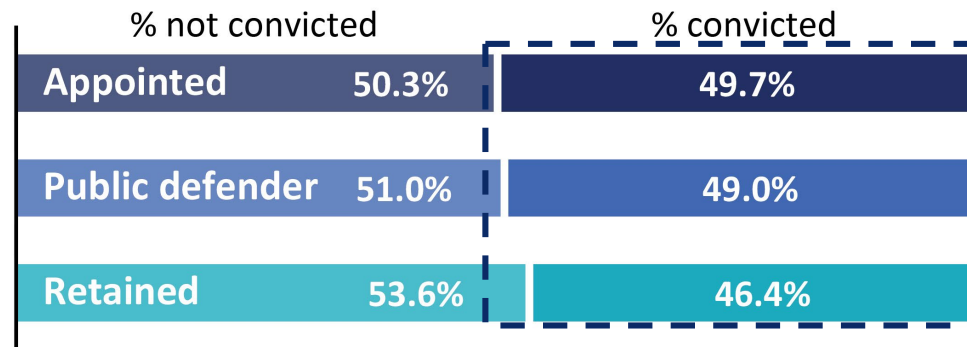
- U.S. Supreme Court has established that defendants should have “effective assistance of counsel”
- State-provided attorneys—whether public defender or court appointed—must practice “pursuant to prevailing professional norms” to defend their client

Findings

Analysis shows no evidence that type of defense attorney substantially affects case results.

Judges report court-appointed attorneys and public defenders both provide quality representation.

Little or no systemic differences in outcomes by attorney type during last 10 years



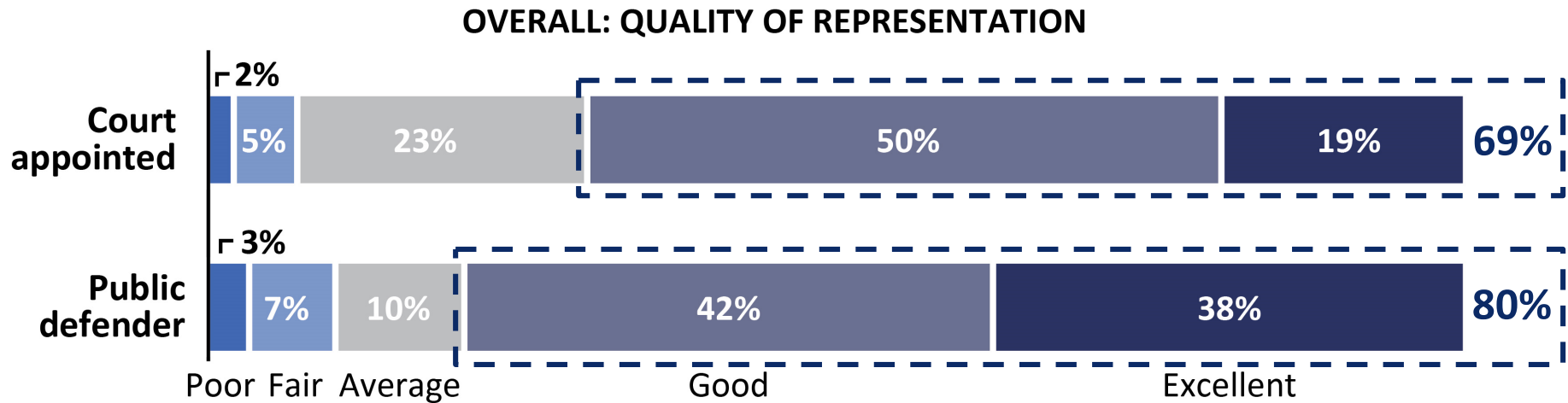
Analysis is based on outcomes by criminal charge; some cases have more than one charge. FY13–FY22 OES circuit court data and Fairfax circuit court data. 4.4 million criminal charges included in analysis.

No quantifiable evidence attorney type affects how cases were resolved during last 10 years

	% plea	% trial
Appointed	85.9%	14.1%
Public defender	86.5%	13.5%
Retained	85.9%	14.1%

JLARC analysis of FY13–FY22 OES circuit court data, Fairfax circuit court data, and Virginia Criminal Sentencing Commission sentencing guidelines data.

Judges: a majority of public defenders and court-appointed attorneys are “good” or “excellent”



JLARC survey of judges, summer 2023. 297 responses; 67% response rate.

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Commonwealth's attorneys offices receive state funding based on “staffing standards”

- Compensation Board determines staffing allocations and funding for each commonwealth's attorney office
- In 2023, the Compensation Board and the National Center for State Courts undertook an effort to better calculate workload & staffing needs for each office
- Resulted in new “staffing standards” that will be used by the board for future staff allocations and budget requests

Finding

New staffing standards suggest more commonwealth's attorney staff are needed to handle workload.

Current commonwealth's attorney staffing allocation is sufficient to handle 87% of workload

- State would need to allocate 112 additional attorney positions to meet statewide felony prosecution workload
 - 15 percent increase to the 728 state-funded attorney positions currently allocated
 - estimated to cost \$9.2 million annually
- Filling existing commonwealth's attorney vacancies (6.5%) would not be enough to fully meet workload demand
 - would address less than one-half of unmet felony workload
 - nearly three-quarters of offices have no vacancies to fill but still have unmet workload

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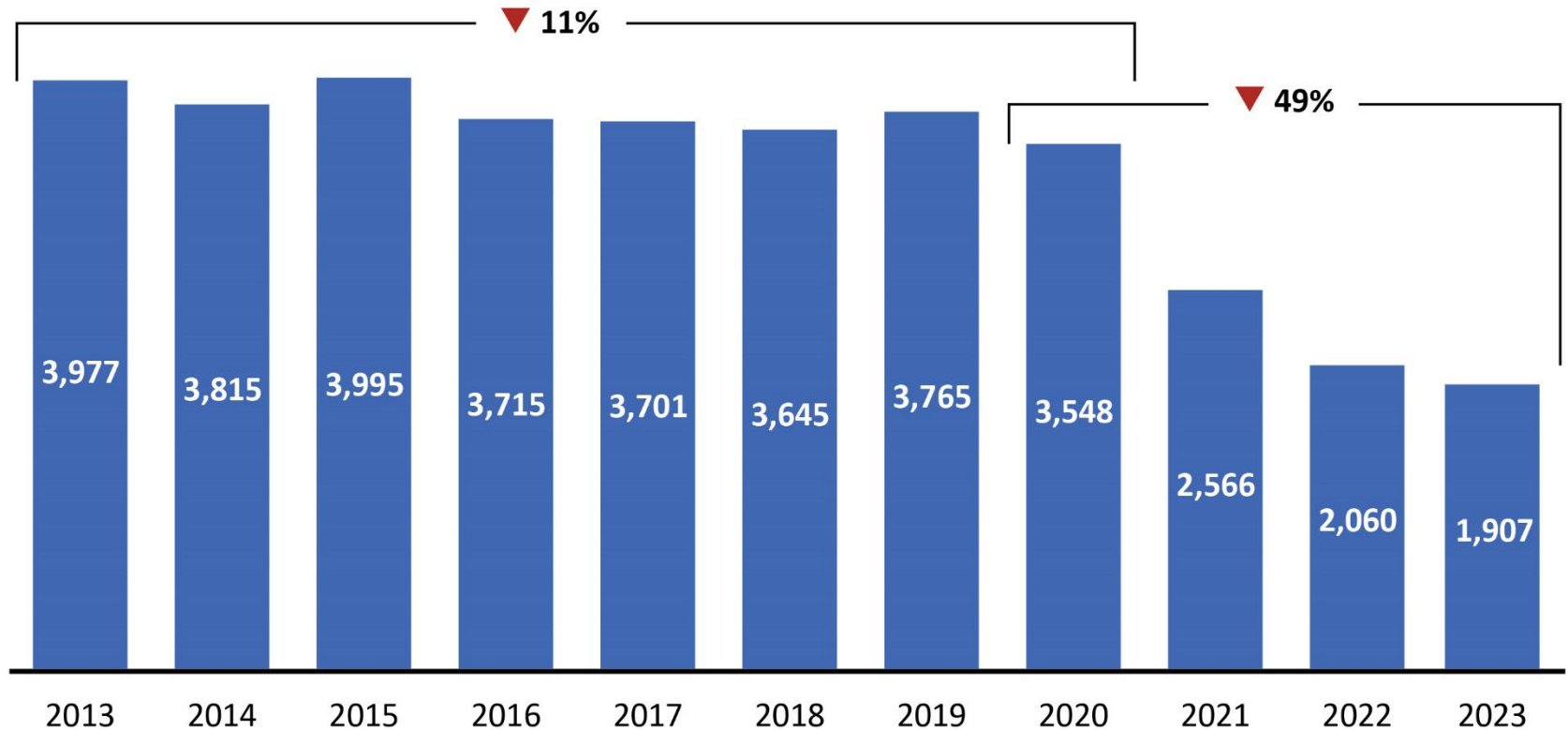
Court-appointed attorneys are an integral part of the state's indigent defense system

- Court-appointed attorneys are private attorneys paid through the state's criminal fund for time spent providing counsel for indigent criminal defendants
- Court-appointed attorneys defended 54% of the charges for which the state provided representation

Finding

Fewer attorneys are serving in court-appointed defense role.

Decline in active court-appointed defense attorneys has recently accelerated



Represents the number of court-appointed attorneys receiving payment for providing court-appointed defense representation for at least one charge in a fiscal year.

Judges have difficulty finding attorneys willing to take court appointments

- Half of judges reported it is challenging to find an attorney to appoint for an indigent defendant; most said it has gotten more difficult in the past two years
- “We are getting to the point that my staff are calling many, many lawyers before they can find one who will take the case.” - *Judge*
- “We are down to two or three attorneys willing to handle misdemeanor and felony cases. Those attorneys are so busy they are telling us not to appoint them to new cases.” - *Judge*

Finding

Judges in some parts of the state say the lack of court-appointed attorneys is hindering court operations.

Decline in court-appointed attorneys hinders court efficiency and risks litigation

- Having too few court-appointed attorneys reduces court efficiency
 - court staff need more time to find an attorney to serve
 - more schedule conflicts and harder to schedule hearings
- State has potential legal exposure if indigent criminal defendants cannot be provided an attorney (lawsuits in Wisconsin and Georgia)

Judges cite lack of court-appointed attorneys as reason for delays

- “Sharing the very few [court-appointed attorneys] between six to eight courts that are running at any time in our jurisdiction is causing extensive delays in the flow of the docket.” - *Judge*
- “For the first time, we have had to continue a trial date because we could not find counsel before the court date.” - *Judge*

Finding

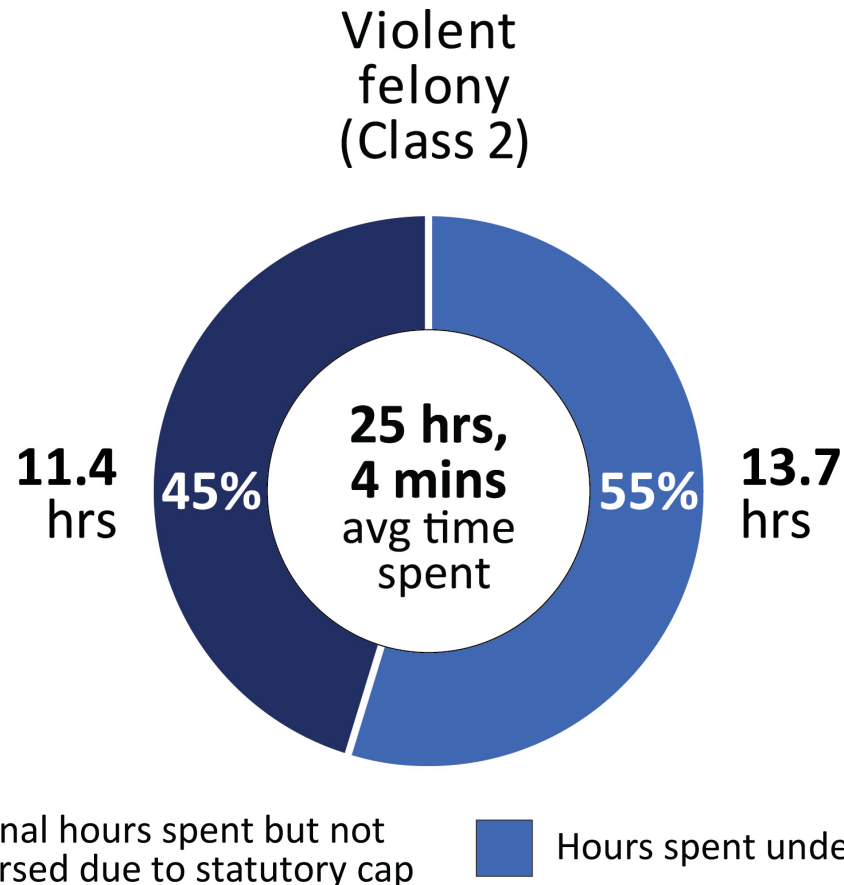
Low compensation—primarily due to caps set in statute—
cited for decline in court-appointed attorneys.

Virginia sets court-appointed attorney hourly rates and caps payment amounts

- Hourly rate for court-appointed attorneys is \$90
- Pay caps are set in statute and based on type of charge

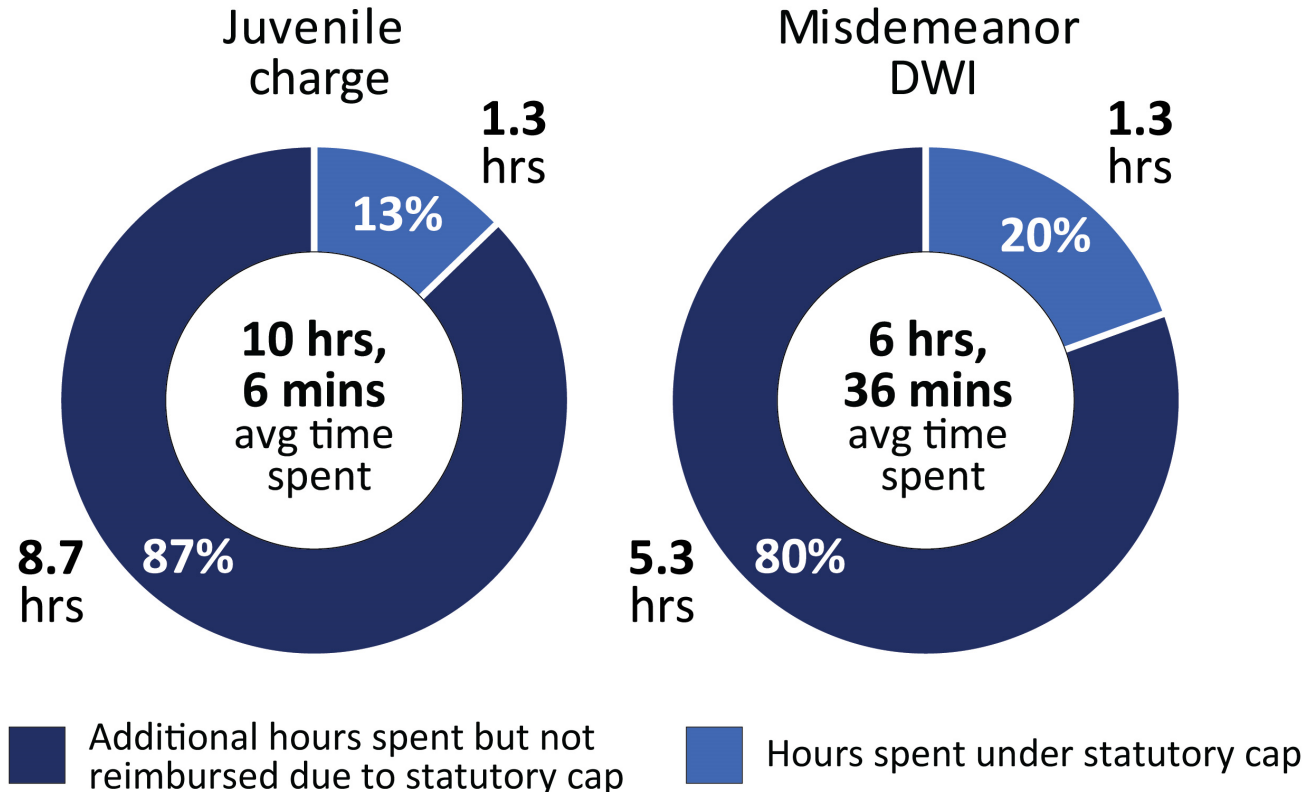
Court	Charge type	Pay cap	Maximum supplemental waiver
JDR	Any juvenile charge	\$120	\$650
District	Misdemeanor	\$120	\$120
Circuit	Misdemeanor	\$158	N/A
Circuit	Class 3 to 6 felony	\$445	\$155
Circuit	Class 2 felony	\$1,235	\$850
Circuit	Class 1 felony	None	N/A

Court-appointed attorneys work substantial time for which they are not paid on a typical case



Average time based on 2023 National Center for State Courts Virginia public defender case time estimates.

Court-appointed attorneys work substantial time for which they are not paid on a typical case (cont.)



Average time based on 2023 National Center for State Courts Virginia public defender case time estimates.

Low compensation is the major reason cited as why fewer attorneys take court-appointed work

- 89% of attorneys who stopped serving in court-appointed defense cited low pay as a top factor
- 91% considering taking fewer cases or leaving service cited low pay as a top factor
- 94% of judges cited raising court-appointed attorney compensation as one of the top ways to address concerns with indigent defense system

JLARC survey of current and former court-appointed attorneys, summer 2023. 580 responses; 36% response rate.

Pay caps should be raised so payment more closely reflects the time attorney spends

- Certain approaches are not advisable
 - having no pay caps
 - setting caps without a sound analytical basis (e.g., doubling the current caps)
- Estimated average time a defense attorney *in Virginia* spends on a case should be the basis for setting pay caps

Recommendation

The General Assembly may wish to consider amending the Code to set higher pay caps for court-appointed criminal defense attorneys representing indigent clients.

Finding

If payment caps are increased, offense categories should be changed.

Offense categories should be changed so pay caps more closely align with time spent by attorney

- Pay caps differ by offense category; current offense categories often do not align with the workload associated with each type of charge
- Attorney survey and case time analysis show misalignment between current categories used to set pay caps and time required for defense attorney
- Example: Violent felony and DWI take attorneys far more time on average than is compensated under current pay caps

Recommendation

If the General Assembly increases court-appointed criminal defense attorney pay caps, it may wish to consider amending the Code to establish the following new offense categories for payment:

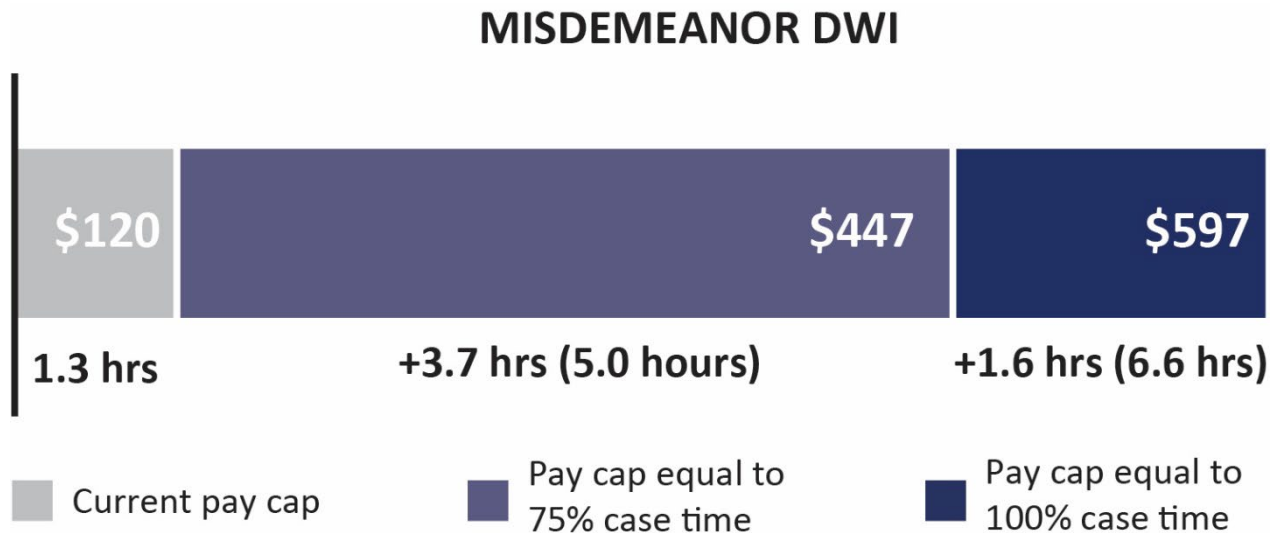
- (i) violent felonies,
- (ii) nonviolent felonies,
- (iii) misdemeanor DWIs,
- (iv) non-DWI misdemeanors, and
- (v) juvenile charges.

Finding

The amount of additional compensation for attorneys and the fiscal impact to the state would depend on the extent to which caps are raised.

Amount of additional payment would depend on which caps are raised and by how much

- Pay caps could be raised for all types of charges or target certain types of charges
- Example: set cap to 75% or 100% of average time spent

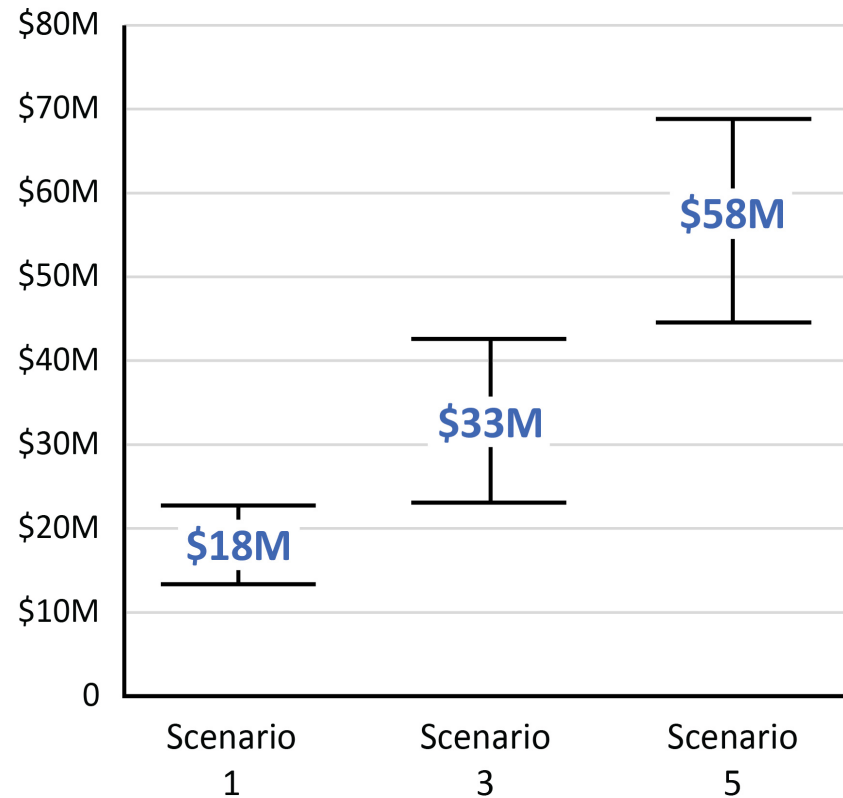


Examples of setting pay caps by different offense categories and amounts

- *Target* raising pay caps only for offenses with greatest disparity between average time spent and current pay cap; set caps to 75% of average time spent (Scenario 1)
- Set pay caps for *all* offense categories to 75% of average time spent (Scenario 3)
- Set pay caps for all offense categories to 100% of average time spent (Scenario 5)

See pages 28 and 29 of report for more detail about additional scenarios.

Fiscal impact to state would depend on which caps are raised and by how much



See pages 28 and 29 of report for more detail about additional scenarios. Dollar value represents midpoint of estimated range of net new spending. FY23 spending was ~\$53m.

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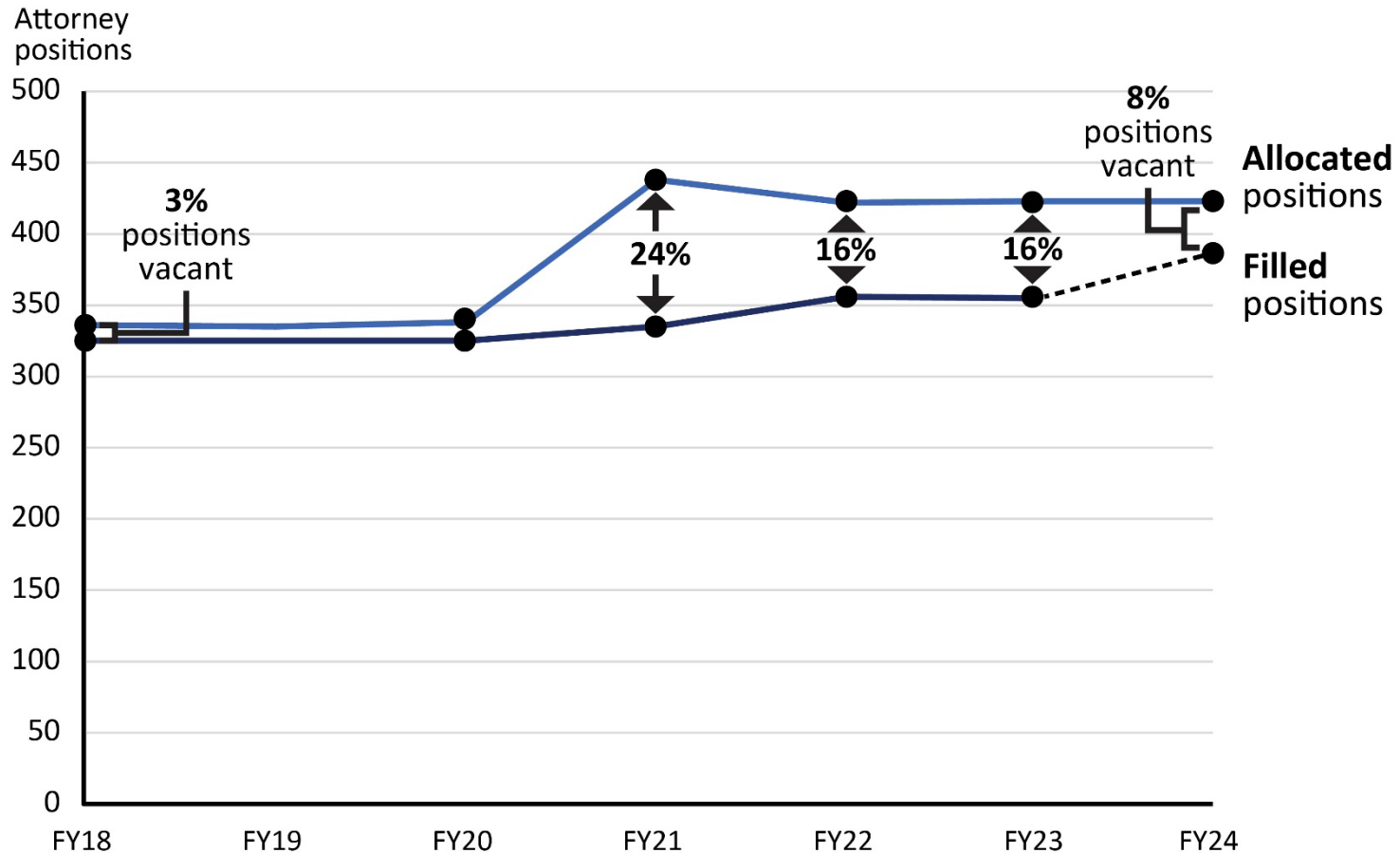
Pretrial process

Safeguarding state funds paid to attorneys

Public defenders play a critical role in the state's indigent defense system

- Attorneys are state employees who receive salary and full state-provided benefits (e.g., health insurance, retirement, leave, etc.)
- Public defenders defended 46% of the charges for state-provided representation
- Public defender offices also employ non-attorney support staff

Vacant positions rose substantially in recent years; recent recruitment efforts are helping

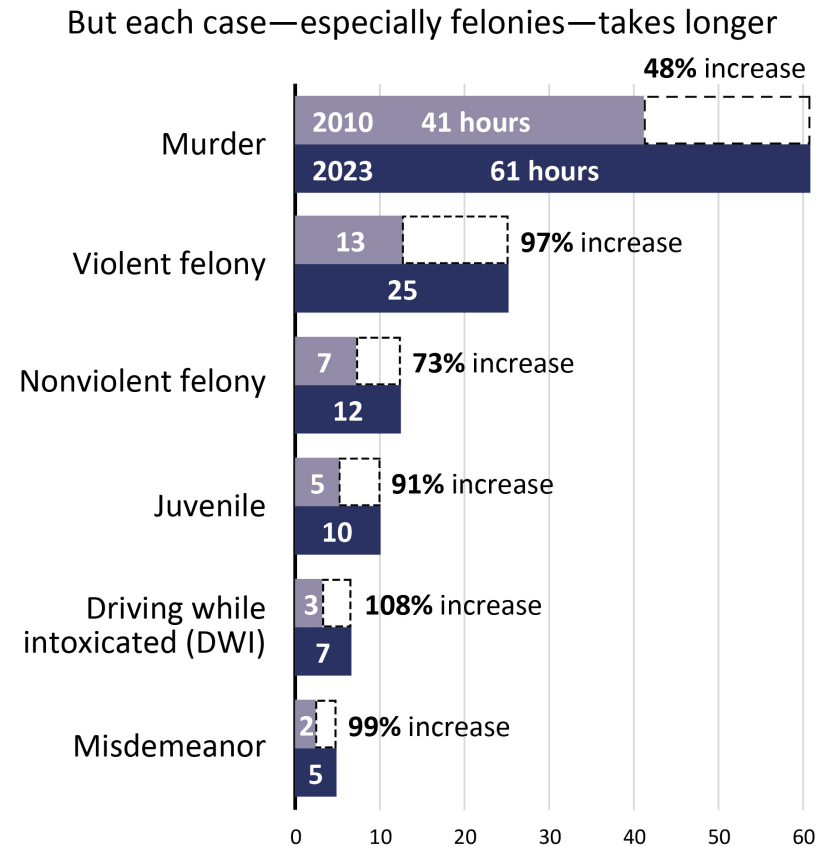
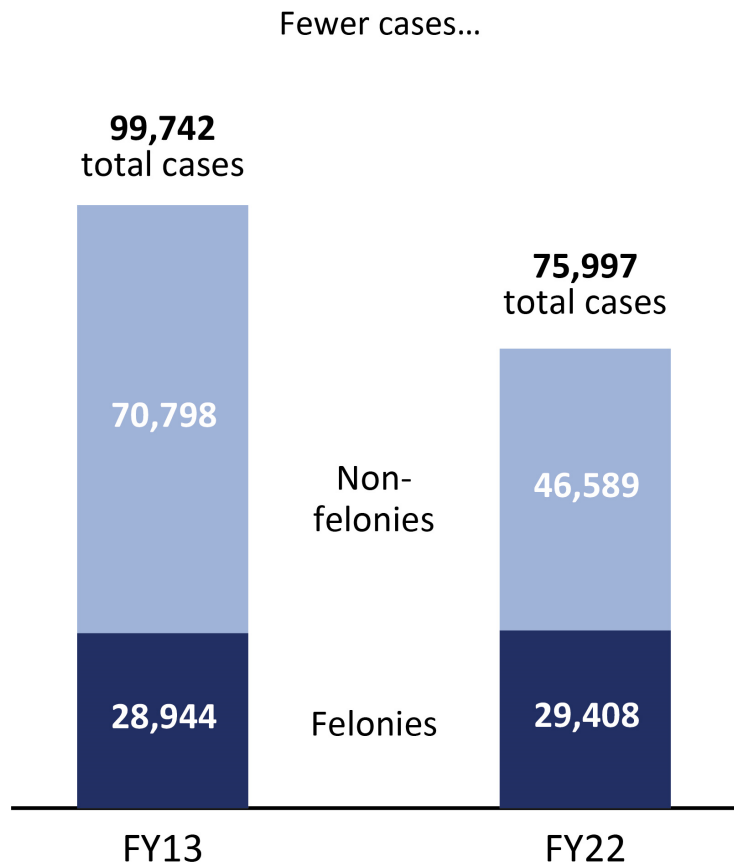


NOTE: 16 capital defender positions were reallocated to support staff positions.

Finding

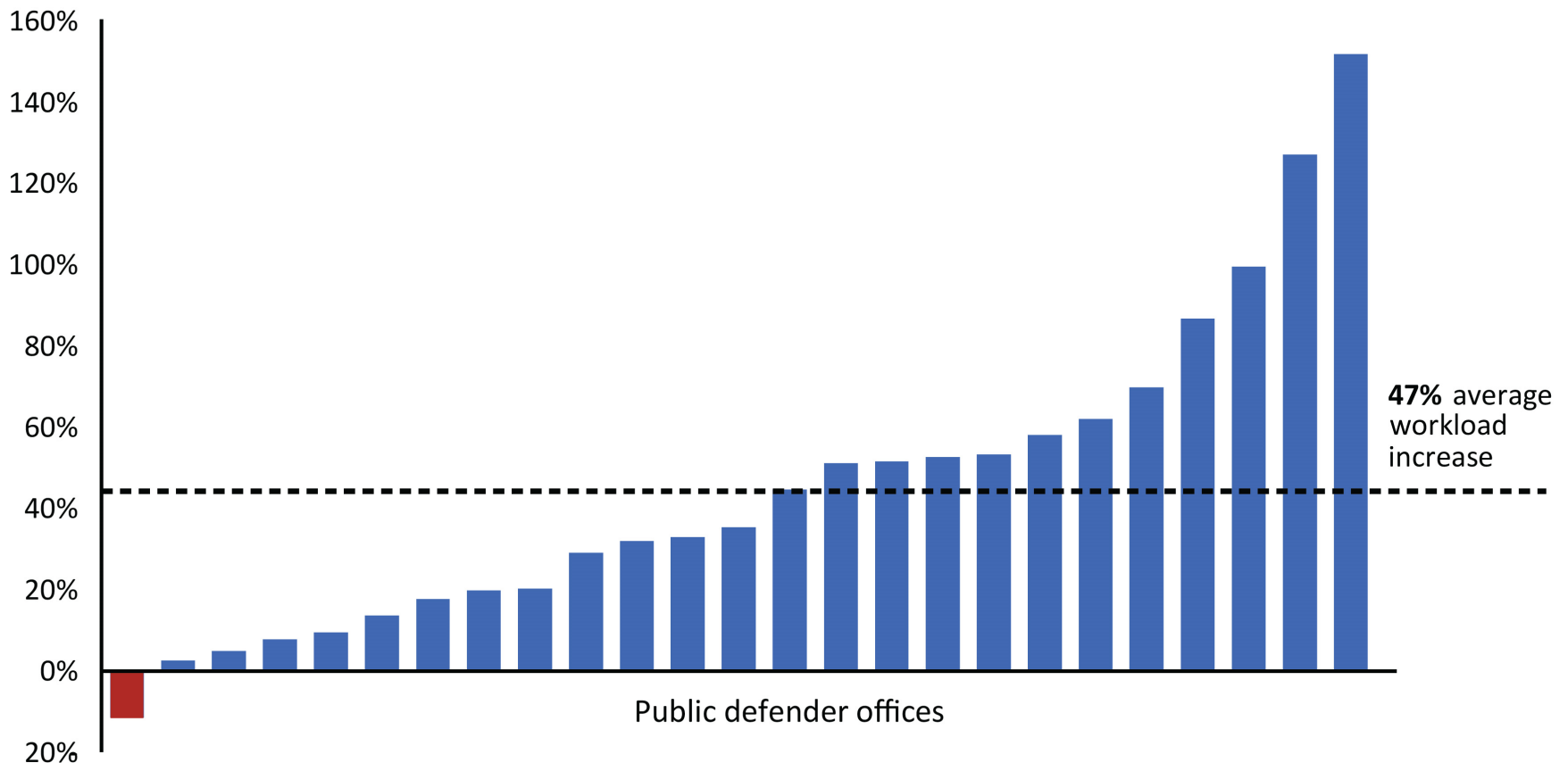
New estimates suggest public defender workload has increased substantially.

Total cases have declined, but each case now takes longer to defend



NOTE: Based on 2023 National Center for State Courts Virginia public defender “case weights.”

Workload increased 47% on average across public defender offices (FY13–FY22)

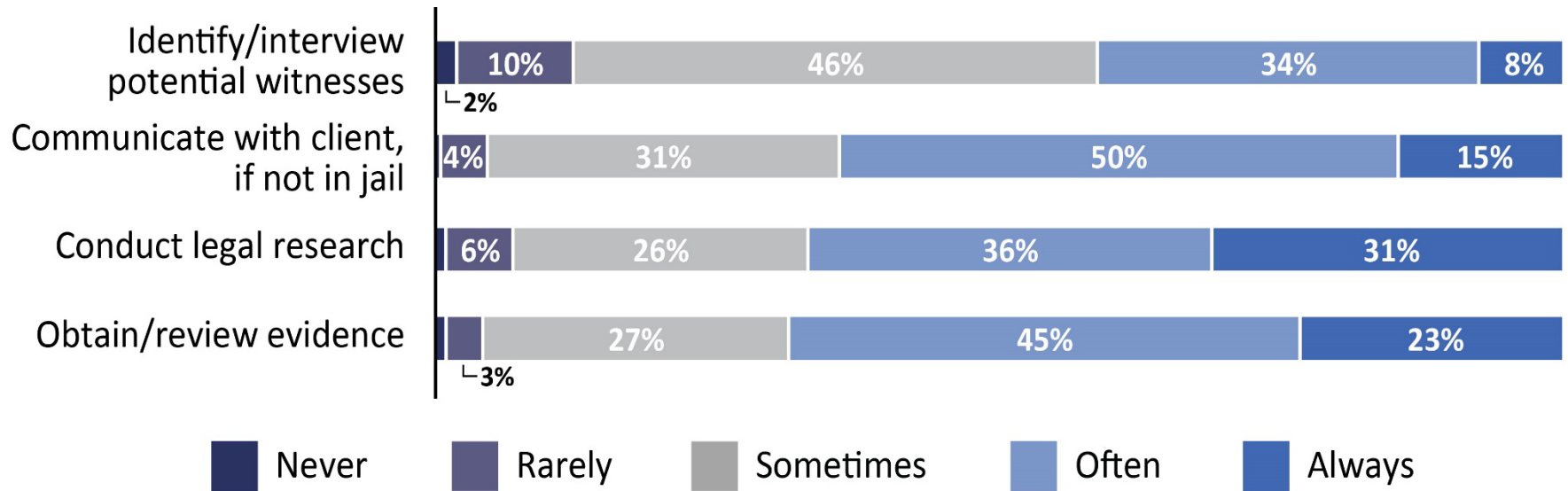


NOTE: Based on 2023 National Center for State Courts Virginia public defender case times. Changes in public defender workload account for changes in both the number and nature of cases for each office.

Finding

Workload imbalance can hinder quality of public defender representation and court operations.

Public defenders report not always having enough time for important tasks*



- Judges expressed concern about the imbalance between workload and the number of public defenders
- Six offices paused taking new cases during past year

*Public defenders were asked: “across all my cases, I generally have sufficient time to...”

Finding

Only half of public defenders reported having sufficient support staff to provide quality representation to their clients.

Many public defender offices have only 1 of each support staff position, even some very large offices

- Most offices have a single position for each type of support staff, because of limited funding
- Several of state's largest offices have only 1 paralegal

Office	Attorneys	Paralegals
Fairfax	25	1
Prince William	24	1
Richmond	34	1
Virginia Beach	30	1

- National Association for Public Defense recommends 4 attorneys to 1 paralegal; current ratio is 13 to 1 (statewide)

Additional support staff could be cost-effective way to mitigate public defender office workload

- Support staff can do administrative tasks and other tasks that do not require a law degree, freeing up attorney staff time
- Chief public defenders report it is easier to fill support staff positions than attorney positions; there are low vacancy rates system wide for support staff
- Support staff have lower average salaries than attorneys and therefore are less costly to employ

Recommendation

The General Assembly may wish to consider funding additional mitigation specialist and paralegal positions to help lessen public defender attorney workload.

Estimated range of fiscal impacts shown in Table 4-1 of written report.

Finding

More attorney positions or system expansion can be longer term considerations.

Adding more attorney positions or expanding coverage could be considered in the future

- Increased support staff does not directly address having too few attorneys
- Filling all 430 allocated attorney positions sufficient to handle just 87% of workload
- After full impacts of recent salary increases and recruitment efforts are clear
 - Re-evaluate total allocated positions
 - Assess need for and feasibility of expanding coverage to additional localities

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Attorney compensation consists of state, and in some localities, local funding

- Commonwealth's attorneys are state-funded employees of the elected commonwealth's attorney
- Public defenders are state-funded, *state* employees
- Localities can supplement salary for public defenders and/or commonwealth's attorneys in their jurisdiction

State substantially increased attorney compensation in the last two fiscal years

- Across-the-board state salary increases
 - 5% - FY23 & FY24
 - 2% - Jan 2024
- Public defenders (\$3.7M) and commonwealth's attorneys (\$3.9M) also received additional funding*
 - average public defender salary will increase by ~\$12K
 - average commonwealth's attorney salary will increase by ~\$11K

NOTE:*Annualized to \$7.4M and \$7.9M in future years.

Findings

Recent salary increases for public defenders and commonwealth's attorneys will likely narrow salary gaps with local government and private attorneys.

Salaries historically below local and private attorneys, but new funding will likely narrow gap

- In FY23, average public defender and commonwealth's attorney salaries—including local supplements—were 33% and 20% less than local government attorneys
- Also lower on average than private sector attorneys within the same region
 - 43% less for public defenders and 24% less for commonwealth's attorneys in FY23
- Steps taken to increase salaries in FY24 will narrow compensation gaps to some extent

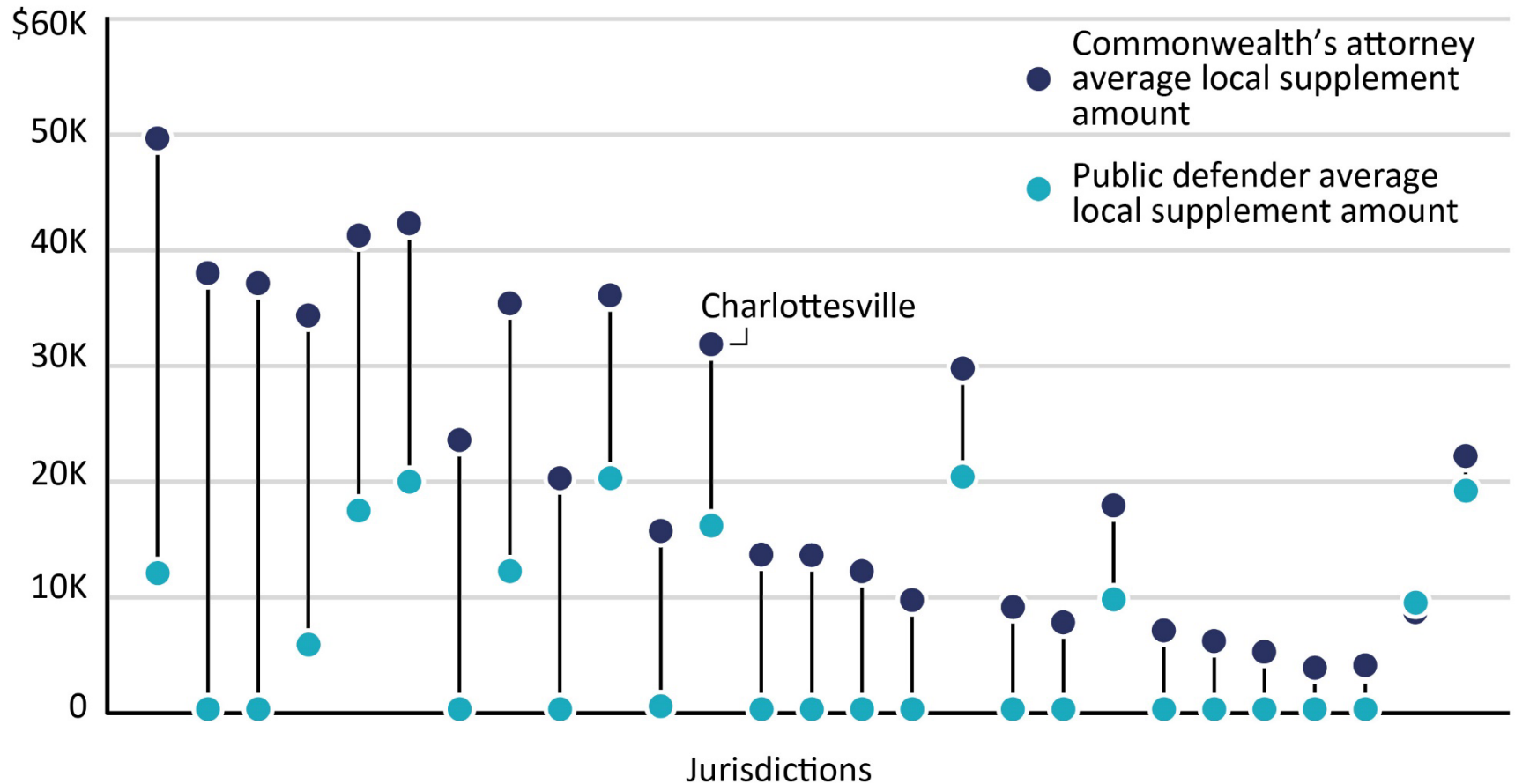
Finding

Local salary supplements are associated with fewer vacancies and account for differences between public defenders and commonwealth's attorney salaries.

Local supplements explain differences in public defender and commonwealth's attorney pay

- Localities generally choose to provide more supplemental funding to commonwealth's attorneys
- Nearly all commonwealth's attorney offices that share jurisdiction with public defenders offer a local supplement, averaging about \$21,000 per attorney
- In contrast, only about half (13) of public defender offices receive local supplements, averaging about \$15,000 per attorney in those offices

Public defenders receive smaller local supplements on average than commonwealth's attorneys



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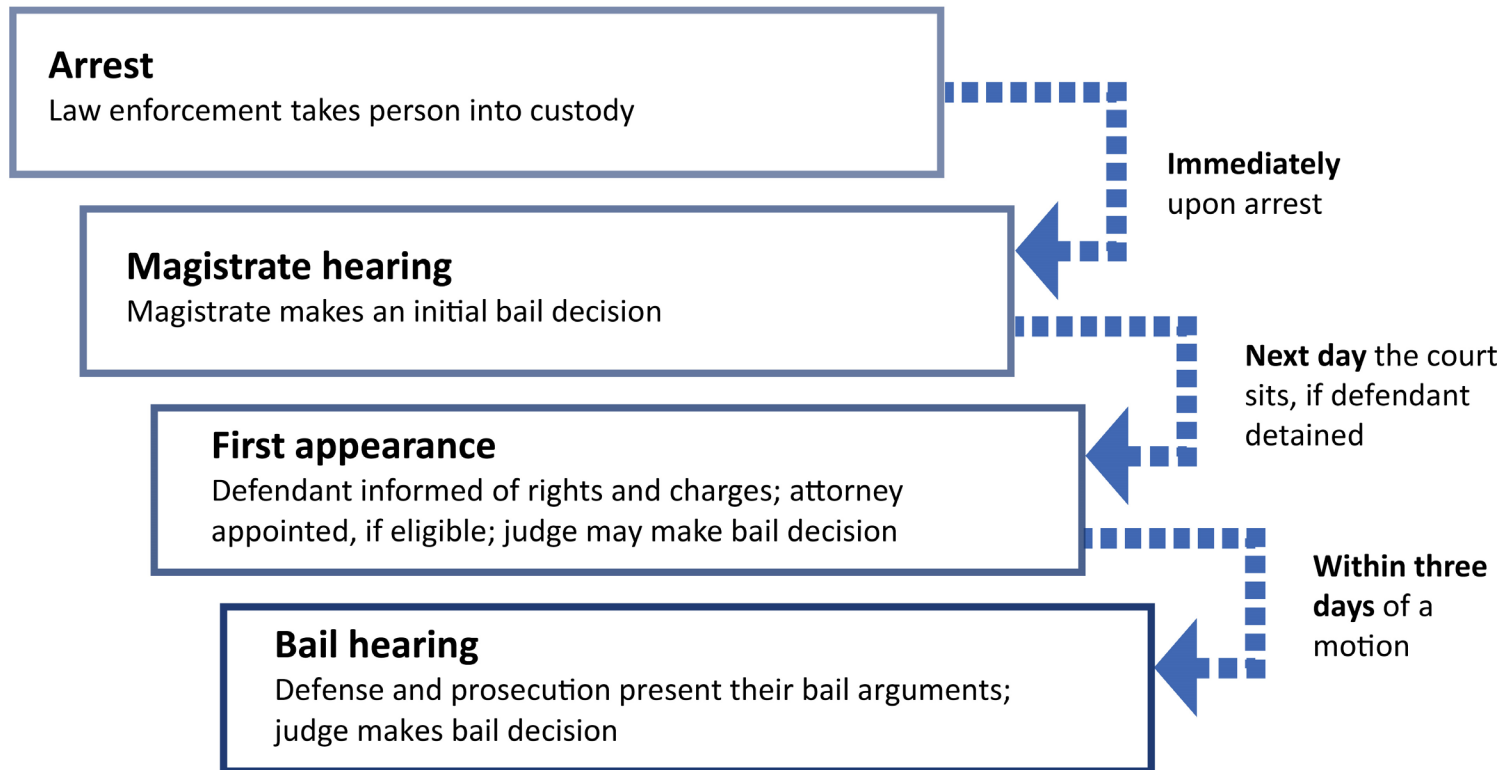
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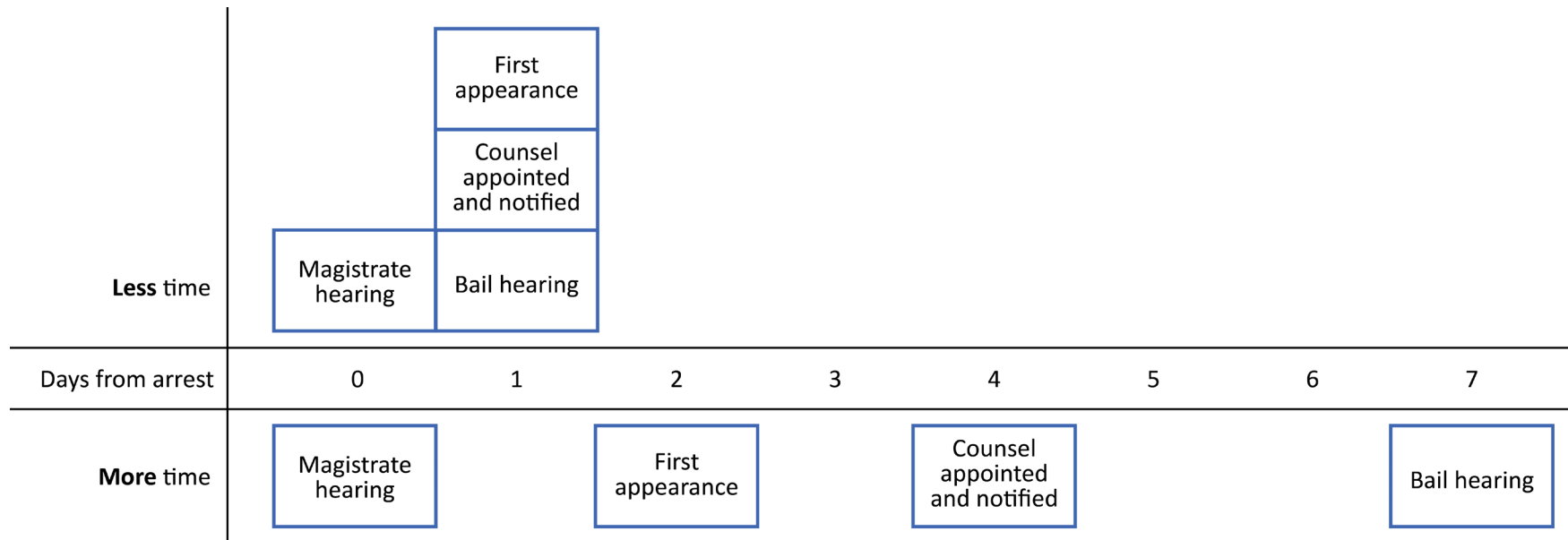
Study resolution directs staff to evaluate two changes to pretrial process

- Providing counsel at first appearance for all detained defendants, regardless of their financial resources
- Holding bail hearings on the same day as first appearances (“same-day bail hearings”)
- Policies intended to
 - improve quality of legal representation
 - help courts decide more quickly whether to release a defendant on bail
 - reduce time detained if defendant will ultimately be released on bail

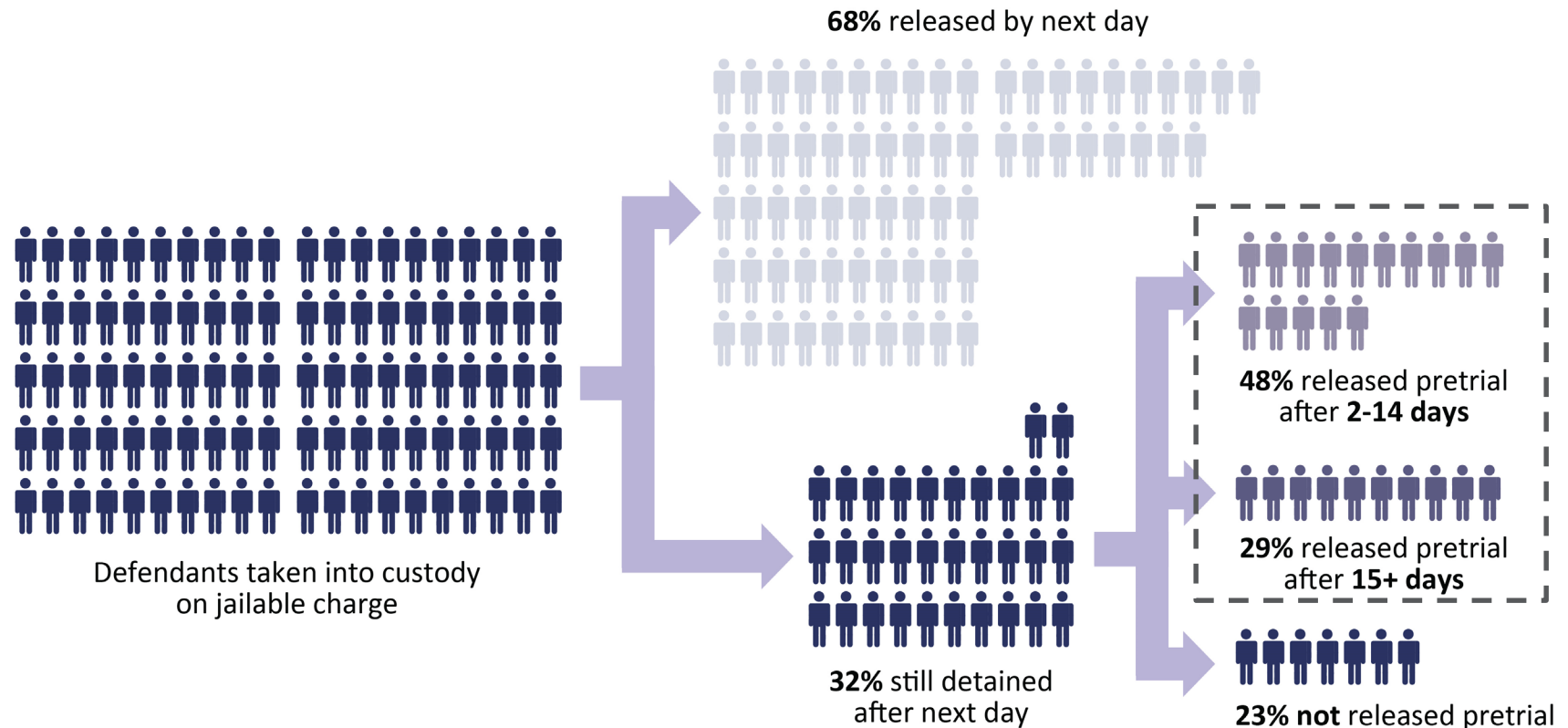
Initial pretrial process typically involves: magistrate hearing, first appearance, and bail hearing



Timing of pretrial process affects how quickly a detained defendant has a bail hearing



Policies would affect defendants still detained after one day in custody



Findings

Counsel at first appearance and same-day bail hearings have benefits but face logistical impediments.

State could take several actions to help interested localities move toward the goals of these policies.

Though policies would have benefits, impediments preclude requiring statewide implementation

Potential benefits

- Reduce length of pretrial detention
- Improve quality of legal representation
- Improve court efficiency
- Lower jail costs

Impediments

- Limited availability of attorneys
- Less time to prepare
- Ethics concerns related to conflicts of interest
- More difficult to ensure victims' rights are preserved
- Bail decisions may not be fully informed if made too quickly

Without a statewide requirement, several actions could help interested localities

- Allowing a defendant to complete their required forms* earlier could allow court to appoint an attorney sooner
- Clarifying whether limited defense representation—for just a first appearance and/or bail hearing—could reduce the potential for conflicts of interest
- Clarifying that defendant can argue for bail at both the first appearance and later at a bail hearing if needed

*Required forms include financial eligibility statement (form DC-333) and a request for appointment of a lawyer statement (form DC-334)

Recommendations

General Assembly may wish to amend the Code to clarify that magistrates, notarized pretrial services officers, and notarized jail staff members can affirm a defendant's financial and attorney request statements to help courts appoint counsel earlier.

Virginia State Bar should study limited representation at first appearances and same-day bail hearings, and if deemed appropriate, refer a rule of professional conduct to the Virginia State Bar Council for review and approval.

Policy option

The General Assembly could amend the Code to allow defendants who have already presented a bail argument at the first appearance hearing to still request a formal bail hearing in the same court.

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Payments to some court-appointed attorneys raise questions about whether they are handling an unreasonably high number of charges or are requesting payment for an illegitimate number of hours worked.

Additional safeguards are needed to ensure integrity of workload and payments to court-appointed attorneys.

A few court-appointed attorneys had unusually high workload and payment (FY22)

	Total charges	Total payment	hours per...		
			Week	Weekday	Annually
Attorney 1	1,420	\$502,836	111.7	22.3	5,587
Attorney 2	1,434	\$493,767	109.7	21.9	5,486
Attorney 3	351	\$245,273	54.5	10.9	2,725
Attorney 4	474	\$242,697	53.9	10.8	2,697
Attorney 5	1,043	\$241,706	53.7	10.7	2,686

- Raises questions about whether an attorney is
 - handling a reasonable number of charges
 - requesting payment for legitimate # of hours

State should more closely review and analyze individual attorney workload and hours paid

- Develop criteria to identify attorneys whose payment requests warrant further scrutiny
- Office of the Executive Secretary of the Supreme Court (OES) should
 - review and analyze court-appointed attorney payment requests quarterly
 - flag court-appointed attorneys that meet or exceed criteria and notify chief judges where attorney serves

Recommendations

The General Assembly may wish to consider amending Code to:

- Require the Judicial Council of Virginia and the Committee on District Courts to set criteria to review payment requests from court-appointed attorneys
- Direct OES to review court-appointed attorney payment requests and notify the chief judge when an attorney may have an unreasonably high workload or potentially illegitimate number of hours worked

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