

Report to the Governor and the General Assembly of Virginia

Indigent Criminal Defense and Commonwealth's Attorneys

2023



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Hal E. Greer, Director
Justin C. Brown, Associate Director
Joe McMahon, Chief Legislative Analyst, Project Leader
Kate Agnelli, Senior Legislative Analyst
Brittany Utz, Senior Legislative Analyst
Scarlett Saunders, Senior Associate Legislative Analyst
Madison McCaffrey, Assistant Legislative Analyst

Information graphics: Nathan Skreslet
Managing editor: Jessica Sabbath

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Summary: Indigent Criminal Defense and Commonwealth’s Attorneys

WHAT WE FOUND

Court-appointed attorneys and public defenders generally provide effective counsel

Public defenders and court-appointed attorneys (private attorneys appointed by the court and paid by the state) generally provide quality representation and effective counsel to indigent clients, according to judges. A majority of judges reported that public defenders and court-appointed attorneys provide “good” or “excellent” representation overall. Few judges reported that public defenders or court-appointed attorneys provide “poor” representation.

In addition, data analysis shows that over the last 10 years, defendants represented by a public defender, court-appointed attorney, or privately retained attorney had similar (i) rates of conviction, (ii) rates of cases resulting in a plea deal or trial, and (iii) sentence lengths if found guilty. However, court-appointed attorneys and public defenders were slightly more likely than privately retained attorneys to get their clients’ charges reduced.

Fewer attorneys are willing to serve in court-appointed role

The number of attorneys serving as court-appointed defense attorneys in Virginia has declined since FY13, especially during the last few years. Participation has declined by more than half, from nearly 4,000 attorneys in FY13 to about 1,900 in FY23. Most of this decline has occurred since 2020. Sixty percent of court-appointed attorneys responding to a JLARC survey reported they were considering leaving or taking fewer cases in the next 12 months.

The decline has been more severe and concerning in judicial districts in rural areas in the central and southern parts of the state. Twenty-seven of the 50 localities in these districts do not have a public defender’s office, meaning court-appointed attorneys are the only attorneys available to provide indigent defense.

WHY WE DID THIS STUDY

In 2022, the Joint Legislative Audit and Review Commission (JLARC) directed staff to review Virginia’s system of attorneys for indigent criminal defendants and prosecution of criminal cases.

ABOUT COURT-APPOINTED ATTORNEYS, PUBLIC DEFENDERS, AND COMMONWEALTH’S ATTORNEYS

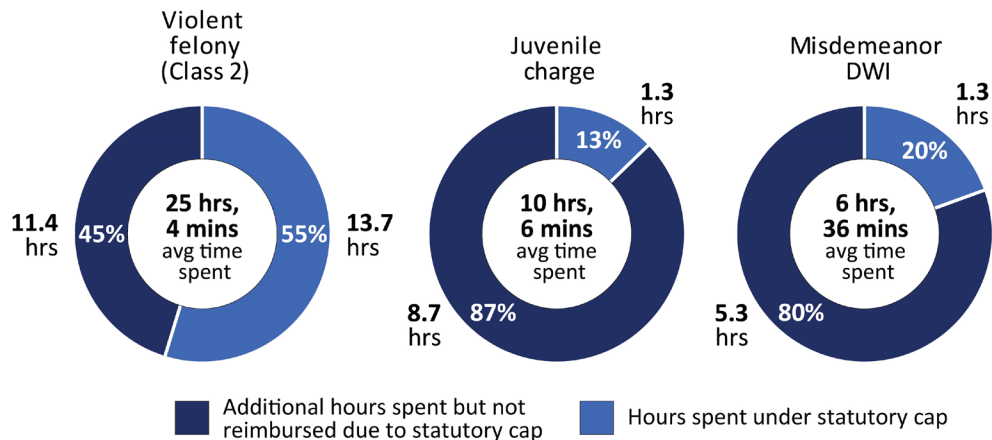
Virginia’s publicly funded indigent defense system provides defense representation to indigent criminal defendants through a hybrid system of (1) state-funded, locally based public defenders in 28 offices serving 56 localities, and (2) private attorneys who are compensated by the state when they serve as a court-appointed defense attorney. Virginia’s 120 commonwealth’s attorney offices act on behalf of the state to prosecute criminal offenses, among other responsibilities.

Low compensation cited as primary reason for decline in number of court-appointed attorneys

The most common reason attorneys cited for their decision to stop serving as court-appointed attorneys was low compensation. A court-appointed attorney said: "I can make \$1,500 on a retained DWI, or 12 [court-appointed] misdemeanor charges at \$120 each." In addition, 94 percent of judges cited compensation as a main concern that needs to be addressed. One judge noted, "the state reimbursement for court-appointed counsel is embarrassingly low."

Court-appointed attorneys are often paid for only a small portion of the time they spend defending a client, primarily because of low pay caps set in statute. For example, the average estimated time needed to defend a misdemeanor DWI charge is about six-and-a-half hours (figure). An attorney spending that amount of time would be paid for only about 20 percent of that time because of the cap. In more than half of their cases, court-appointed attorneys are not fully compensated at the full hourly rate for all hours worked because of the pay cap.

Attorney time spent on typical cases is uncompensated because of caps



SOURCE: Office of the Executive Secretary court-appointed attorney payment data, FY22, and National Center for State Courts case weights, 2023.

Virginia's hourly pay rate of \$90 is roughly in line with the hourly rate paid to court-appointed attorneys in other states, but Virginia's pay caps are much lower than those of surrounding states and the federal government.

Public defender system has filled more of its vacant positions in recent months but support staff needed to help address workload

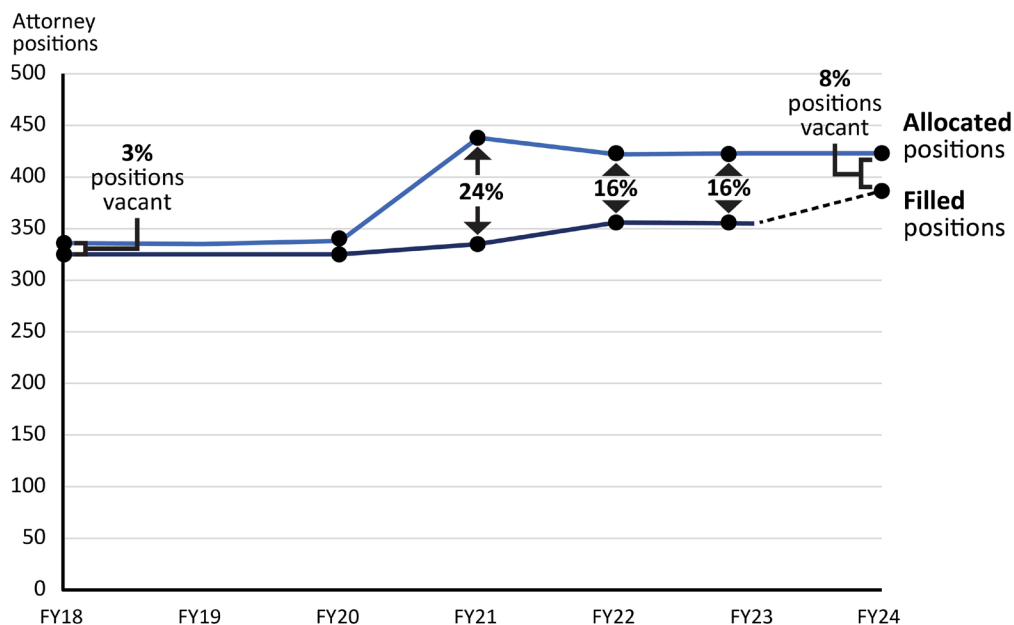
After a period of very high vacancy rates in the state's public defender offices, vacant attorney positions are beginning to be filled. In FY21, the General Assembly allocated 59 new attorney positions for the existing public defender offices, plus positions to

open two new offices. During this time period, nearly one-quarter of all attorney positions were vacant.

As of October 2023, the number of vacant positions had dropped substantially, resulting in an 8 percent statewide vacancy rate (figure). Six offices still have 20 percent or more of their attorney positions vacant: Fredericksburg, Hampton, Lynchburg, Danville, Pulaski, and Bedford. However, public defenders’ salaries have increased substantially recently because of salary increases for all state employees as well as ones specifically for public defenders, which should further improve the ability of public defender offices to recruit and retain staff.

Even if all attorney positions are eventually filled, public defenders still face a substantial increase in workload. From FY13 to FY22, public defender workload is estimated to have increased nearly 50 percent. Many attorneys responding to the JLARC survey indicated that because of their workload, they only “sometimes,” “rarely,” or “never” have time for some activities that could be important for a case, such as conducting legal research and identifying and interviewing potential witnesses.

Public defender vacancy rates are declining as of early FY24



SOURCE: Department of Human Resource HuRMan and Cardinal data, FY14–FY23; VIDC staffing data, October 2023.

Public defenders cited not having enough support staff as a contributing factor to their workload challenges. The public defender system includes five types of support staff: mitigation specialists, paralegals, investigators, legal assistants, and office managers. Just half of public defenders reported having enough support staff in their offices to provide quality representation to their clients.

Commonwealth's attorney vacancies have increased amid workload challenges

The number of vacant commonwealth's attorney positions in Virginia has been increasing, especially entry-level positions. Commonwealth's attorney vacancy rates were generally stable from FY18–FY20 but have increased in recent years. In FY23, vacancy rates across all attorney positions averaged 6.5 percent, up from 3.1 percent in FY18. The majority of vacant positions are in offices with lower salaries because the locality provides no salary supplement or only a small one.

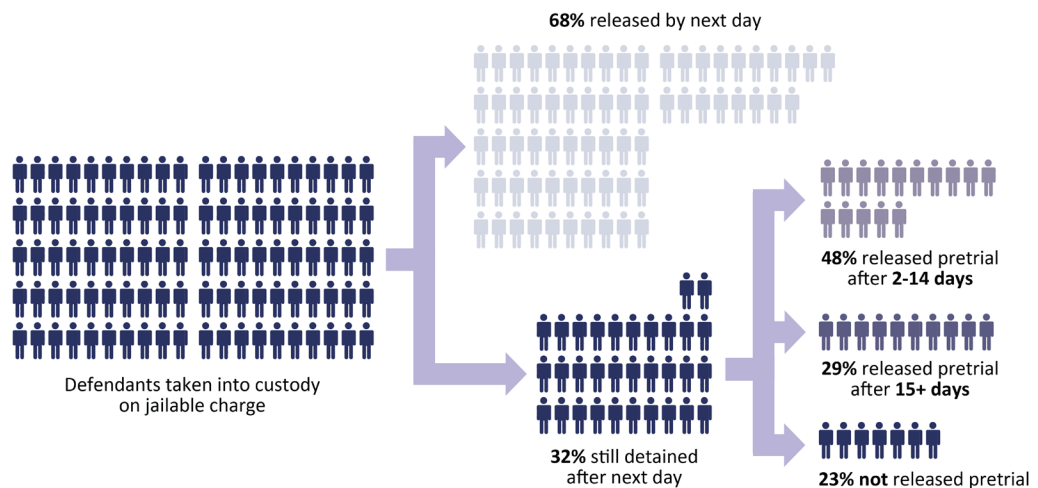
Even if all vacant positions were filled, there would not be enough commonwealth's attorneys to fully meet the estimated workload. The Compensation Board recently updated commonwealth's attorney staffing standards to better calculate attorney workload and the number of staff needed in each office to handle it. Filling all vacant positions would address only about 40 percent of the total unmet workload, according to the new staffing standards.

The study resolution directs JLARC staff to evaluate making two changes in Virginia's pretrial process: providing counsel at first appearance for all detained defendants, regardless of their financial resources, and holding bail hearings on the same days as first appearances ("same-day bail hearings").

Providing defense counsel at first court appearances and requiring same-day bail hearings are not feasible to implement statewide

The goals of counsel at first appearance and same day bail hearings include improving the quality of legal representation for defendants and facilitating faster court decisions about whether to release a defendant on bail (sidebar). The policies are intended to minimize the detention period of defendants who will eventually be released on bail *without* increasing the proportion of defendants who are released on bail. Recently, about two-thirds of defendants taken into custody have been released by the next day (figure). The other one-third of defendants remain detained for longer.

Two-thirds of defendants released from custody by the day after arrest (FY22)



SOURCE: JLARC analysis of FY22 data provided by the Office of the Executive Secretary of the Supreme Court, the Department of Criminal Justice Services, and the Compensation Board.

Despite the potential benefits, a statewide requirement to provide counsel and hold bail hearings at first appearance would have logistical and other impediments. Some jurisdictions would face substantial challenges if required to provide counsel at first appearance and same-day bail hearings. These challenges include ensuring attorney availability and preparedness, victims' rights, and court access to needed information to make informed bail decisions.

State could help interested localities with counsel at first appearance and same-day bail hearings

If the state is interested in promoting counsel at first appearance and same-day bail hearings when feasible, it could consider gauging courts' interest in adopting these policies and consider providing funding to interested courts. It can also address some impediments through providing additional flexibility or clarity. For example:

- Defense counsel is typically not appointed until *after* the first appearance, in part, because courts do not finalize indigent defense eligibility paperwork until the first appearance. Completing a defendant's eligibility paperwork earlier in the pretrial process could help courts appoint counsel more quickly, at least in some cases.
- Some attorneys expressed concern about unintentional conflict of interest breaches when providing counsel at first appearance or a same-day bail hearing, or that providing representation could create future conflicts of interest. "Limited representation" could reduce attorneys' potential for conflicts of interest and increase some attorneys' willingness to serve in those roles.

WHAT WE RECOMMEND

Legislative action

- Raise the pay caps for court-appointed attorneys representing indigent clients.
- Fund additional mitigation specialist and paralegal positions to help public defenders manage their workloads.
- Clarify that magistrates, notarized pretrial services officers, and notarized jail staff members can affirm a defendant's statements for (i) financial eligibility for indigent defense and (ii) request for appointment of a lawyer, and transmit those statements to the court.

Executive action

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

The complete list of recommendations and options is available on page vii.

Recommendations and Options: Indigent Criminal Defense and Commonwealth's Attorneys

JLARC staff typically make recommendations to address findings during reviews. Staff also sometimes propose policy options rather than recommendations. The three most common reasons staff propose policy options rather than recommendations are: (1) the action proposed is a policy judgment best made by the General Assembly or other elected officials, (2) the evidence indicates that addressing a report finding is not necessarily required, but doing so could be beneficial, or (3) there are multiple ways in which a report finding could be addressed and there is insufficient evidence of a single best way to address the finding.

Recommendations

RECOMMENDATION 1

The General Assembly may wish to consider amending the Code of Virginia to set higher pay caps for court-appointed criminal defense attorneys representing indigent clients. (Chapter 3)

RECOMMENDATION 2

If the General Assembly chooses to increase court-appointed criminal defense attorney pay caps, it may wish to consider amending the Code of Virginia to establish the following new offense categories for court-appointed attorney payment: (i) violent felonies, (ii) nonviolent felonies, (iii) misdemeanor DWIs, (iv) non-DWI misdemeanors, and (v) juvenile charges. (Chapter 3)

RECOMMENDATION 3

The General Assembly may wish to consider amending §19.2-163 of the Code of Virginia to require the Judicial Council of Virginia and the Committee on District Courts to set criteria the Office of the Executive Secretary of the Supreme Court of Virginia should use to review payment requests from court-appointed attorneys to identify attorneys with potentially unreasonably high court-appointed workloads or who request payment for an illegitimate number of hours worked. (Chapter 3)

RECOMMENDATION 4

The General Assembly may wish to consider amending §19.2-163 of the Code of Virginia to direct the Office of the Executive Secretary of the Supreme Court of Virginia to review court-appointed attorney payment requests on a quarterly basis and notify the chief judge of the courts in which any court-appointed criminal defense attorney actively practices when a quarterly review of attorney payments shows unreasonably high court-appointed workloads or request for a potentially illegitimate number of hours worked, according to criteria set by the Judicial Council of Virginia and the Committee on District Courts. (Chapter 3)

RECOMMENDATION 5

The General Assembly may wish to consider including funding in the Appropriation Act for additional mitigation specialist and paralegal positions to lessen public defender office attorney workload. (Chapter 4)

RECOMMENDATION 6

The General Assembly may wish to consider amending § 19.2-159 of the Code of Virginia to clarify that magistrates, notarized pretrial services officers, and notarized jail staff members have the authority to affirm a defendant's sworn financial eligibility statement and request for appointment of a lawyer statement and transmit those statements to the court. (Chapter 7)

RECOMMENDATION 7

The Virginia State Bar ethics committee should study limited representation at first appearances and same-day bail hearings, and if deemed to be appropriate, refer a rule of professional conduct on limited representation at first appearance and same-day bail hearings to the Virginia State Bar Council for review and approval. (Chapter 7)

Policy Options to Consider

POLICY OPTION 1

The General Assembly could include language and funding in the Appropriation Act for the Virginia Compensation Board to increase state funds for career prosecutor pay stipends, limiting the new stipends to qualified attorneys in offices in which attorneys do not receive local salary supplements. (Chapter 6)

POLICY OPTION 2

The General Assembly could include language and additional funding in the Appropriation Act for the Virginia Indigent Defense Commission to expand the number of existing positions designated as senior trial attorney positions across public defender offices. (Chapter 6)

POLICY OPTION 3

The General Assembly could include language and funding in the Appropriation Act for the Virginia Indigent Defense Commission to establish pay bands for public defender attorney positions. (Chapter 6)

POLICY OPTION 4

The General Assembly could include language in the Appropriation Act directing the Office of the Executive Secretary of the Supreme Court of Virginia to solicit input from the chief judges of all courts on behalf of all affected stakeholders on (i) interest in implementing counsel at first appearance and same-day bail hearings if state funding was available to address barriers; and (ii) logistical barriers that could be addressed if funds were made available. (Chapter 7)

POLICY OPTION 5

The General Assembly could amend § 19.2-158 of the Code of Virginia 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. (Chapter 7)

1 Indigent Defense and Commonwealth's Attorneys

In 2022, the Senate Finance and Appropriations Committee referred four bills (SBs 136, 282, 475, and 640) for consideration by JLARC. Subsequently, JLARC approved a study resolution (Appendix A) incorporating the four referred bills and more broadly directing a review Virginia's systems of attorneys for indigent criminal defendants and prosecution of criminal cases. The resolution directed staff to:

- determine the adequacy of legal representation provided to indigent defendants;
- determine how many court-appointed attorneys, public defenders, and commonwealth's attorneys the state needs;
- assess court-appointed attorney, public defender, and commonwealth's attorney compensation, and evaluate the impact compensation has on having enough attorneys to adequately fulfill their roles; and
- evaluate (1) providing defendants with counsel at first appearance and (2) holding a bail hearing on the same day as their first appearance in court.

To address the study resolution, JLARC analyzed data related to criminal case outcomes across all Virginia's courts, the number of court-appointed attorneys, staffing of public defender and commonwealth's attorney offices, and compensation for various types of public sector attorneys. JLARC also surveyed and interviewed judges, court-appointed attorneys, and public defender office attorneys and support staff. Furthermore, JLARC interviewed elected commonwealth's attorneys, as well as staff at the Virginia Indigent Defense Commission (VIDC), the Office of the Executive Secretary of the Virginia Supreme Court (OES), the Compensation Board, pretrial services and victim witness assistance offices, sheriff's offices, and local and regional jails. Finally, JLARC contracted with the National Center for State Courts to estimate public defender workload (Appendix B).

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

The criminal justice system relies upon having an adequate prosecution *and* defense. Prosecutors and defense attorneys each play a vital role in the United States' adversarial criminal justice system. This system is based on the concept that a vigorous prosecution and defense, overseen by an impartial judge, will result in a fair and just outcome across criminal cases.

Commonwealth's attorneys represent the state in Virginia's criminal proceedings and perform numerous other duties for the commonwealth and the locality. Foremost, they

By statute, a **defendant in Virginia is indigent** if (1) they are currently enrolled in a state or federally funded public assistance program for the indigent; or (2) their available funds are equal to or below 125 percent of the federal poverty income guidelines prescribed for the size of the household by the federal Department of Health and Human Services.

act on behalf of the state to protect the public and on behalf of victims by prosecuting criminal offenses and holding individuals who commit them accountable. In addition, prosecutors have duties for protecting the rights of the accused such as filing only charges that are supported by probable cause and making timely disclosure of information that the defense is entitled to receive. Finally, commonwealth's attorneys have other statutory responsibilities beyond criminal prosecution. These include:

- community outreach;
- providing legal training and advice to local officials, law enforcement, and other public safety agencies;
- handling public records requests; and
- handling expungements, extraditions, mental health appeals, asset forfeiture, and truancy.

Defense attorneys protect the rights of individuals accused of a criminal offense. Defense attorneys are responsible for zealously defending their clients to ensure a fair outcome, even if their clients are ultimately found guilty. If the defense counsel does not adequately represent their client, a client may be eligible for post-conviction relief through a retrial or overturned conviction. Defense attorneys also commonly take on other roles for their clients that go beyond providing a legal defense, such as communicating with a client's family or helping a client access services or locate housing.

To function efficiently, the criminal justice system needs enough prosecutors and public defense attorneys who have the time and ability to fully represent the state's and defendants' interests. The Sixth Amendment of the U.S. Constitution requires access to a speedy, public, and fair trial. Prosecutors must effectively determine which charges to prosecute, investigate cases they decide to prosecute, and effectively represent the state in court. Likewise, defense attorneys must be able to promptly communicate with the client and understand the charges against them, review relevant case-related information, and effectively represent their client in court.

State has constitutional obligation to provide attorneys for criminal defendants who are indigent

The state has a responsibility to ensure that criminal defendants have access to an adequate defense attorney, even if they cannot afford to hire one. The U.S. Constitution guarantees the right to an attorney for every person accused of a crime whose life or liberty is at stake (*Gideon v. Wainwright*, 1963, and *Strickland v. Washington*, 1984). When an individual cannot afford to hire their own attorney, the government is required to provide an attorney to represent them. Furthermore, the U.S. Supreme Court established in *Strickland v. Washington* that defendants should also have "effective assistance of counsel." State-provided attorneys, whether a public defender or court-appointed attorney, must practice "pursuant to prevailing professional norms" at a minimum in providing a quality defense of their client.

Statute sets forth the process to determine whether a defendant is indigent and eligible for a publicly provided defense. Each defendant completes a financial statement to determine their eligibility for indigent defense and attests to its accuracy by swearing under oath in court. Indigent defendants can waive their right to counsel or retain counsel on their own behalf. Indigent defendants receiving a publicly provided defense are required to reimburse the state for their counsel on any charge(s) for which they are convicted.

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

Virginia's publicly funded indigent defense system provides defense representation to indigent criminal defendants through a hybrid system of (1) state-funded, locally based public defenders and (2) private attorneys who are compensated by the state for charges when they serve as a court-appointed defense attorney. Public defenders serve a majority of the indigent defendants charged in localities in which they are located. Court-appointed attorneys serve indigent defendants in localities without public defender offices, in cases where a public defender has a conflict of interest, or when the court finds that appointment of other counsel is necessary to attain the ends of justice (e.g., typically when a private attorney with specialization is needed in a particular type of case).

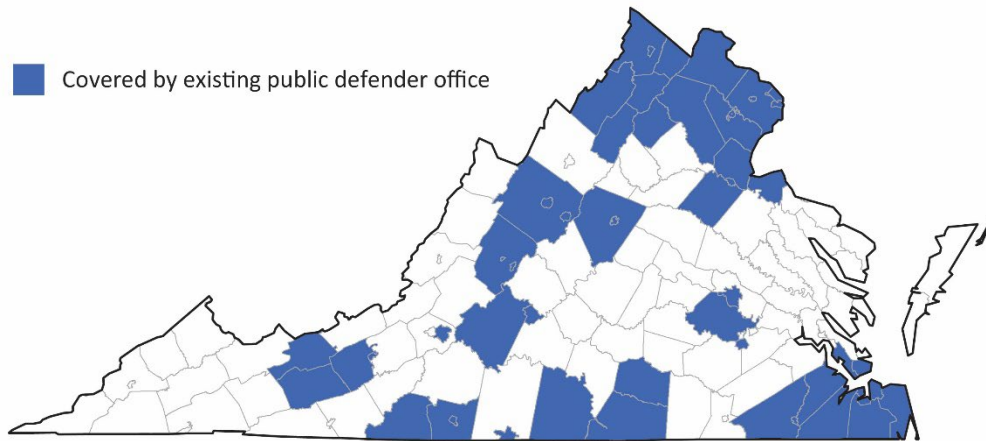
State has 28 public defender offices that operate in 56 localities

Virginia's public defender system comprises 28 public defender offices (and two satellite offices) serving 56 localities across the state (Figure 1-1). The first public defender offices were established in 1972, and the system has expanded over time with new offices and new localities gaining public defender services. Offices generally serve urban or suburban locations, but also exist in several rural parts of the state. Offices are authorized by the General Assembly in the Code of Virginia.

Public defender offices have attorneys and support staff who are state employees. Approximately 430 public defender attorney positions are allocated across the state, ranging from five in the Bedford office to 32 in the Richmond office. In addition to attorneys, public defender offices employ non-attorney support staff, generally including at least one mitigation specialist, investigator, paralegal, office manager, and legal assistant.

Virginia's public defender system is overseen by VIDC, which is responsible for maintaining all public defender offices. Its role includes hiring the chief public defender for each office, developing initial training and certifying continuing legal education courses for public defenders, tracking and reporting data on public defender staffing and workload, and providing other support services such as information technology. VIDC's administrative office is located in Richmond and employs about 30 staff.

FIGURE 1-1
Virginia's public defender offices currently serve 56 localities



SOURCE: Code of Virginia.

State relies on private attorneys who the court can appoint when there is no public defender office, a conflict of interest, or in the interest of attaining justice

To be eligible to represent a defendant through court appointment, an attorney must be a member of the Virginia State Bar and (1) receive training and certification from the Virginia Indigent Defense Commission, or (2) meet certain experience requirements.

Court-appointed attorneys are paid for their time spent representing a defendant on each charge. Court-appointed attorneys cannot request reimbursement for overhead costs such as support staff time or office space; they can request reimbursement for travel mileage.

Court-appointed attorneys are private attorneys who are qualified, through a combination of experience and training outlined in statute, to represent indigent criminal defendants (sidebar). A judge appoints an indigent defendant a court-appointed attorney if the defendant is charged in a locality without a public defender office. A court-appointed attorney may be appointed by a judge in a locality with a public defender when the public defender has an actual or potential conflict of interest; most conflicts of interest are due to having previously represented the complainant or a witness in the case, or already representing a co-defendant in the same case. A court may also find it necessary to use a court-appointed attorney to better attain justice, such as in a complex case in which an attorney with a certain specialization is more suited for the role. In FY22, approximately 2,000 court-appointed attorneys statewide served as defense counsel for an indigent defendant for at least one charge.

Court-appointed attorneys are paid through the state's criminal fund for time spent providing counsel to indigent defendants (sidebar). Payment amounts are based on an hourly rate set by the Supreme Court of Virginia and statutory fee caps that set a maximum allowable payment based on the type of charge. Statute also allows for payment supplements above the fee cap, which must be requested by attorneys and approved by judges. Attorneys can also request an additional waiver for payment in addition to the supplement, pending the presiding judge's and chief judge's approval.

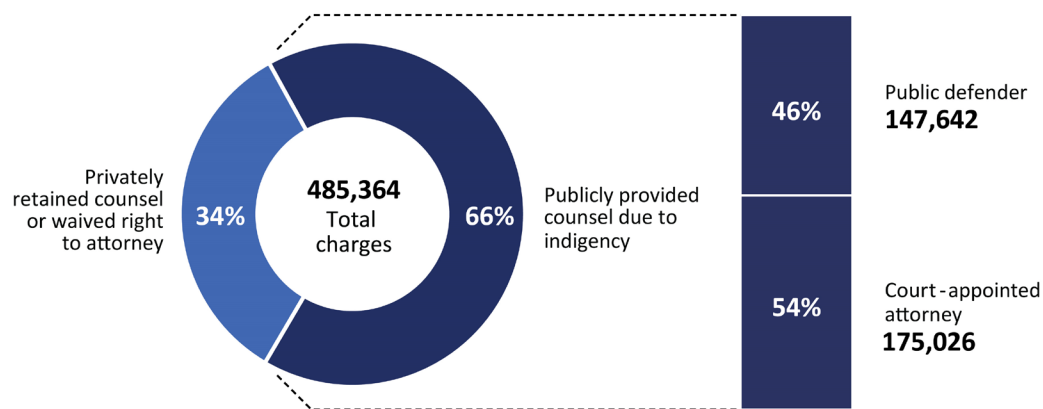
Public defenders and court-appointed attorneys represent defendants in two-thirds of criminal charges statewide

The state provided representation to defendants for approximately two-thirds of total charges in FY22 that involved the possibility of incarceration (i.e., liberty was at stake). The remaining one-third of charges included cases in which a defendant retained private counsel or waived their right to an attorney (sidebar). Court-appointed attorneys provided representation for 54 percent of the charges for which the state provided representation. Public defenders provided representation for the remaining 46 percent of charges (Figure 1-2).

The total number of charges in which defense attorneys represented indigent clients statewide had remained relatively stable from FY15 to FY19, but declined beginning in FY20 largely because of court closures and disruptions associated with the COVID-19 pandemic.

There were approximately 157,000 additional charges in FY22 where the defendant did not face the prospect of incarceration (e.g., liberty was not at stake) and therefore was not entitled to an attorney.

FIGURE 1-2
State-provided legal representation for two-thirds of charges involving the possibility of incarceration



SOURCE: Office of the Executive Secretary of the Supreme Court of Virginia annual report, FY22 and Case Management System (CMS) data, FY22; VIDC annual report, FY22.

NOTE: Includes only charges for which defendant faced the possibility of incarceration and was entitled to defense counsel; therefore, excludes 157,319 less serious charges for which a defendant may elect to hire retained counsel. A defendant found to be indigent can elect to retain private counsel instead of accepting a state-provided attorney, or waive their right to an attorney.

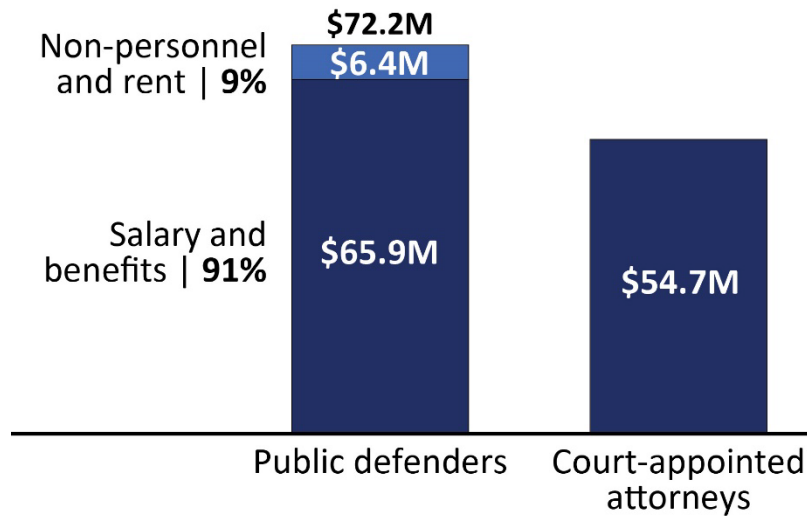
Virginia spent \$127 million on indigent defense, the vast majority of which was for attorney compensation

Virginia spent \$126.9 million providing defense representation to indigent criminal defendants in FY23, including \$72.2 million for the public defender system and \$54.7 million in payments to court-appointed attorneys (Figure 1-3). Funding for public defender offices is appropriated to VIDC, which then allocates funding to individual

Court-appointed attorneys can be paid beyond the statutory cap by seeking supplemental compensation and/or a waiver with a judge's approvals. Judges approved 97 percent of the 7,750 supplemental compensation and waiver requests.

offices. Ninety-one percent of VIDC's budget is salaries and benefits with the remaining spending for rent and non-personnel expenses. Most spending on court-appointed attorneys was for "standard" payment up to the initial statutory cap (\$49.6 million), with an additional \$5.1 million paid as supplemental and waiver payments for amounts above the statutory cap. All state spending for court-appointed attorneys is paid as compensation to attorneys through the criminal fund administered by OES (sidebar).

FIGURE 1-3
State spent \$127 million on indigent defense, majority on public defenders



SOURCE: Office of the Executive Secretary of the Supreme Court of Virginia Court-Appointed Counsel Report (Q4 FY23); Virginia Indigent Defense Commission annual report, FY23.
 NOTE: Public defender expenses do not sum because of rounding.

Most recently, **public defender offices were established** in Prince William County (2020) and Chesterfield County (2021). An additional office was proposed for Henrico County in 2022 and 2023, but the legislation was not enacted.

State spending on indigent defense has increased during the past decade, primarily because of new funding for the public defender system. Funding for public defenders (including VIDC administrative office spending) has increased 62 percent over the past decade. This represents a 29 percent increase when adjusting for inflation. The largest increases occurred in FY21 and FY22, primarily because new attorney positions were funded in FY21 to address high workload among existing attorneys and as a result of opening of two new offices to serve additional localities (sidebar).

State spending on court-appointed attorneys remained relatively stable from FY14 to FY19 and then declined during the pandemic, resulting in a 12 percent decrease from FY14 to FY23. Spending decreased 30 percent, adjusting for inflation. The decline during the pandemic corresponded with a 22 percent decrease in the number of charges court-appointed attorneys handled. Spending began to rise again in FY23 (3 percent).

Commonwealth's attorneys are state funded and locally administered

Commonwealth's attorneys are the state's prosecutors and are elected constitutional officers. Virginia has 120 local offices, each led by a commonwealth's attorney. Commonwealth's attorneys and their staff are responsible for prosecuting all felony indictments in their locality and have discretion to prosecute misdemeanors. Each office consists of an attorney or attorneys and support staff that can include paralegals and/or administrative assistants.

Commonwealth's attorney offices receive state funding based on staffing standards and compensation set by the Compensation Board, subject to appropriation from the General Assembly. The state appropriated \$83.7 million for commonwealth's attorneys in FY23. State appropriations increased 27 percent from FY14 to FY23, or 2.7 percent annually on average. This represents a 1 percent total increase, adjusting for inflation.

Localities also provide substantial additional funding to commonwealth's attorney offices. Localities reported \$22.7 million of funds allocated to supplement salaries for state-supported positions in FY23, representing a 28 percent increase over the state salaries paid to those staff. In addition, localities paid the full cost of nearly 300 additional attorney positions, at an estimated cost of \$30 million statewide in local funds. Furthermore, localities typically provide funds in addition to state funds for administrative costs such as materials, supplies, and office space.

2 Adequacy of Representation

The study resolution directed JLARC to assess the representation provided to indigent criminal defendants in Virginia. The U.S. Constitution guarantees the right to an attorney for every person accused of a crime whose life or liberty is at stake. The U.S. Supreme Court has established that defendants should have “effective assistance of counsel.” State-provided attorneys, whether a public defender or court-appointed attorney, must practice “pursuant to prevailing professional norms” at a minimum to defend their client. In addition, adequate representation for indigent defendants is a key component of the criminal justice system because it helps to ensure an effective adversarial legal system and helps courts operate in a timely and efficient manner.

Analysis shows no evidence that type of defense attorney substantially affects charge and case resolution

To help determine whether state-provided attorneys provided “effective assistance of counsel,” JLARC analyzed 10 years of criminal court data (about 4.4 million charges) to examine whether there were systemic differences in how charges and cases were resolved across different types of attorneys (sidebar). The analysis also examined the relative influence of other factors on resolutions (i.e., race, gender, or the nature of the charges).

For analysis in this chapter, **attorney type** includes public defenders, court-appointed attorneys, and privately retained counsel.

JLARC analyzed four different indicators that *could* potentially be influenced by the type of attorney a defendant has:

- (1) the proportion of criminal charges that resulted in a conviction in circuit, general district, and juvenile and domestic relations courts;
- (2) the proportion of criminal charges that were reduced to a less serious offense at sentencing in circuit, general district, and juvenile and domestic relations court;
- (3) the manner (e.g., trial vs. plea) in which charges resulting in a conviction were resolved in circuit court;
- (4) the active term of incarceration (“sentence length”) received for felony convictions in circuit court for the most common types of felony offenses.

JLARC’s analysis used the best available data from the court system, but there are limitations to the analysis, primarily because not all information that is potentially relevant is collected. For example, not all factors that contribute to the likelihood that a defendant is convicted or how their charge or case is resolved can be fully accounted for or easily measured. This analysis accounts for case or charge resolutions *after* a

defendant has been charged with a criminal offense; it does not assess factors earlier in the process, such as policing, arrest rates, or charging practices. Additionally, factors such as a defendant's criminal history are not captured in court data from the Office of the Executive Secretary of the Virginia Supreme Court (OES), and therefore are not measured by some of this analysis. Furthermore, other factors, such as a defendant's willingness to communicate with their attorney, are difficult to systematically measure (Appendix E).

Criminal court data in Virginia is reported by individual charge. Some cases involve a single defendant with multiple charges, and a defendant could be convicted of one charge, but not others. In that example, the case would result in a conviction for the defendant because one or more individual charges led to a conviction.

JLARC's analysis of outcomes for this chapter is by charges, not cases (sidebar). Some cases have more than one charge. Therefore, within that case, a defendant could be convicted of one or more charges while not be convicted of others. For the defendant and their attorney, a conviction of even a single charge is significant because it results in a criminal record and could lead to incarceration or a financial penalty. However, for the analysis in this chapter, the charges from a single case with multiple charges and different outcomes by charge are counted by charge in the appropriate category which is either (1) leading to conviction or (2) not leading to conviction. This only applies to small subset of cases. Most cases include only one misdemeanor or felony charge (though they may have multiple *counts* of the same charge).

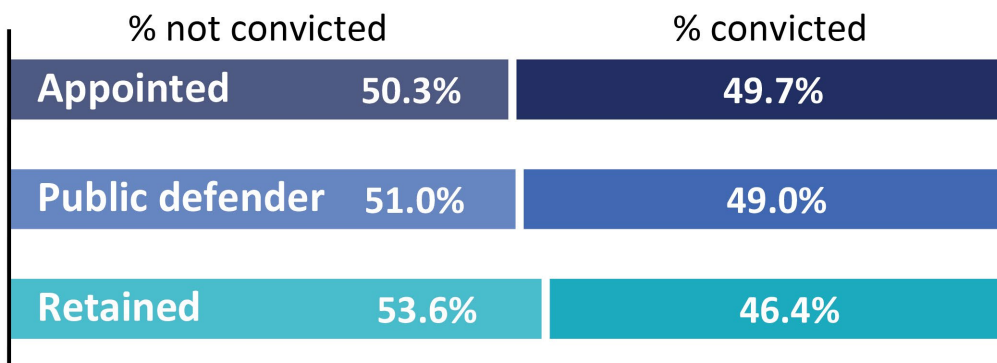
Finally, JLARC's analysis is intended to provide insight into the indigent defense system as a whole—not about individual clients or attorneys. Clients could experience excellent or poor representation from their attorney regardless of the attorney type. Moreover, clients' cases may have different facts and circumstances that heavily influence the case outcome, even if they are accused of the same type of crime and have other similar demographic characteristics.

No quantifiable evidence attorney type affects whether a charge results in a conviction

A criminal charge is not significantly more or less likely to result in a conviction based on the type of attorney representing the defendant for that charge. Over the past 10 years, charges resulted in conviction 49, 50, and 46 percent of the time when represented by public defenders, court-appointed attorneys, and privately retained counsel, respectively (Figure 2-1). These differences are not statistically significant. This indicator is meaningful because, though providing a zealous defense is important, ultimately, representation is fundamentally about whether or not a charge leads to a conviction. A statistically significant difference in whether a charge results in conviction based on attorney type could mean that a defendant receives “better” representation depending on the type of attorney they have.

JLARC analysis did show that factors other than attorney type influence whether a charge results in a conviction. For instance, Hispanic defendants were 1.8 times more likely to be convicted than white defendants, and men were 1.2 times more likely to be convicted than women, though these results alone are not sufficient evidence to show inherent bias in the criminal justice system.

FIGURE 2-1
Rate that charges result in a conviction does not vary appreciably by attorney type



SOURCE: JLARC analysis of OES court case management data (FY13–FY22) and Fairfax circuit court case management system data (FY13–22).

NOTE: Includes charges in circuit, general district, and juvenile and domestic relations courts (adults) in localities with a public defender. Court case data from Alexandria circuit court was not used for this analysis because its circuit court case management system is separate from OES. “% not convicted” includes dismissed and nolle prosequi charges as well as charges that went to trial and did not result in a conviction. Proportions are based on individual charges, not cases; cases can have more than one charge. Therefore, a single defendant could be convicted of one charge, but not the other, in the same case.

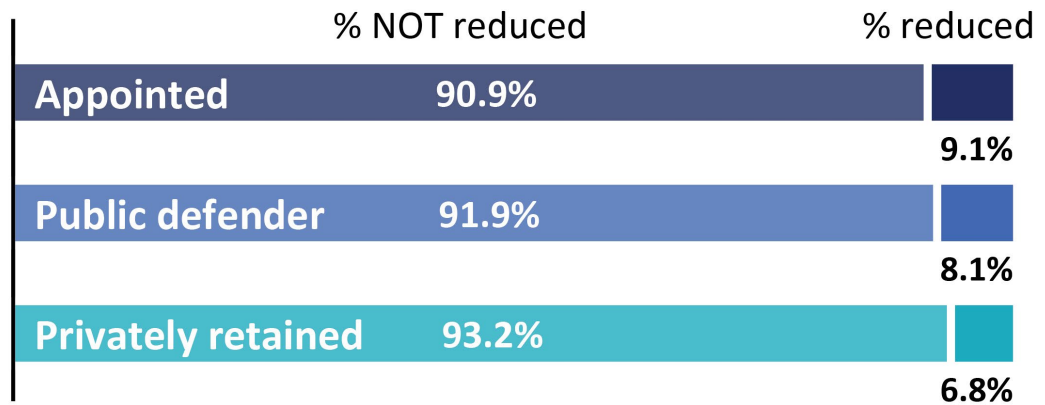
Court-appointed attorneys and public defenders were slightly more likely than retained attorneys to have clients’ charges reduced

Court-appointed attorneys and public defenders have their clients’ felony charges reduced to misdemeanors, meaning their clients are convicted of a less serious offense than the one for which they were originally charged, at a slightly higher rate than retained attorneys (sidebar). These differences are statistically significant, but the difference is small, comprising less than 1.5 percent of charges each year. Court-appointed attorneys had felony charges reduced to a misdemeanor at the highest rate, followed by public defenders. Retained attorneys had the lowest rate (Figure 2-2). A charge being reduced from a felony to a misdemeanor is meaningful because it may result in a shorter sentence and fewer sanctions (e.g., fines or probation) for a defendant.

Other factors also appear to influence whether a defendant’s felony charge is reduced to a misdemeanor. For example, women are 1.2 times more likely than men to have their charge reduced, and Hispanic defendants are 4 times *less* likely than white defendants to have their charge reduced, though these results alone are not sufficient evidence to show inherent bias in the criminal justice system.

Charges can also be reduced from a more serious class of felony or misdemeanor to a less serious class (e.g., from a Class 1 to a Class 2), but those reductions were not included in this analysis because of data limitations.

FIGURE 2-2
Court-appointed attorneys and public defenders get clients' charges reduced in severity at a higher rate than retained attorneys



SOURCE: JLARC analysis of OES court case management data (FY13–FY22) and Fairfax circuit court case management system data (FY13–22).

NOTE: Includes charges in circuit, general district, and juvenile and domestic relations courts (adults) in localities with a public defender. Court case data from Alexandria circuit court was not used for this analysis because its circuit court case management system is separate from OES. A charge was considered “reduced” if it was reduced in severity from a felony to a misdemeanor in any court. Proportions are based on individual charges, not cases; cases can have more than one charge. Therefore, a single defendant could be convicted of one charge, but not the other, in the same case.

No quantifiable evidence attorney type affects whether a case resulting in a conviction resolves with a plea or a trial

Defendants convicted of felonies in circuit court had similar case resolutions (i.e., plea or trial) whether they were represented by a public defender, court-appointed attorney, or privately retained attorney (sidebar) (Figure 2-3). Public defenders and court-appointed attorneys pled 86.5 percent and 85.9 percent of their cases, respectively. This was essentially the same as how frequently privately retained attorneys pled their charges (85.9 percent), and these small differences are not statistically significant. This result is noteworthy because it suggests that based on this indicator, the zealotness of defense offered by state-provided attorneys is comparable to privately retained attorneys. They are not more likely to counsel their clients to take plea deals even though high workload and the additional work required to go to trial could create the incentive to do so.

For the analysis of case resolution and sentence lengths, “case” is used instead of “charge” because JLARC analyzed these outcomes by “sentencing events.” Sentencing events can include multiple charges.

FIGURE 2-3

Case resolutions for charges resulting in conviction do not vary appreciably by attorney type

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

SOURCE: JLARC analysis of OES court case management data (FY13–FY22), Fairfax circuit court case management system data (FY13–22), and Virginia Criminal Sentencing Commission sentencing guidelines data (FY13–FY22).

NOTE: Includes felony charges resulting in conviction in circuit courts statewide. Proportions are based on sentencing events, meaning there was one record per conviction that was inclusive of all charges. Court case data from Alexandria circuit court was not used for this analysis because its circuit court case management system is separate from OES.

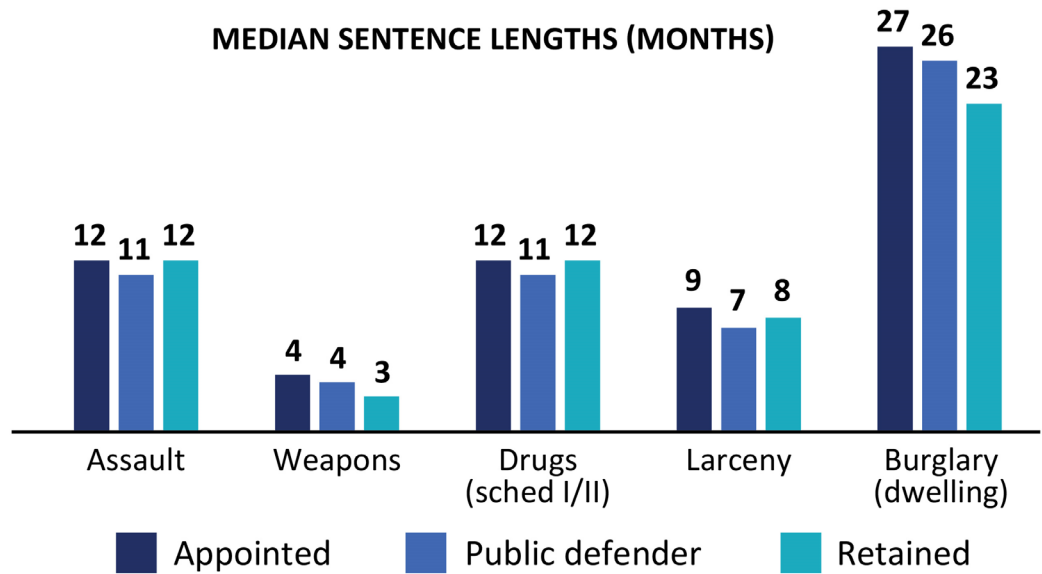
No quantifiable evidence attorney type affects sentence length

Sentence lengths for defendants convicted of felonies do not appear to be affected by attorney type (sidebar). Median sentence lengths are similar regardless of the type of attorney that represented a defendant across the most common types of felony charges (Figure 2-4). The largest difference in sentence lengths was for burglary, but even that difference was a comparatively small percentage of the total sentence length. Statistical analysis confirmed that there is no evidence attorney type affects a defendant's ultimate sentence length.

Factors other than attorney type have larger effects on sentence length. Statistically significant factors include whether a victim was injured during the offense; whether the defendant committed more than one offense at the same time; and the defendant's criminal history (e.g., prior convictions and prior periods of incarceration).

JLARC analyzed sentences for **five types of felonies** (assault, burglary of a dwelling, larceny, weapons offenses, and schedule I/II drug offenses) that comprised over 70 percent of all sentencing events from FY13 to FY22.

FIGURE 2-4
Sentence lengths for most common felony offenses do not vary appreciably by attorney type



SOURCE: JLARC analysis of OES circuit court case management data (FY13–FY22), Fairfax circuit court case management system data (FY13–22), and Virginia Criminal Sentencing Commission sentencing guidelines data (FY13–FY22). NOTE: Includes felony charges resulting in conviction in circuit courts statewide. Excludes convictions for charges that have a mandatory minimum sentence because sentence lengths for those charges are largely driven by mandatory minimum requirements. Analysis is based on sentencing events, meaning there was one record per conviction that is inclusive all charges. See Appendix E for a summary of sentence length by offense type with convictions for mandatory minimum charges included.

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

JLARC surveyed local court judges in circuit, general district, and juvenile and domestic relations courts for their perspectives on several topics, including the quality of representation provided by public defenders and court-appointed attorneys.

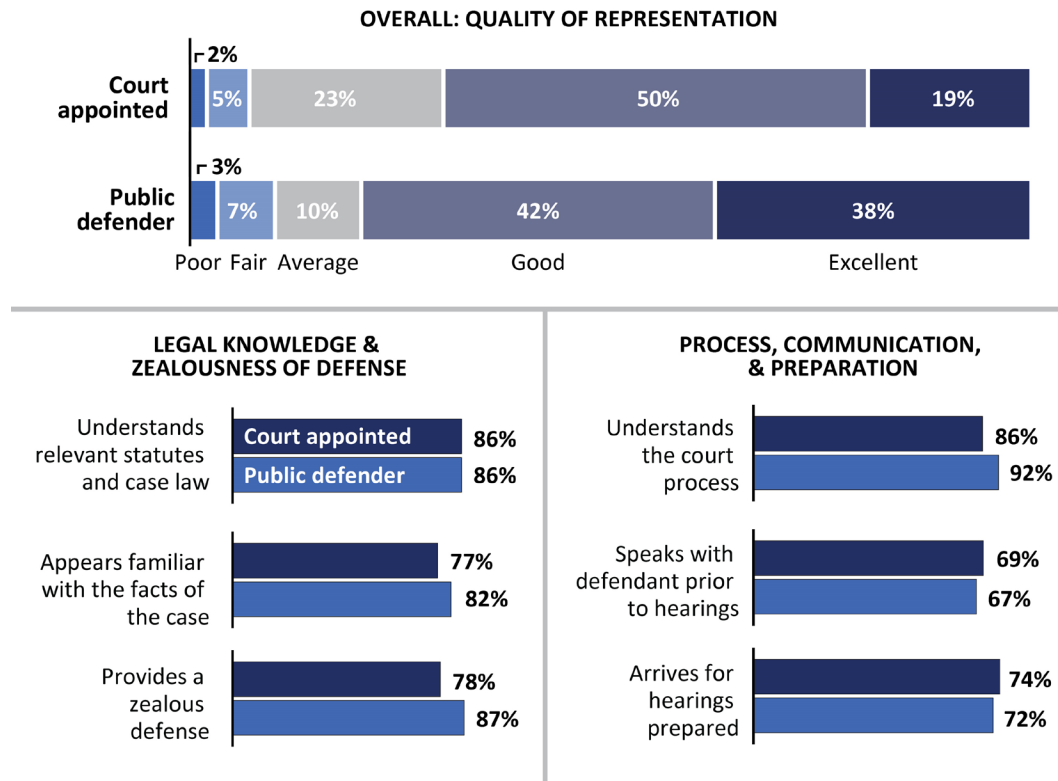
The survey received 297 responses, a 67 percent response rate.

Judges are in a unique position to observe whether court-appointed attorneys and public defenders provide “effective assistance of counsel.” JLARC surveyed judges across all local courts in Virginia to obtain their opinion on the quality of representation provided to indigent criminal defendants in their jurisdiction by public defenders and/or court-appointed attorneys (sidebar).

Overall, public defenders and court-appointed attorneys generally provide quality representation and effective counsel to indigent clients, according to judges. A majority of judges reported that public defenders and court-appointed attorneys provide “good” or “excellent” representation overall. Few judges reported that public defenders or court-appointed attorneys provide “poor” representation (Figure 2-5). A majority of judges observed that public defenders and court-appointed attorneys generally understood the relevant law and facts of the case and provided a zealous defense for their clients. A majority also observed these types of attorneys generally understand

court processes. A smaller proportion observed that both types of attorneys communicated with their clients prior to hearings and arrived for hearings prepared.

FIGURE 2-5
Judges consider court-appointed attorneys and public defenders generally to be of high quality



SOURCE: JLARC survey of judges, 2023.

NOTE: Includes only responses from judges that serve in a jurisdiction that uses both public defenders and court-appointed attorneys.

Judges generally indicated that having a privately retained attorney does not guarantee better representation than having a court-appointed attorney or public defender. A judge said: “The public defender’s office in my circuit is outstanding. I know if a public defender is on a case that they will zealously and competently represent their clients.” Many court-appointed attorneys also take privately retained cases, and judges said that they see the same quality of representation, regardless of whether those same attorneys are serving in a court-appointed or privately retained role. A judge commented: “We have 24 attorneys on our court-appointed attorney list, and many of those are also frequently retained. I don’t detect a distinction between the two.”

3 Court-Appointed Criminal Defense Attorneys and Compensation

The study resolution directed staff to determine how many court-appointed criminal defense attorneys the state needs and the impact compensation has on the number of attorneys willing to serve in the role. Court-appointed attorneys represent indigent criminal defendants in localities without a public defender or when a public defender is unable to handle the case because of workload or conflict of interest. Court-appointed attorneys are paid by the state for each charge for which they provide representation. The payment is based on an hourly rate set by the Supreme Court of Virginia and maximum payment amounts set in statute.

Chapter 2 indicates that court-appointed attorneys likely provide their clients with a similar quality of representation as public defenders and privately retained attorneys. Ensuring that court-appointed attorney representation continues to be of sufficient quality depends on having enough attorneys with the knowledge and experience to provide adequate representation. JLARC staff assessed court-appointed workload using updated workload estimates developed with the National Center for State Courts (NCSC). The updated workload estimates were for *public defenders* but are also applicable for analyzing court-appointed attorney workload and compensation.

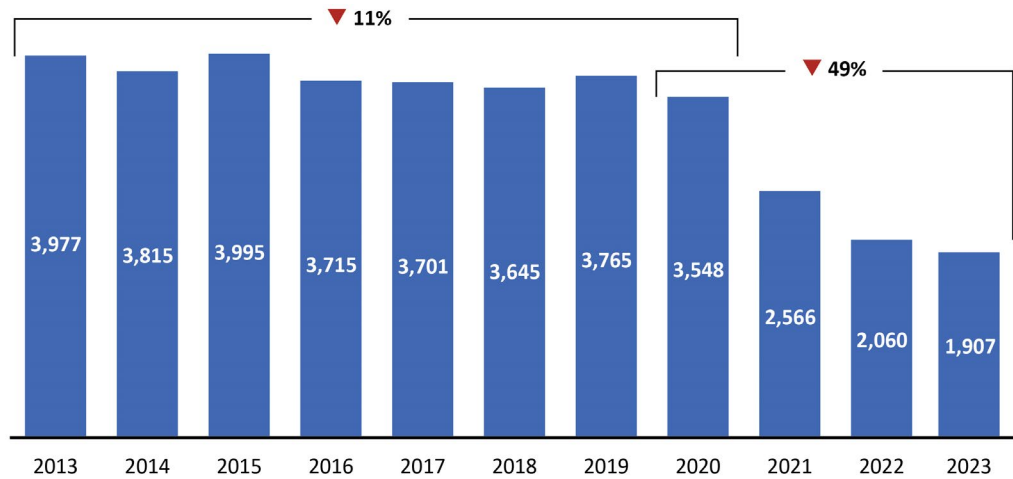
Fewer attorneys are serving in court-appointed role, especially in certain parts of the state

The overall number of attorneys serving as court-appointed defense counsel in Virginia has declined since FY13, and the decline has accelerated in recent years. The number of court-appointed attorneys—defined as the number of attorneys appointed to serve for at least one charge in a given year—declined by more than half, from nearly 4,000 in FY13 to about 1,900 in FY23. The vast majority of the decline occurred in the last few years (Figure 3-1). The Virginia Indigent Defense Commission’s (VIDC) court-appointed attorney list, another measure of the number of attorneys available to serve in the role, has similarly declined during this time period (sidebar).

The decline in attorneys serving in a court-appointed defense counsel role is not due solely to fewer charges during the pandemic, and is not the result of fewer attorneys practicing criminal law in general. The number of active court-appointed attorneys has decreased at a higher rate (52 percent) than the number of charges they handle (23 percent). In addition, both the number of attorneys practicing criminal law in general and the number of newly licensed attorneys in Virginia have been relatively stable over the last five years.

VIDC is required in statute to maintain a list of attorneys who have completed its training to serve as court-appointed attorneys for indigent defendants and are qualified for the role. An attorney who has sufficient experience may waive the training requirement to represent indigent defendants, and judges may appoint any attorney they deem qualified. As of Q3 of FY23, there were 1,244 court-appointed attorneys on the list.

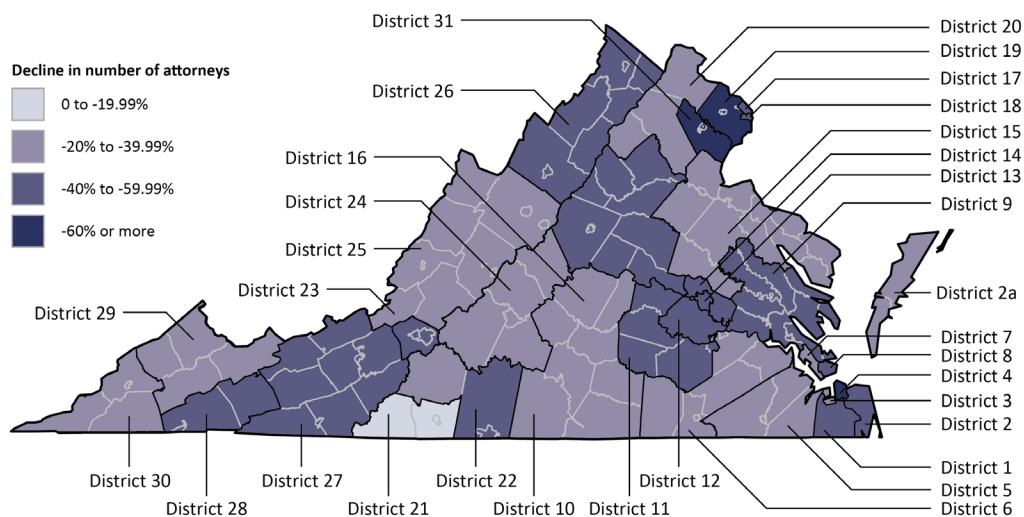
FIGURE 3-1
Decline in active court-appointed defense attorneys has accelerated



SOURCE: Office of the Executive Secretary court-appointed attorney payment data, FY13–FY23.

The decline in the number of active court-appointed attorneys has been more pronounced in some areas of the state (Figure 3-2). Seventeen judicial districts saw a decline of more than 40 percent, and these districts are primarily in rural areas in the central and southern portions of the state. Twenty-seven of the 50 localities in these districts do not have a public defender’s office, meaning court-appointed attorneys are the only attorneys available to provide indigent defense.

FIGURE 3-2
Decline in court-appointed attorneys is worse in some judicial districts



SOURCE: Office of the Executive Secretary court-appointed attorney payment data, FY13–FY22.

NOTE: Chesterfield County (District 12) and Prince William County (District 26) opened public defender offices in 2021, contributing to the decline in the number of active court-appointed attorneys in their district.

Judicial District 25 is an example of an area with a significant decline and the associated challenges. The district includes Alleghany, Augusta, Bath, Botetourt, Craig, Rockbridge, and Highland counties and the cities of Buena Vista, Lexington, Staunton, and Waynesboro. The average number of charges handled by each court-appointed attorney more than doubled in six of the 11 localities within the district (FY13–FY22). A majority of judges serving in the district indicated it is now “very challenging” to find attorneys to appoint to cases for indigent defendants.

Experienced attorneys are leaving court-appointed defense work, posing a risk to the quality of representation for indigent defendants. A majority (63 percent) of attorneys who discontinued court-appointed work in the last three years were highly experienced—having served in the role for 10 or more years. Attorney experience is a key factor that can affect the quality of representation for indigent defendants. Judges most often cited a lack of experience as a key factor that negatively affects representation quality, both for court-appointed attorneys and public defenders (sidebar).

Court-appointed attorneys tend to have more experience than public defenders, with 68 percent having at least 10 years of experience, compared with just 27 percent of public defenders.

The decline in the number of defense attorneys actively serving in a court-appointed role is likely to continue, at least in the near term. Sixty percent of court-appointed attorneys surveyed by JLARC reported they were considering leaving or taking fewer cases in the next 12 months; only 16 percent said they plan to take on more cases in that time period. Attorneys who have left or are considering leaving the role most commonly indicated that they would stay in the legal profession (i.e., private criminal defense) but no longer take court-appointed cases.

Court efficiency and quality of representation at risk as fewer serve in court-appointed role

Court-appointed attorneys have a vital role in the state’s indigent defense system. They represented indigent defendants on the majority of charges statewide in FY22 and are the only source of legal defense for indigent clients in the 64 jurisdictions without a public defender office. Having too few court-appointed attorneys can hinder a court’s ability to operate efficiently because it becomes more difficult to find an attorney to defend an indigent defendant. For attorneys who are serving in a court-appointed role, their ability to provide adequate legal counsel may be at risk if they are asked to take on too many cases. The state may also be at risk for lawsuits on constitutional grounds if some indigent criminal defendants cannot be provided with timely appointment of an attorney because there is a shortage, which has happened in Wisconsin and Georgia.

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

A majority of judges indicate that the decline in court-appointed attorneys is making it more challenging to find attorneys to appoint to cases in their court. Overall, 52 percent of judges responding to JLARC’s survey said that is it challenging or very challenging to find a court-appointed attorney for cases in their locality. The shortage

of court-appointed attorneys has worsened in the last two years, with 67 percent of judges reporting that it has become more challenging to find an attorney to appoint during that time. One judge said, “We are getting to the point that my staff are calling many, many lawyers before they can find one who will take the case.” Another judge expressed concerns that their court may have trouble complying with the constitutional requirement to appoint attorneys for indigent defendants: “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.”

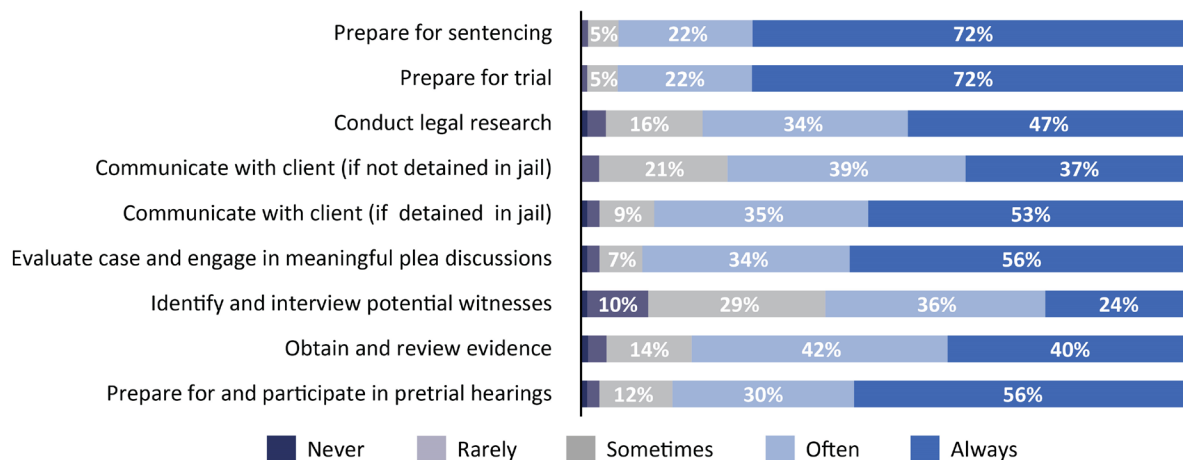
Not having enough court-appointed attorneys, especially in certain areas of the state, increases courts’ and jails’ operating costs and can threaten defendants’ right to a speedy trial. Judges reported that the lack of court-appointed attorneys delays their dockets. These delays can increase the staff time needed to find a court-appointed attorney and the amount of time defendants are held in jail before their trial. One judge said: “Sharing the very few [court-appointed attorneys] between six to eight courts that are running at any time (between juvenile and domestic relations court, general district court, and circuit court) in our jurisdiction is causing extensive delays in the flow of the docket.” Another judge said: “For the first time, we have had to continue a trial date because we could not find counsel before the court date.”

Some court-appointed attorneys have so many cases it raises questions about their ability to provide an adequate legal defense

The decline in the number of attorneys serving in a court-appointed defense role means that attorneys remaining in the role take more cases (e.g., greater workload). Charges handled annually per court-appointed attorney—a measure of attorney workload—increased statewide from 54.6 to 81.6 (49 percent) from FY13 to FY22 (Figure 3-3). The annual number of charges handled on a per attorney basis increased in most localities (103 of 120) during the same time period, and in eight localities, the number of charges per court-appointed attorney more than doubled.

Attorney workload is a key factor that can affect representation quality. A higher workload is not necessarily an indicator that attorneys are delivering lower quality representation, but it reduces the time available to provide all aspects of quality representation. The time court-appointed attorneys need to spend on cases has increased in recent years because of factors such as statutory changes related to bail presumptions and jury sentencing and the proliferation of electronic evidence collected through body-worn law enforcement cameras (Appendix D). Some attorneys indicated that because of their workload, they only “sometimes,” “rarely,” or “never” have time for some activities that could be important for a case, such as identifying and interviewing potential witnesses or communicating with their client (Figure 3-3).

FIGURE 3-3
Court-appointed attorneys cannot always complete tasks associated with a quality defense



SOURCE: JLARC survey of court-appointed attorneys.

NOTE: For each of the activities above, attorneys were asked, “across all of my cases, I generally have sufficient time to...” Two activities were phrased as “only if necessary,” but received high percentages of sometimes, rarely, or never responses: identify and confer with independent experts (75%) and visit the crime scene (71%).

Judges in areas of the state where court-appointed attorney workload has increased most significantly in recent years had less favorable views of their quality of representation. For example, in Southside, southwest, and along the I-81 corridor—areas where the decline in the number of attorneys serving in a court-appointed role tended to be the greatest—56 percent of judges indicated that there was “good” or “excellent” representation from court-appointed attorneys, which is less than the 70 percent indicated statewide. Likewise, only 58 percent of judges indicated that at least three-quarters of court-appointed attorneys were providing an adequate defense.

The reduction in the number of court-appointed attorneys has led to some attorneys taking a concerningly high number of charges. About 9 percent of court-appointed attorneys took a high (275 to 410) or very high (more than 410) number of charges in FY22 (sidebar). The portion of charges statewide that were handled by attorneys with high or very high workloads increased from 36 percent in FY13 to 43 percent of charges in FY22.

Currently, a typical workload for a public defender is 210 cases or approximately 275 charges annually, which is considered a high workload for court-appointed attorneys for the purposes of this report. A very high workload of 315 cases or approximately 410 charges annually represents 1.5 times the typical public defender caseload.

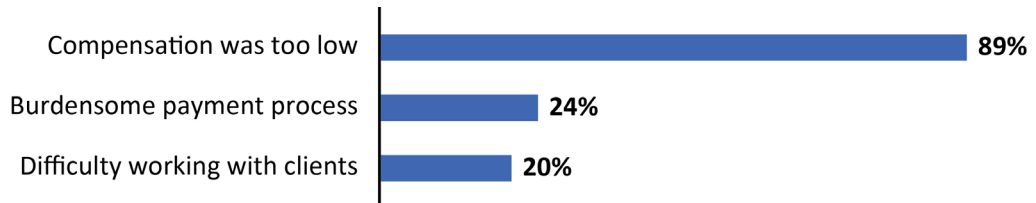
Low pay—primarily due to statutory payment caps—cited for decline in court-appointed attorneys

Low payment rates were most commonly cited by attorneys and judges as the reason for the decline in the court-appointed attorney workforce. Eighty-nine percent of defense attorneys who stopped serving as court-appointed attorneys in the past three years cited low pay as one of the top factors affecting their decision to do so (Figure 3-4). Likewise, 91 percent of current court-appointed attorneys who are *considering* leaving service or taking fewer court-appointed cases cited low pay as a top factor

JLARC’s survey of court-appointed attorneys included attorneys’ opinions on factors that affect their decisions to continue serving as a court-appointed defense attorney, including compensation, challenges working with clients, workload, stress, workload stability, and issues with the appointment or payment processes.

(sidebar). In addition, 94 percent of judges cited raising compensation for court-appointed attorneys as one of the top ways to address concerns with the indigent defense system. One judge noted that “the state reimbursement for court-appointed counsel is embarrassingly low.”

FIGURE 3-4
Low compensation was by far the most cited reason for leaving role as court-appointed defense attorney



SOURCE: JLARC survey of court-appointed attorneys. Attorneys could choose more than one response. Other options receiving fewer than 20 percent of responses included, court-appointed work not offering a predictable workflow, overall workload being too high, feeling like the work is not making a difference for clients, the stress associated with practicing criminal law, and personal reasons.

Attorneys indicated that the pay available for court-appointed defense does not sufficiently compensate them for their time and is not competitive with what they can earn in private practice. Attorneys said that there is an opportunity cost to taking on court appointed work—working more time for less money. A current court-appointed attorney said: “I can make \$1,500 on a retained driving while intoxicated (DWI), or 12 [court-appointed] misdemeanor charges at \$120 each.” One former court-appointed attorney said: “I was losing money doing court-appointed cases. This is because of the opportunity cost of not being able to do more retained work.”

The Supreme Court of Virginia sets the hourly rate for court-appointed attorneys (\$90 per hour), and statute sets caps for the maximum allowable payments. These pay caps are based on the type of charge (e.g., a misdemeanor) and the court (e.g., circuit court) in which the charge is resolved (Table 3-1) (sidebar). Virginia’s pay caps for court-appointed attorneys have not changed in more than 20 years. Court-appointed attorneys are also eligible for a supplemental waiver and discretionary waiver to receive payments exceeding the cap (sidebar, next page). Both types of waivers are subject to the availability of money set by the Appropriation Act for this purpose (sidebar). A majority of payments to court-appointed attorneys are under or up to the statutory pay cap, with payments pursuant to waivers accounting for only about 9 percent (\$5.1 million) of the \$54.6 million spent in FY23.

Class 1 felonies (e.g., aggravated murder) have no statutory pay cap.

Budget language in the 2022–2024 biennial budget) appropriates \$5.2 million annually for court-appointed attorney payment waivers. When this funding is used, waivers are not granted until the next fiscal year.

TABLE 3-1
Virginia sets court-appointed attorney pay caps in statute

Court	Charge type	Statutory cap	Maximum supplemental waiver
JDR	Any juvenile charge	\$120	\$650
District	Misdemeanor	\$120	\$120
Circuit	Misdemeanor	\$158	Not available
Circuit	Class 3 to 6 felony	\$445	\$155
Circuit	Class 2 felony	\$1,235	\$850
Circuit	Class 1 felony	None	N/A

SOURCE: Office of the Executive Secretary of the Supreme Court of Virginia.

NOTE: District court includes general district court and juvenile and domestic relations court. JDR=Juvenile and domestic relations court. Supplemental waivers are not available for misdemeanors resolved in circuit court. All cases are eligible for additional payment beyond statutory waiver subject to approval by presiding judge and chief judge.

The majority of charges, and most attorneys, are being affected by the pay caps. About 60 percent of all charges in FY22 were paid at the cap. This translates to more than 1,700 attorneys (83 percent) being paid for at least one charge exactly at the pay cap amount. Though data is not available on how much time is actually spent on these cases, this strongly suggests a substantial number of attorneys perform more work than they are paid for, at least for some charges.

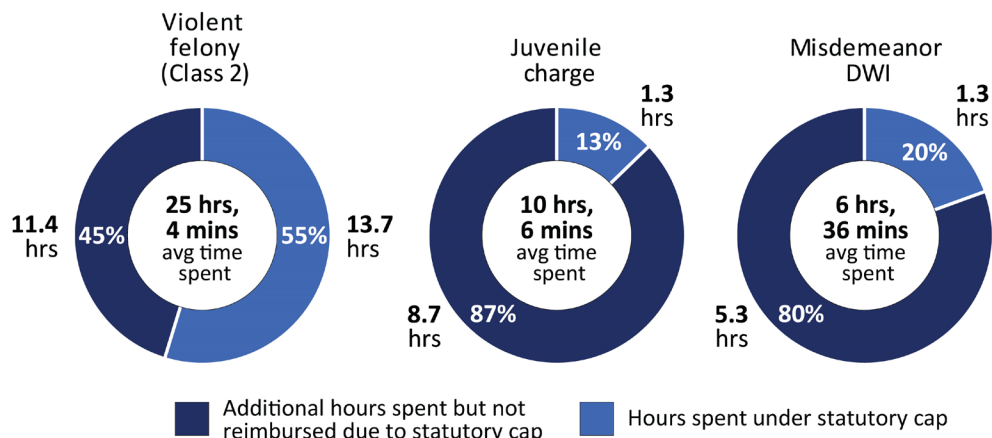
The pay caps result in attorneys being paid only for a subset of the total hours they spend defending a client, but the typical amount of uncompensated time varies by type of case (Figure 3-5). For example, the pay cap for a misdemeanor DWI in district court is \$120, which allows an attorney to be compensated for up to one hour and 20 minutes of work based on the hourly rate. However, a typical misdemeanor DWI is estimated to take an attorney an average of more than six hours of work. This means that 80 percent of an attorney's time on a typical misdemeanor DWI is uncompensated. Even with the supplemental waiver, which was only awarded in about 19 percent of cases where the attorney reached the pay cap, more than half of an attorney's time goes uncompensated for a typical misdemeanor DWI. Similarly, on average, 87 percent of an attorney's time goes uncompensated for juvenile cases, and 45 percent of time spent on a Class 2 felony, on average, is uncompensated.

Starting in FY08, the state implemented supplemental waivers to the statutory cap for court-appointed cases.

The **supplemental waiver** has its own cap, and attorneys must account for additional hours spent working on a charge that are above what can be paid by the statutory cap. Supplemental waivers must be approved by a judge.

A waiver for additional payment beyond the supplemental waiver, can be approved by the presiding judge and chief judge in cases when the effort expended, the time reasonably necessary for the particular representation, the novelty and difficulty of the issues, or other circumstances warrant such a waiver.

FIGURE 3-5
Attorney time spent on typical cases is uncompensated because of caps



SOURCE: Office of the Executive Secretary court-appointed attorney payment data, FY22, and National Center for State Courts case weights, 2023.

NOTE: DWI=driving while intoxicated/driving under the influence.

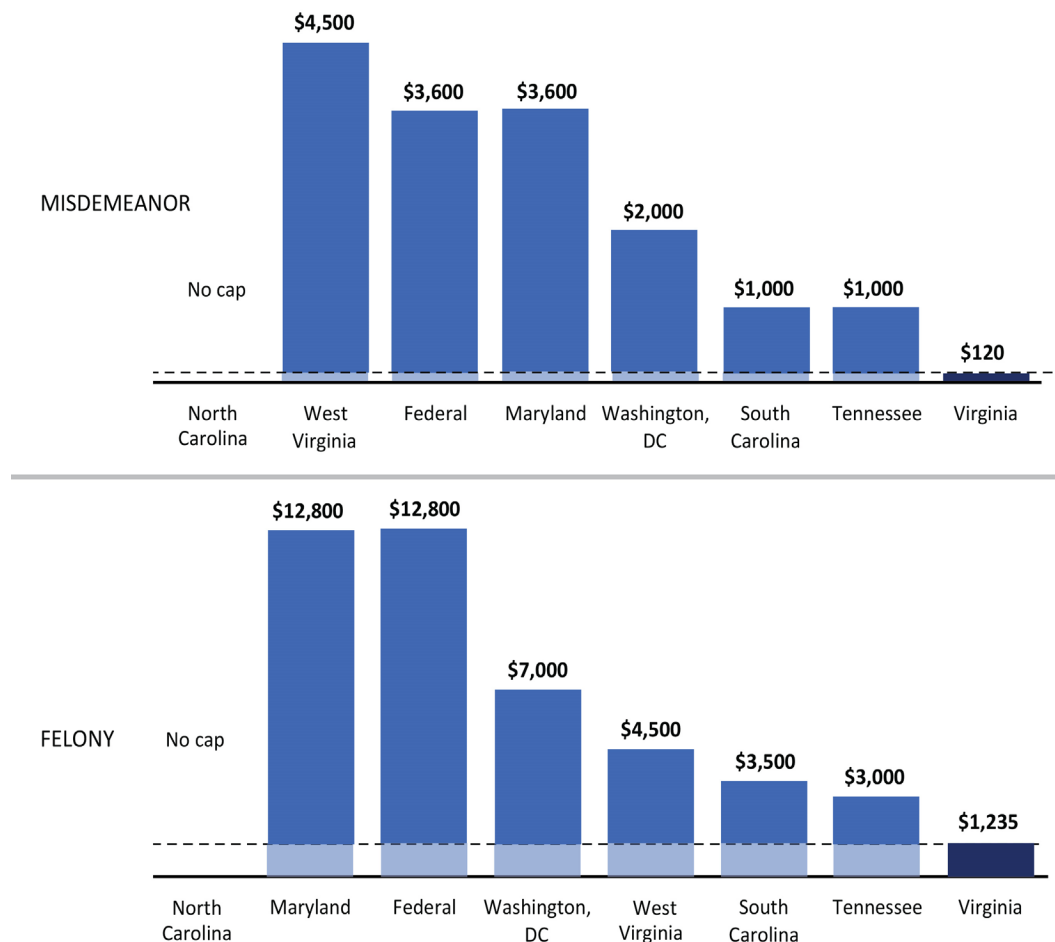
Virginia’s caps are substantially below those set by other states and the federal government

Neighboring states and the federal government have higher pay caps for court-appointed criminal defense attorneys. Maryland and the federal government have much higher pay caps than Virginia. North Carolina has no caps in place, and West Virginia does not cap certain types of cases (Figure 3-6). Overall, Virginia’s pay caps are two to 26 times lower than neighboring states.

Virginia’s hourly pay rate of \$90 is roughly in line with the hourly rate paid to court-appointed attorneys in other states, but Virginia’s low pay caps effectively lower the hourly rate for the majority of cases. In more than half of their cases, court-appointed attorneys are not fully compensated at the full hourly rate for all hours worked because of the pay cap. Once the cap is reached, additional hours worked are not compensated, which results in attorneys often receiving an effective hourly rate for a case that is well below \$90.

One difference is that Virginia pays attorneys for *all* charges related to a case, while most other states pay attorneys for only *the most serious* charge. However, this does not significantly offset the discrepancy in pay caps between Virginia and other states because most court-appointed cases in Virginia have only one charge.

FIGURE 3-6
Virginia’s caps for court-appointed attorney maximum pay amount are much lower than surrounding states



SOURCE: JLARC review of other states’ statutes.

NOTE: Represents Virginia’s statutory pay cap for Class Two felonies and the pay caps for comparable charges in other states. West Virginia does not cap cases in which the sentence could be life without the possibility of parole.

Raising pay caps may incentivize more attorneys to serve as court-appointed attorneys

Increasing the pay caps would provide compensation that more closely reflects the time a court-appointed attorney spends representing an indigent defendant. Higher caps would seem to be the primary way to incentivize attorneys to perform court-appointed work. Attorneys are reaching the cap for a majority of charges and are receiving the maximum supplemental waiver for about one-fifth of charges. Raising the hourly rate would be of limited benefit for cases in which the cap is reached and would only have the effect of attorneys being paid for fewer hours on a per charge basis.

State should raise its pay caps for court-appointed defense attorneys, increasing all caps or using a more targeted approach

If the state wishes to address the decline in the number of attorneys willing to serve in a court-appointed role, it needs to increase compensation. Adopting the approach of states like North Carolina, which does not have pay caps, may be fiscally imprudent for Virginia. Arbitrarily raising the caps (e.g., doubling the current cap amounts or adjusting them for inflation) would result in higher compensation, but this blanket approach would not fully address the root cause of the problem—that the pay caps are not aligned with the amount of time required to defend some types of cases.

The state should increase the pay caps for court-appointed attorneys using the estimated average amount of time a defense attorney spends on a case as the primary basis. Raising the caps to reflect 100 percent of the estimated average case time for all charges would have the greatest fiscal impact but most closely align with the amount of time attorneys spend on a typical case.

To lessen the fiscal impact, the state could increase caps for only some types of charges or to less than compensation for the full estimated case time. For example, raising the caps to reflect 75 percent of the estimated case time would still be a substantial increase in compensation from the current cap amounts but would have a lower fiscal impact. Likewise, raising pay caps for only certain charges, targeting those with the most uncompensated time for typical cases, would also reduce the fiscal impact. However, the less the pay caps are raised to reduce the fiscal impact, the less positive impact raising them is likely to have on stemming the decline in the number of court-appointed defense attorneys.

RECOMMENDATION 1

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

Ideally, court-appointed attorney pay caps would be increased periodically over time based on a reliable measure of public and/or private attorney compensation. For instance, the state could direct VIDC to report to the General Assembly on changes in attorney compensation (for example, based on the Bureau of Labor Statistics' Occupational Employment and Wage Statistics data) every five years. VIDC could also be directed to calculate how much pay caps for court-appointed attorneys would need to increase to keep pace with the increase in attorney compensation overall and estimate the additional fiscal impact of increased caps.

If payment caps are increased, offense categories should be updated

JLARC staff analysis has revealed a significant mismatch between actual attorney workload on cases by type of charge. Currently, time spent working is paid based on

the type of charge (i.e., misdemeanor, felony, or juvenile case) and the court in which the charge is resolved (i.e., circuit or district). However, these offense categories do not necessarily align with the workload associated with different types of cases. For example, Class Three through Six felonies in circuit court are paid at an identical rate, but felonies include both violent and nonviolent felonies, which take substantially different amounts of time, on average, for attorneys to prepare an adequate defense. Likewise, a DWI is compensated at the same rate as other misdemeanors, although DWI cases require nearly three times as much attorney time on average compared with a typical misdemeanor.

If pay caps are raised, it would be prudent to alter the offense categories. Charges could be grouped in five general categories based on attorney time required. Because the type of the charge, rather than which court, is the primary driver of how much time an attorney spends on the case, caps for adult offenses should *not* take into account the court in which the charge is resolved, as some caps do now. The new offenses categories would need to be clearly defined in statute to ensure accurate payment requests and payments. State law currently includes definitions of offenses that could be used as a basis for new categories. For example, violent felonies could be defined as those included in § 17.1-805(C) of the Code of Virginia (sidebar), with all remaining felonies being categorized as non-violent. Any violent felonies that do not currently have a pay cap, such as aggravated murder, should not be included in this change. Likewise, existing code sections for misdemeanor DWI and juvenile offenses could be used to define those categories for payment purposes. OES could work with the Department of Legislative Services to ensure that the definitions used for new offense categories would allow payment request forms and its automated payment system to be appropriately updated to reflect the new categories.

RECOMMENDATION 2

If the General Assembly chooses to increase court-appointed criminal defense attorney pay caps, it may wish to consider amending the Code of Virginia to establish the following new offense categories for court-appointed attorney payment: (i) violent felonies, (ii) nonviolent felonies, (iii) misdemeanor DWIs, (iv) non-DWI misdemeanors, and (v) juvenile charges.

Changing the offense categories for attorney payments would require OES to reprogram two existing data systems, including the electronic system attorneys use to submit payment requests and internal data systems to process payments. This would represent additional work for information technology staff at the agency and likely have a one-time fiscal impact.

Code offers several other examples of how “violent felony” could be defined. These include § 53.1-40.02(C), relating to exceptions for conditional release of terminally ill inmates, and § 16.1-269.1(C), relating to procedures for juveniles charged as adults in criminal court.

For the purposes of this analysis, JLARC defined “violent felony” as any of those cited in § 17.1-805(C). JLARC excluded offenses currently without a pay cap (i.e., aggravated murder) from fiscal impact projections.

Fiscal impact of raising pay caps would depend on which caps were increased and how much attorney time is compensated

The fiscal impact of raising the pay cap would depend on several factors (Table 3-2) (Figure 3-7). JLARC staff have developed five scenarios that illustrate a range of options the state could choose and their fiscal impacts. Each scenario includes the same five basic offense categories based on the type of charge but vary by how much attorney time is compensated. The three compensation levels used are (1) full compensation for the typical attorney time required for a charge, (2) compensation for three-fourths of the average time required, and (3) compensation based on the current caps. For example, scenario 5 shows the cost impact (\$58 million) of fully compensating the typical amount of attorney work time for all charges. In contrast, scenario 1 provides a more fiscally conservative and targeted approach that raises pay caps for only violent felony, misdemeanor DWI, and juvenile charges (which are the three categories of charges with the most uncompensated time). Scenario 1 also sets the rate to 75 percent of the typical time an attorney spends working on the charge. This approach would be less than a third of the cost of scenario 5.

Other factors would also determine the fiscal impact of raising the pay caps, which could increase or decrease the fiscal impacts. For example, some attorneys may perform additional activities for a client than they would currently because they would have the ability to be compensated for that additional work with higher pay caps, which could increase the fiscal impact. The fiscal impact could be offset partially by recoupment of defendants’ court costs. The state recouped an average of 30 percent of the costs for court-appointed attorney representation from FY18 through FY22, or about \$12.8 million each year.

TABLE 3-2
Illustrative scenarios for raising pay caps for court-appointed attorneys

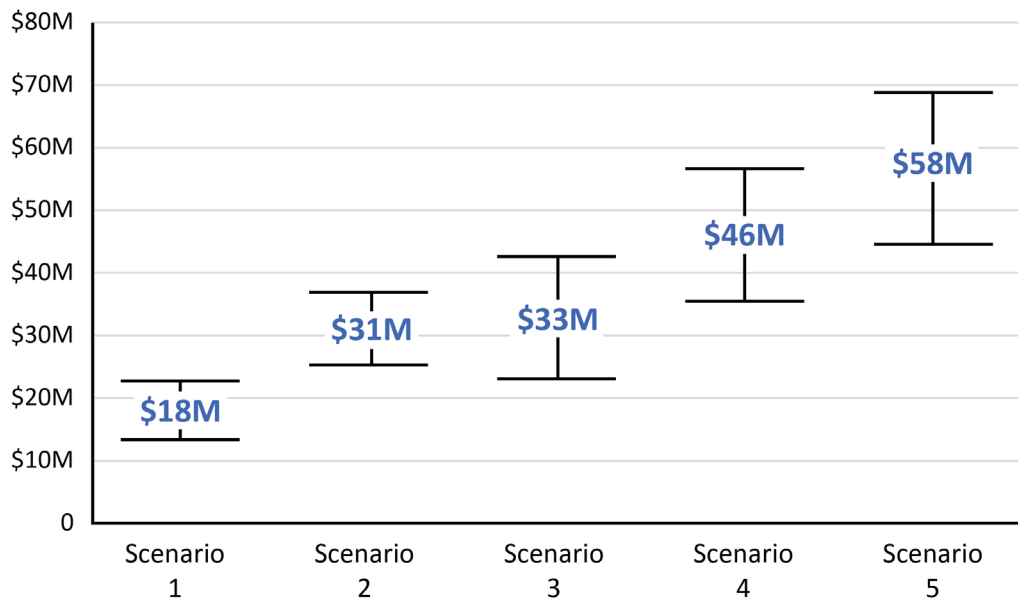
	Scenario 1	Scenario 2	Scenario 3	Scenario 4	Scenario 5
Violent felonies ^a	●	●	●	●	●
Nonviolent felonies	○	○	●	●	●
Misdemeanor DWIs	●	●	●	●	●
Juvenile	●	●	●	●	●
Misdemeanors	○	○	●	●	●

- = current cap
- = 75 percent of case weight time
- = 100 percent of case weight time

SOURCE: JLARC analysis of Office of the Executive Secretary case management system and court-appointed attorney payment data, FY13–FY22, Fairfax County court case management system, FY13–FY22, and National Center for State Courts case weights, 2023.

^aAs defined in § 17.1-805(C).

FIGURE 3-7
Fiscal impact of raising the pay caps varies by which payment caps are increased and the amount of attorney time that is compensated



SOURCE: JLARC analysis of Office of the Executive Secretary court case management system and court-appointed attorney payment data, FY13–FY22, Fairfax County court case management system, FY13–FY22, and National Center for State Courts case weights, 2023.

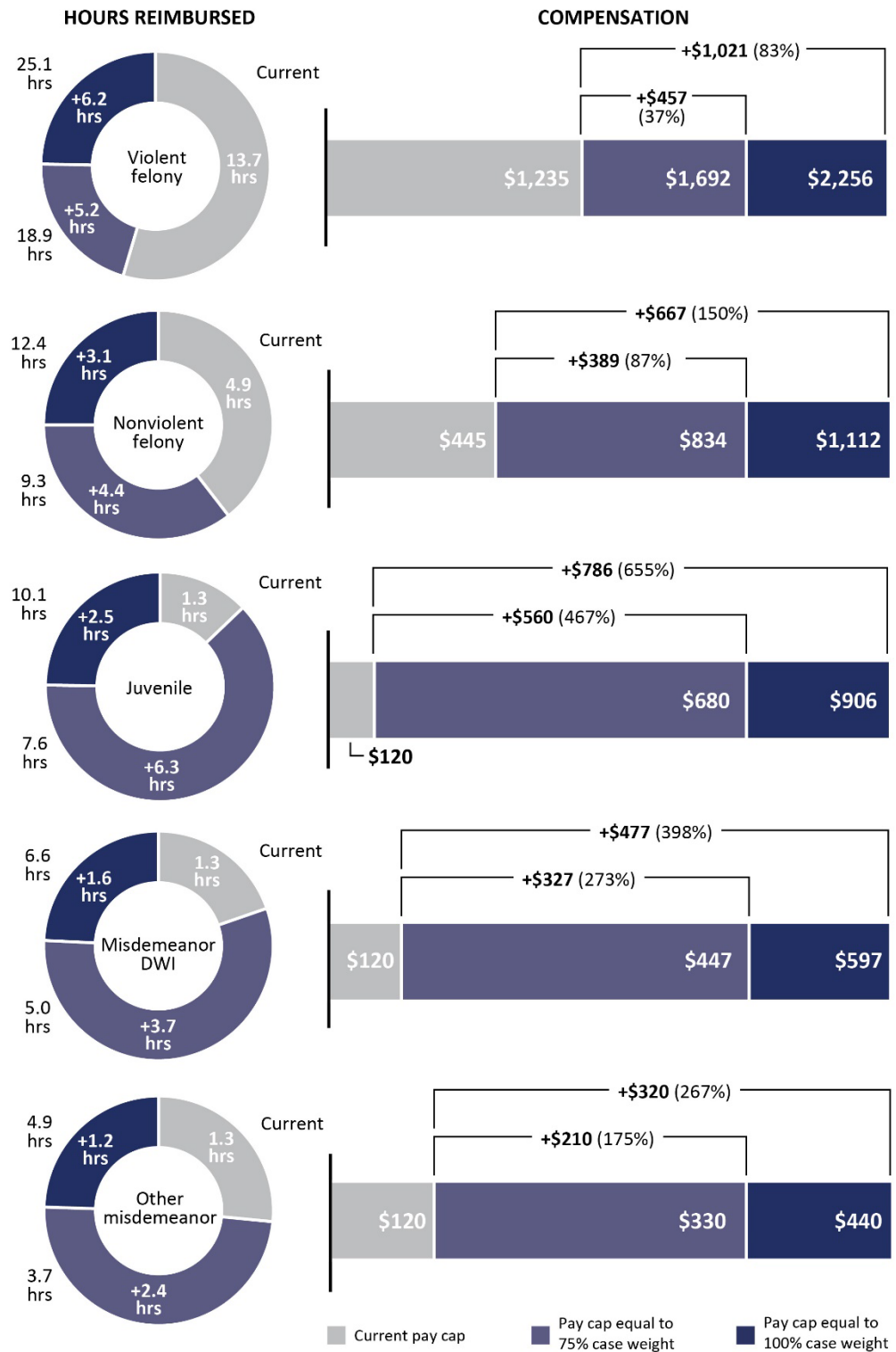
NOTE: Annual spending in FY22 was \$53 million. New spending represents estimated state payments as an increase over current spending levels. Dollar values shown represent the midpoint of an estimated range of fiscal impact; range estimates are based on assumptions about how frequently and to what extent attorneys would request payment for hours above current pay cap (see Appendix B).

Raising the pay caps would reduce uncompensated time and raise compensation

Though raising the caps would have a fiscal impact to the state, increased pay caps would compensate court-appointed attorneys for more of the time they spend representing indigent clients (Figure 3-8). For example, raising the pay caps for violent felonies would compensate attorneys for another 5.2 hours of time worked, if a new cap is set at 75 percent of the average estimated time. This would nearly double the compensation amount, on average.

Raising pay caps would also result in higher annual compensation to attorneys for their court-appointed criminal defense work, but the impact would vary greatly by attorney based on the number of cases and the types of charges. For example, setting pay caps for all categories of charges to 75 percent of the case weight could result in a 62 percent increase in yearly compensation for a court-appointed attorney handling the FY22 average of 89 charges (from \$27,000 to \$43,500). Raising pay caps for all charges to the full average case time could more than double yearly compensation for court-appointed attorneys handling the average number of charges (from \$27,000 to \$56,500).

FIGURE 3-8
Illustrations of attorney compensation from higher pay caps



SOURCE: JLARC analysis and National Center for State Courts public defender workload study, 2023.

The impact to individual attorney compensation could vary depending on the number of charges handled. Half of attorneys handled 28 or fewer charges in FY22; with caps set to 75 or 100 percent of average case times, compensation for attorneys handling 28 charges would increase, on average, from \$8,500 to \$14,000 or \$18,000, respectively.

Raising pay caps too much could potentially exacerbate public defender recruitment and retention challenges

As compensation for court-appointed work increases, there may be some attorneys who shift away from considering becoming (or remaining) a public defender. Currently, a court-appointed attorney with a “high” workload (275 charges; equivalent to the workload of one public defender) would be compensated \$83,000 annually, on average. This is less than the average public defender salary of \$92,000 that will be in effect by the middle of FY24. However, under even the most fiscally conservative scenario (Scenario 1), a typical court-appointed attorney with a workload equivalent to a public defender could earn up to \$111,000 each year. This amount is close or even higher than the dollar value of full employment as a public defender when including holidays, paid leave, and benefits. In the scenario with the largest pay caps increase (Scenario 5), the increase in compensation for a high workload court-appointed attorney would be from \$83,000 to \$174,000, more than the total compensation (salary plus benefits) of nearly all public defenders.

Most attorneys, however, do not have such high caseloads. Only a small portion of court-appointed attorneys (about 9 percent in FY22) have a high caseload; the majority handling fewer charges would earn less on average. In addition, an attorney working as a public defender who is considering becoming a private attorney for court-appointed defense work, would also have to consider the costs of losing benefits that come with working as a public defender, including retirement, health insurance, and access to support staff provided by their office. In addition, to match this level of compensation for court-appointed work, a public defender would need to find a majority of their work in a locality without public defender coverage, which could require the attorney to travel more or even move.

Supplemental waiver could be revisited if pay caps are raised

The state could consider eliminating the *supplemental* waiver for any types of charge(s) for which caps are increased. Increasing statutory payment rates would result in caps that are more reflective of the typical time spent working on a charge, thus reducing the need for a supplement. In addition, the supplemental waiver adds complexity to the payment process, which was also cited by attorneys as a factor contributing to dissatisfaction with the court-appointed role. The supplemental waiver could continue to be used for any category of charges where the existing statutory maximum remains the same or is not increased to the full average case time. Regardless of whether caps are raised, the existing discretionary waiver should remain for the rare cases that are more complex and time-consuming than usual.

Higher pay caps would increase court costs for convicted indigent criminal defendants

Raising court-appointed attorney pay caps would increase court costs for convicted indigent criminal defendants. Indigent defendants convicted of a charge are required to pay back the cost of their publicly provided legal defense as part of their court costs—whether they are represented by a court-appointed attorney or public defender. A convicted person who is unable to pay their court costs can have that debt referred for collection, have a financial judgment against them in court, or be kept on probation until the costs are paid. The state could cap the amount of attorney fees that can be assessed against a convicted defendant if it wishes to reduce the financial impact of raising court-appointed attorney compensation on indigent defendants.

Additional safeguards are needed to ensure court-appointed attorney compensation integrity

Court-appointed attorneys submit a payment request to the court at the conclusion of each case (sidebar). The judge reviews and approves the request, which is forwarded to OES for payment. OES verifies that the request includes all necessary information and signatures and takes other steps to verify that another attorney has not already been paid for the same case. Recently, OES has implemented an automated attorney payment request system, which allows this process to be completed electronically. A majority of courts have adopted this system.

OES publishes detailed guidance on how court-appointed attorneys should file for payment, reducing the likelihood of good faith errors on the part of attorneys.

For instance, the guidance specifies that attorneys can only bill for their own time, not for any support staff working in their office. It also outlines how to submit payment forms.

Additional safeguards may be needed to ensure that attorneys' payment requests accurately reflect their time spent working on each charge. In FY22, the state paid 11 attorneys more than \$180,000, indicating they spent more than 40 hours per week, 50 weeks a year on court-appointed work (Table 3-3). While it is possible for attorneys to work more than 40 hours per week, payment for an unusually high number of hours raises questions about whether an attorney is requesting payment for an illegitimate number of hours.

The payment requests of the two highest compensated court-appointed attorneys in FY22 would have required working more than 100 hours per week for 50 weeks of the year. This equates to about 22 hours over five days per week or 16 hours over seven days per week. These two attorneys had similarly high compensation in previous years and in FY23. Their compensation has been consistently high over time—so it is not a result of a one-time spike in payments because of delays in the court docket or a large one-time payment from a judicial waiver for a particularly time-consuming case.

TABLE 3-3
Some attorneys billed the state for more than 40 hours per week in FY22

	Total charges	% of charges Felony/ Misdemeanor ^a	Total payment	At least ... hours per		
				Week	Weekday	Annually
Attorney 1	1,420	57%/42%	\$502,836	111.7	22.3	5,587
Attorney 2	1,434	56%/44%	\$493,767	109.7	21.9	5,486
Attorney 3	351	48%/52%	\$245,273	54.5	10.9	2,725
Attorney 4	474	55%/45%	\$242,697	53.9	10.8	2,697
Attorney 5	1,043	46%/54%	\$241,706	53.7	10.7	2,686
Attorney 6	755	52%/47%	\$228,324	50.7	10.1	2,537
Attorney 7	567	44%/54%	\$194,364	43.2	8.6	2,160
Attorney 8	804	41%/59%	\$192,113	42.7	8.5	2,135
Attorney 9	618	46%/54%	\$188,698	41.9	8.4	2,097
Attorney 10	664	46%/54%	\$187,147	41.6	8.3	2,079
Attorney 11	485	59%/40%	\$183,375	40.8	5.8	2,038

SOURCE: Office of the Executive Secretary court-appointed attorney payment data, FY22.

NOTE: Assumes attorneys work five days per week and 50 weeks per year. In reality, attorneys may spread the work out over more or fewer days. Amounts do not include additional reimbursements for items such as mileage or other expenses. ^a Juvenile cases are excluded, as juvenile cases comprise 2 percent or fewer of cases for all attorneys shown; therefore, some percentages may not sum to 100.

A recent legislative audit in Maine found court-appointed attorneys were requesting and being paid for an unrealistic number of hours. The auditor recommended additional oversight and auditing of the payment system, including periodic reports about the amount of hours each attorney bills in a given year.

To uphold the integrity of the court-appointed system, OES should more closely review and analyze individual attorney payments to ensure they are requesting payment for a reasonable number of charges and legitimate hours worked. OES already submits quarterly reports to the General Assembly that summarize statewide court-appointed attorney payments, and this additional review and analysis could be conducted quarterly as well. The General Assembly could give OES the discretion whether to publicly report the analysis of individual attorney compensation as part of the quarterly report.

To perform this quarterly review, the OES Department of Fiscal Services would need specific criteria for identifying attorneys whose payment requests warrant further scrutiny. The Virginia Judicial Council and Committee on District Courts, which set policies related to the operation of the judicial system in Virginia, could set the criteria. Criteria for further review should include, at a minimum, measures of the number of hours of work for which payment is being requested and the number of charges handled. For example, criteria could include:

- payment requests for 2,500 or more hours annually (or 625 hours or more quarterly), which would require working at least 50 hours per week, 50 weeks per year on court-appointed criminal defense to legitimately work that number of hours.
- payment requests for 410 or more charges annually (approximately 100 or more quarterly), which would be a workload equivalent to or more than the workload of 1.5 full-time public defense attorneys.

In FY22, the proportion of charges for which maximum payment was requested was 60 percent statewide.

Consideration could be given to other measures. One such measure could be the proportion of payment requests submitted by individual attorneys where they are seeking the *maximum* payment (e.g., meeting the payment cap) for charges handled (sidebar).

Flagging court-appointed attorneys that meet or exceed these or other criteria that the Judicial Council and Committee on District Courts establish should help to identify instances in which court-appointed attorneys have unreasonably high caseloads or are submitting payment requests for an illegitimate number of hours worked and help to ensure the integrity of the system and the quality of representation.

OES should forward the names of court-appointed attorneys whose payment requests meet the established criteria to relevant judges. The workload and payment amounts for attorneys meeting or exceeding the criteria should be shared with the chief judge of the courts in which the attorneys actively practice for their review. Chief judges would then have the responsibility to take appropriate action, which could include curtailing the attorney's appointed work moving forward or further investigating the legitimacy of the payment requests. This investigation could include further scrutiny of the attorney's future payment requests to confirm the legitimacy of the number of hours worked as well as reporting the attorney to the Virginia State Bar or law enforcement as appropriate.

RECOMMENDATION 3

The General Assembly may wish to consider amending § 19.2-163 of the Code of Virginia to require the Judicial Council of Virginia and the Committee on District Courts to set criteria the Office of the Executive Secretary of the Supreme Court of Virginia should use to review payment requests from court-appointed attorneys to identify attorneys with potentially unreasonably high court-appointed workloads or who request payment for an illegitimate number of hours worked.

RECOMMENDATION 4

The General Assembly may wish to consider amending § 19.2-163 of the Code of Virginia to direct the Office of the Executive Secretary of the Supreme Court of Virginia to review court-appointed attorney payment requests on a quarterly basis and notify the chief judge of the courts in which any court-appointed criminal defense attorney actively practices when a quarterly review of attorney payments shows unreasonably high court-appointed workloads or request for a potentially illegitimate number of hours worked, according to criteria set by the Judicial Council of Virginia and the Committee on District Courts.

The implementation of this review would require OES staff to conduct additional analysis and reporting, and, in some instances, create the need for staff to notify and provide information to chief judges. This would represent additional work for agency staff and could result in a fiscal impact.

VIDC could notify all court-appointed attorneys that review and analysis of individual attorney payments will be conducted, and OES should also update the Chart of Allowances to inform attorneys that this review will be occurring. These actions should help to discourage attorneys from accepting an unreasonably high number of charges and deter attorneys from submitting requests for an illegitimate number of hours.

4 Public Defender Staffing and Workload

The study resolution directed JLARC staff to determine how many public defenders the state needs and the impact compensation has on maintaining a sufficient public defender workforce to provide quality representation. Having an effective public defender workforce is essential for ensuring each indigent defendant receives adequate counsel. It is also in the state's interest to have enough public defender staffing. Over the past year, six offices had to pause accepting new cases for at least four weeks because of insufficient staffing, with two offices having to pause for more than 12 weeks. When public defender offices cannot accept new cases, these cases must be assigned to court-appointed attorneys. However, fewer attorneys have been willing to serve as court-appointed attorneys in recent years, and remaining court-appointed attorneys are also struggling with increasing workloads (see Chapter 3).

Chapter 2 indicates that public defenders likely provide representation that is of the same quality as that provided by court-appointed and privately retained attorneys. Continuing to maintain adequate public defender system representation depends on having enough public defenders to sufficiently handle their workload and the ability to attract and keep quality attorneys.

Vacant positions rose substantially as new positions were added and two new offices were created

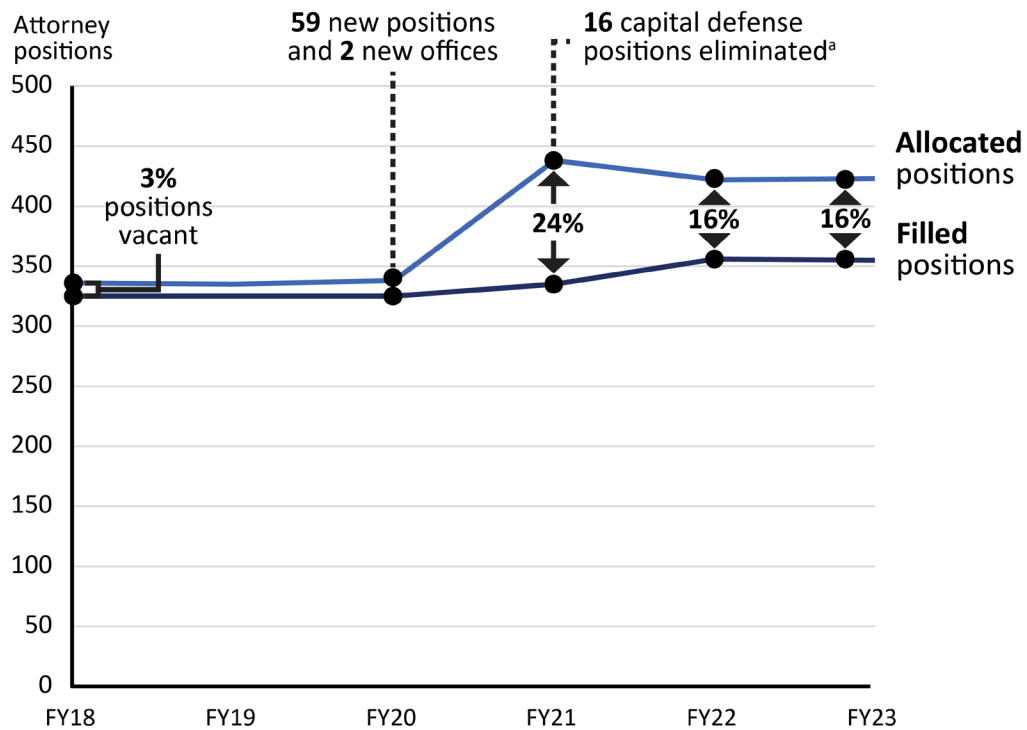
A major reason that JLARC was directed to review the public defender system was concern about the growing number of vacant public defender office attorney positions. When JLARC was directed to conduct its review in November 2022, the system was struggling to fill a substantial number of vacant positions, especially entry level.

After a period of relatively low vacancies, the number of vacant positions began to increase in FY20 (Figure 4-1). In FY21, the General Assembly allocated 59 attorney positions to the Virginia Indigent Defense Commission (VIDC) to be allocated across existing public defender offices, plus additional positions to staff new public defender offices in Prince William and Chesterfield counties, which created substantially more vacant positions. VIDC had difficulty filling both new and existing positions as a result of workforce challenges—primarily high workload and low compensation—and a difficult hiring environment exacerbated by the COVID-19 pandemic. This combination of factors contributed to a statewide vacancy rate of 24 percent in FY21.

The public defender attorney vacancy rate decreased in 2022 and into 2023. VIDC began to fill many of the attorney positions in the two new public defender offices. Also during this time, 16 attorney positions were reallocated as support staff positions.

(After Virginia stopped imposing the death penalty, capital murder attorney positions were reallocated across public defender offices as support staff positions.) Though the percentage of vacant positions had declined to 16 percent, this was still more than five times the recent average prior to FY21.

FIGURE 4-1
Public defender vacancies rose as positions and offices were added



SOURCE: Department of Human Resources HuRMan and Cardinal data, FY18–FY23.

NOTE: ^aVIDC retained 16 capital defense attorney positions upon the closure of the capital defense offices and reallocated those positions across public defender offices, largely as support staff positions.

As more experienced attorneys left the profession, overall experience for public defender attorneys decreased from an average of 7.7 years in FY20 to 7.1 years in FY22. Experience is a key component of attorney quality, and judges most often point to a lack of experience as a factor affecting the quality of public defender representation. Public defenders have fewer years of experience on average than court-appointed defense attorneys.

Entry-level public defenders are staying on the job for less time. From FY13 to FY20, assistant public defender Is left VIDC after 2.7 years, on average. However, during FY21 and FY22, the average assistant public defender I was only in the position 1.5 years before leaving.

Public defender system has filled more of its vacant positions in recent months

Many attorneys who decide to work as public defenders do so because of their interest in public service and passion for the work. The top three reasons public defenders cited for initially choosing to enter the profession include “to improve the lives of indigent defendants” (62 percent); “to uphold the constitutional right to effective assistance of counsel” (48 percent); and “to serve the public” (44 percent), according to JLARC’s survey of public defenders (sidebar).

Low compensation and high workload are by far the most common reasons public defenders cited when asked why they consider leaving their jobs. Low compensation and high workloads have been cited in Virginia, and nationally, as factors that make it difficult for public defender offices to maintain a sufficient workforce and provide quality representation. On a JLARC staff survey, the most common reason cited for why public defenders were considering leaving their job was “the pay is not commensurate with the amount of effort required,” (73 percent). The second most commonly cited reason was “my job does not allow for a good work-life balance,” (56 percent).

The combination of recent state government-wide and public defender-specific salary increases are substantially raising public defender salaries. The General Assembly funded 5 percent salary increases in FY23 and FY24, and an additional 2 percent increase effective January 2024. Moreover, the General Assembly provided additional funding specifically for public defender offices to increase salaries and address salary compression. This new funding will increase the average public defender salary by about \$12,000 and entry-level salaries by more than \$15,000. (See Chapter 6 for more information about public defender compensation.)

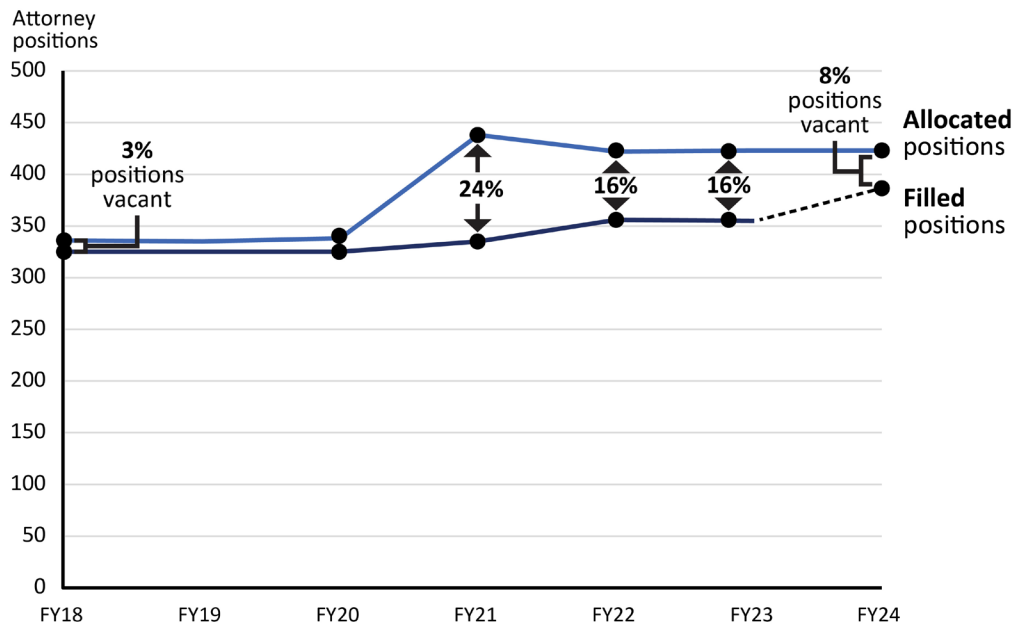
VIDC has also recently been improving its recruitment for public defender attorney positions. Attorney recruitment has historically been up to the chief public defender in each office. However, chief public defenders were having difficulty dedicating enough time to attorney recruitment in addition to their regular responsibilities. In recent years, VIDC has centralized recruitment and now has two staff specifically dedicated to recruitment in the central office. These staff conduct on-campus interviews at law schools, as well as lead and coordinate job fairs. VIDC has also organized and launched a targeted paid internship program for law students. Additionally, in 2023, VIDC leadership hired a professional recruiter to specifically target certain offices with very high vacancy rates and identify strategies to help VIDC make the public defender profession more attractive to prospective applicants.

Amid these efforts, public defender offices have been able to continue to reduce the number of vacant attorney positions. Across all offices, a recent hiring push is beginning to reduce the vacancy rate. Because there were a large number of positions open system wide, VIDC targeted and made offers to students in their third year of law school, contingent on their graduation and passing the Bar. As of early FY24 (October

JLARC staff surveyed public defenders and support staff across the state to obtain their perspectives on several topics, including workload, compensation, and training. A total of 466 public defenders attorneys and support staff responded to the survey, for a 77 percent response rate. See Appendix B.

2023), 8 percent of attorney positions were vacant—half the vacancy rate of the prior year (Figure 4-2). The recent additional funding for salary increases will also likely improve VIDC’s ability to recruit new attorneys moving forward and retain existing attorneys, both of which would further reduce vacancy rates.

FIGURE 4-2
More positions are being filled as of early FY24

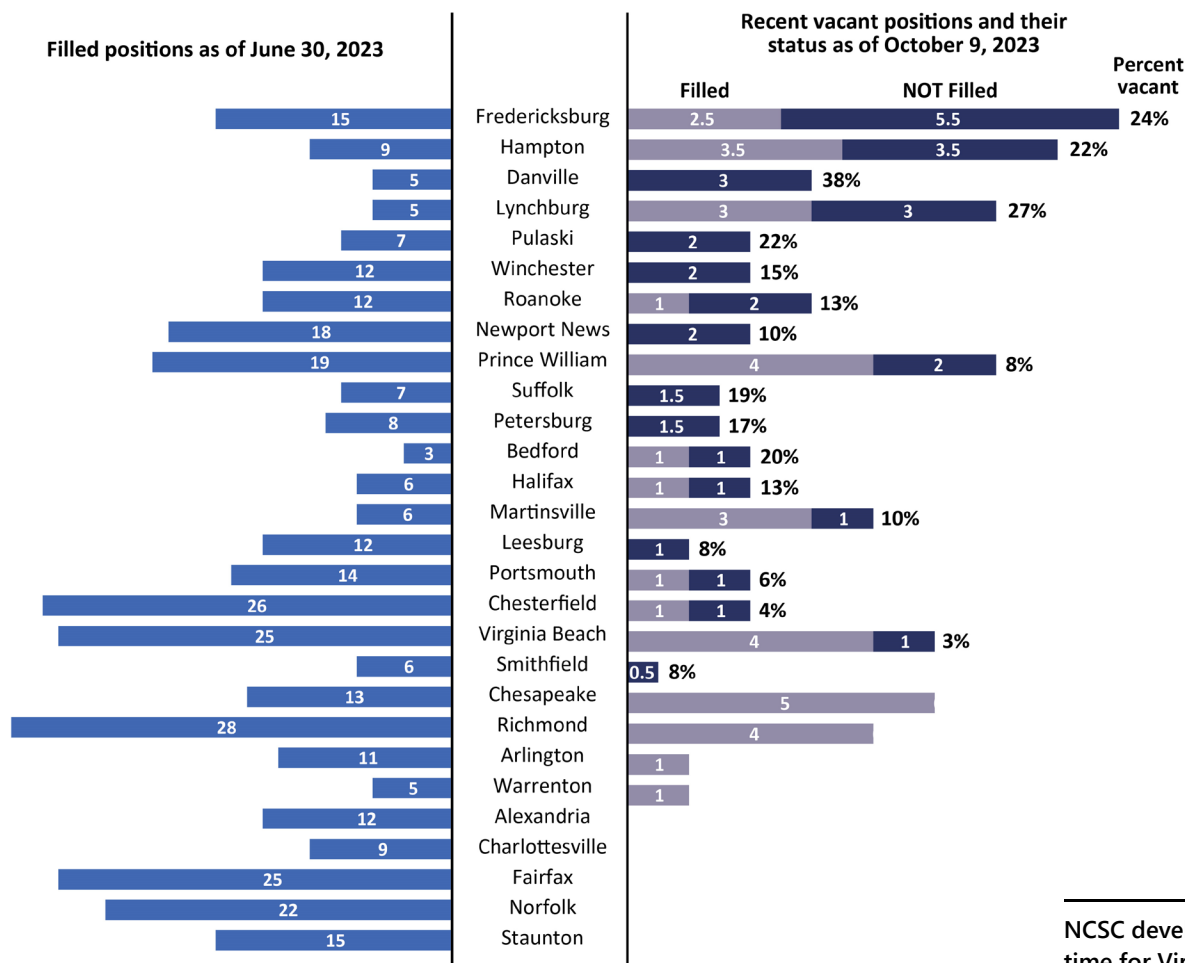


SOURCE: Department of Human Resources HuRMan and Cardinal data, FY18–FY23; VIDC staffing data, October 2023.

Some offices have made progress filling vacant positions thus far in FY24, but others still have high vacancy rates. Five offices have no vacant positions. Fifteen of the 28 public defender offices were able to fill at least one vacant position (Figure 4-3). However, as of early FY24 there are still six offices with 20 percent or more of their attorney positions still vacant: Fredericksburg, Hampton, Danville, Lynchburg, Pulaski, and Bedford.

Positions are generally being filled by individuals with less experience. Nearly all new hires in October 2023 came from offers to prospective law school graduates who will have no previous experience when they start as a public defender. In addition, most public defender offices also have at least one attorney position that is “under filled.” For example, an office may be allocated an assistant public defender II position, but choose to fill it as an assistant public defender I if there are no applicants who are otherwise qualified for the higher position. Though many public defender offices now have lower vacancy rates, having a higher number of less experienced attorneys and under filled positions may mean they are less than optimally staffed to handle their full workload. As of October 2023, approximately 50 attorney positions were underfilled across the public defender system statewide.

FIGURE 4-3
Most offices have been able to hire at least one attorney or have no vacant attorney positions
(October 2023)



SOURCE: FY23 Virginia Indigent Defense Commission Cardinal data and VIDC office-level staffing data, October 2023.
 NOTE: Recent vacant positions are those that were vacant as of June 30, 2023 or later.

NCSC developed case time for Virginia in 2010 (e.g. "case weights"), which provided a formula to assess public defender workload and staffing based on the average amount of time needed to provide quality representation on each case relative to the amount of available working time. JLARC worked with NCSC to update the 2010 case times to reflect the current environment and legal practices.

Workload of public defender system has increased

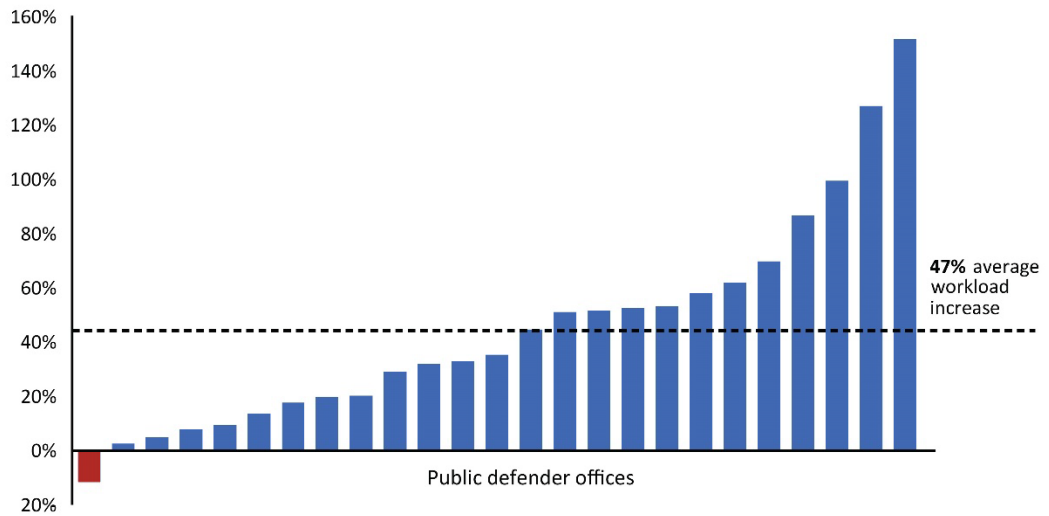
Attorney workload is a key factor that can affect the quality of representation. A higher workload is not necessarily an indicator that attorneys are delivering lower quality representation, but is concerning because it increases the likelihood that attorneys do not have sufficient time to provide all aspects of quality representation. JLARC worked with the National Center for State Courts (NCSC) to update the amount of time estimated necessary to provide representation for different types of criminal cases and found that the amount of time needed in each case has increased over the past decade (sidebar).

Public defenders are working fewer cases, but each case now takes longer, resulting in higher workload

Changes in public defender workload were determined by accounting for changes in both the number and nature of cases (e.g., proportion of felonies vs. misdemeanors, etc.) for each public defender office.

In addition to having fewer public defender attorney positions filled in recent years, public defenders’ workload has increased. Statewide, workload is estimated to have risen nearly 50 percent over the last decade (sidebar). From FY13 to FY22, public defender workload is estimated to have increased an average of 47 percent across public defender offices (Figure 4-4). Workload has increased the most in Winchester (158 percent), Arlington (133 percent), and Staunton (104 percent).

FIGURE 4-4
Workload has increased an average of 47 percent across public defender offices (FY13–FY22)



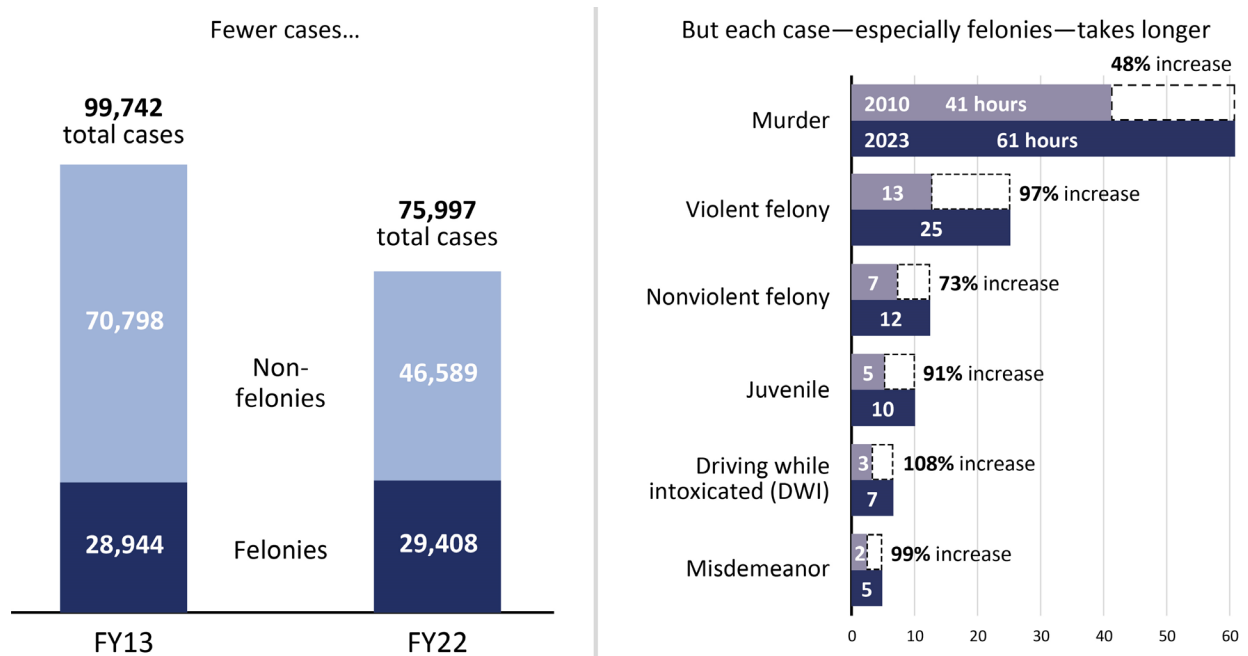
SOURCE: JLARC staff analysis of Virginia Indigent Defense Commission caseload data and National Center for State Courts case weights.

NOTE: Excludes Prince William and Chesterfield, as these offices were not open in FY13 to calculate a change in workload. Also excludes Warrenton, which was not a standalone office in FY13.

This workload increase is not due to more cases, but rather cases requiring more time—especially felonies (Figure 4-5) (Appendix D). Across 10 different case types, the amount of time estimated to be necessary for each case in 2023 has increased by an average of 70 percent from 2010. The most time-consuming cases—felonies—are estimated to now take substantially more time than in 2010. For example, a violent felony is estimated to take 25 hours on average, up from about 13 hours in 2010—nearly twice as long (Appendix G).

FIGURE 4-5

The number of cases has declined, but the decline has been offset by cases taking more time, especially violent felony cases



SOURCE: Virginia Indigent Defense Commission case data, FY13–FY22, and National Center for State Courts Virginia public defender workload assessments, 2010 and 2023.

NOTE: Time needed to defend an appellate case increased 135 percent from 51 hours to 119 hours, but is not shown because of scaling. Appellate cases also represent a small proportion of total cases. Other case weights not shown include probation violations for felonies, misdemeanors, and juveniles. Felony and misdemeanor probation violations are both estimated to take more time in 2023 than 2010, to varying extents. See Appendix G for more information on caseload, case weights, and workload.

Public defenders report a variety of factors that have increased the amount of time they spend on each case in recent years, including:

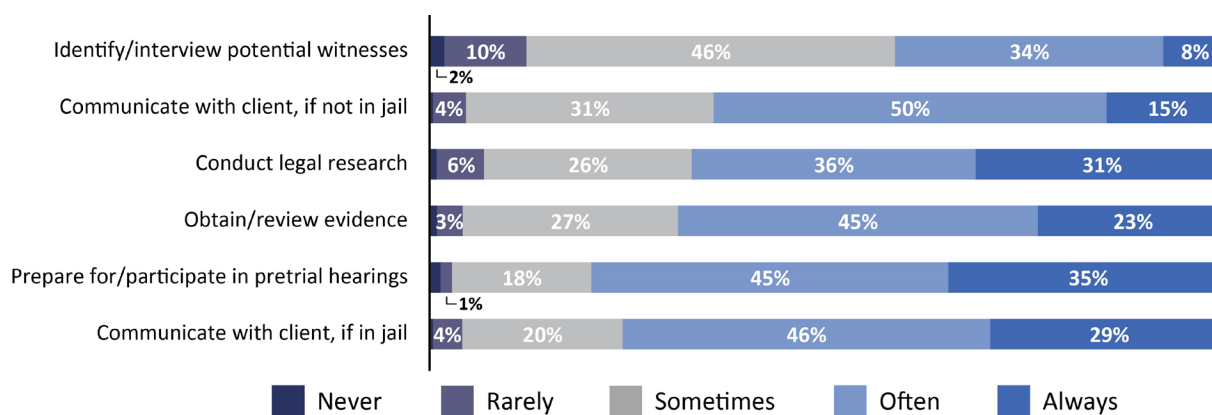
- a proliferation of electronic evidence to review, such as body worn camera footage, mobile devices (e.g., text messages), and social media;
- a number of statutory changes and resulting changes to legal practice, including the elimination of presumptions against bail and the ability for a defendant to receive judge sentencing upon conviction in a jury trial;
- a philosophical shift to a holistic criminal defense, which aims to address both the legal and social needs that can help mitigate punishment for current offense(s) or reduce the chance of future contact with the criminal justice system; and
- more travel to visit clients as a result of an increased use of regional detention centers (rather than local jails).

Workload imbalance can hinder quality of representation and court operations

Chapter 2 found no evidence of a significant difference in key representation outcomes among court-appointed attorneys, privately-retained attorneys, and public defenders. However, long-term imbalances between the workload handled by the system and the number of attorneys available may eventually compromise the quality of representation.

Many attorneys responding to the JLARC survey indicated that due to their workload, they only “sometimes,” “rarely,” or “never” have time for some activities that could be important for a case, such as interviewing potential witnesses (Figure 4-6).

FIGURE 4-6
Public defenders cannot always complete tasks associated with a quality defense



SOURCE: JLARC survey of public defenders.
NOTE: For each of the activities above, public defenders were asked, “across all of my cases, I generally have sufficient time to...” Two activities were phrased as “only if necessary,” but received a high percentages of sometimes, rarely, or never responses: identify and confer with independent experts (80 percent) and visit the crime scene (79 percent).

Judges have expressed concern about the need to address the imbalance between workload and the number of staff available:

Our public defenders all seem committed to the work they do, but are constrained in their efforts by the number of cases they are handling. They just have too many cases. (Judge)

Our public defenders are constantly going back and forth between at least two, and sometimes all three courts during a docket. They are prepared and provide great representation when they appear in court, but they are spread far too thin, which decreases efficiency in each courtroom. (Judge)

When asked what actions would help concerns they have with the public defender system, judges most frequently cited greater compensation (65 percent) and more manageable caseloads (56 percent).

Additional support staff would be cost effective, near term way to address workload challenges

An insufficient number of support staff to help attorneys with administrative and case-related tasks is cited by a majority of public defenders as a factor contributing to their workload challenges. The public defender system includes five types of support staff: mitigation specialists, paralegals, investigators, legal assistants, and office managers (sidebar). Just half of public defenders reported having enough support staff to provide quality representation to their clients. The public defenders who reported having insufficient support staff cited mitigation specialists and paralegals as the greatest needs in their offices.

Public defender offices have varying ratios of attorneys-to-support staff, meaning attorneys in some offices have less support to assist them with their cases. Statewide, the average office currently has 11 attorneys for every one mitigation specialist, 13 attorneys for every one paralegal, eight attorneys for every one investigator, and five attorneys for every one legal assistant. Because VIDC does not have sufficient funding to address high attorney-to-support-staff ratios, most offices only have a single position for each type of support staff (Figure 4-7). For example, the ratio for mitigation specialists is 17:1 in Chesapeake and Portsmouth, 20:1 in Newport News, and 23:1 in Norfolk. Likewise, the ratio of attorneys to paralegals is 24:1 in Prince William, 25:1 in Fairfax, 30:1 in Virginia Beach, and 34:1 in Richmond.

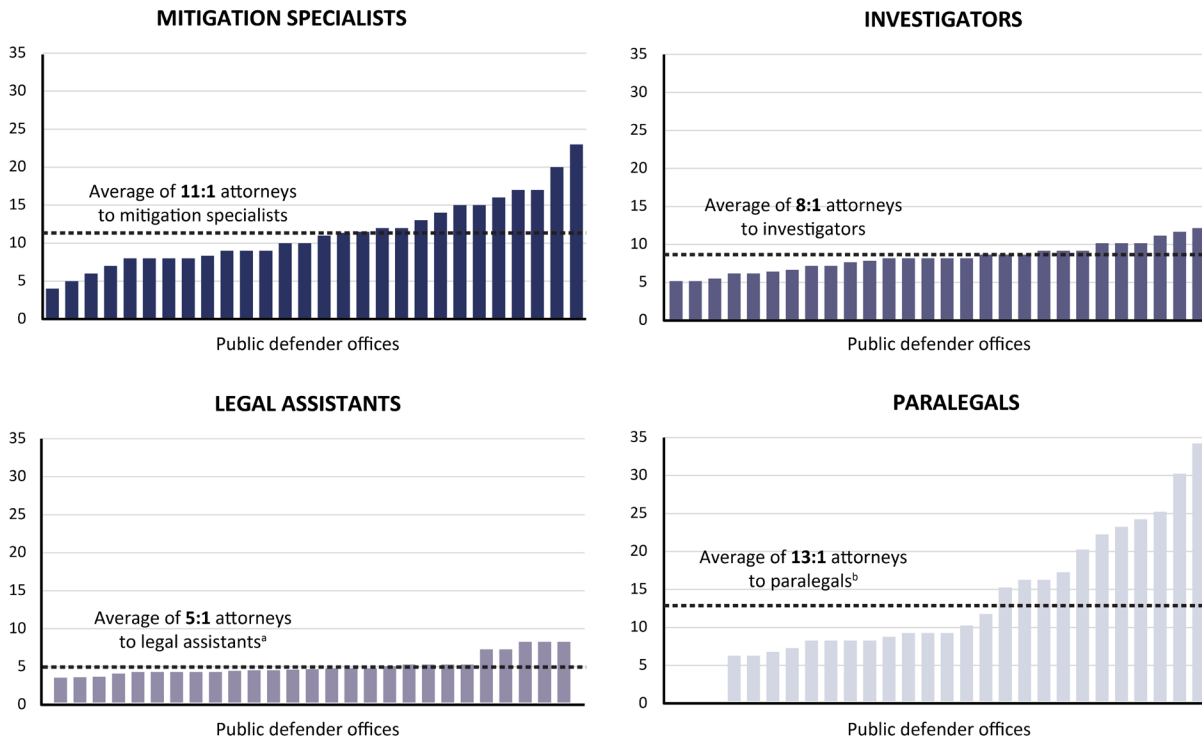
Staff in these roles that support a high number of attorneys often cannot do so for all attorneys and must prioritize which attorneys and cases to assist. The National Association for Public Defense indicates the ideal ratios are 3:1 for mitigation specialists and investigators, and 4:1 for paralegals and legal assistants. Virginia ratios for mitigation specialists and paralegals depart the most from best practices, as there are no offices that meet the national best practice ratios for these two positions. Public defender support staff ratios are also less favorable than state-funded support position ratios for commonwealth's attorneys, which are 7:1 for paralegals and 2:1 for legal assistants.

Providing additional funding to increase the number of support staff in public defender offices could be a relatively cost-effective way to lessen attorney workload. Chief public defenders who responded to a JLARC staff survey report that it often can be easier to fill support staff positions than attorney positions, partially because they require fewer qualifications than attorneys. Staffing data indicates that support staff have lower vacancy rates than attorneys, at 2 percent statewide in FY23 (compared with 16 percent for attorneys). Support staff also have lower average salaries than attorneys and therefore are less costly to employ.

Public defender office support staff include:

- (1) mitigation specialists, who work to understand the defendant's background as it relates to preparing a defense strategy, and may help them to access other services (e.g., drug rehab);
 - (2) paralegals, who assist with various case management activities, such as preparing and filing documents with the court;
 - (3) investigators, who gather relevant information to aid in the preparation of cases;
 - (4) legal assistants, who provide administrative and clerical support;
 - (5) office managers, who assist with day-to-day office operations.
-

FIGURE 4-7
Ratio of attorneys to support staff vary by position and by office



SOURCE: DHRM HuRMan data, FY22.

NOTE: Ratios based on total number of attorney and support staff positions allocated to each office, regardless of any vacancies. ^a Bedford office does not have any legal assistant positions. ^b Alexandria, Bedford, and Smithfield offices do not have any paralegal positions.

“ We could keep 10 mitigation specialists busy. We officially have only one, but we use our two ‘paralegals’ as mitigation specialists since the needs for that work are so high. ”

—Public defender

Additional mitigation specialist and paralegal positions could be allocated to public defenders offices to help lessen attorney workload. One approach would be to increase support staff in offices with less support staff than the average office to meet the statewide ratios (11:1 for mitigation specialists and 13:1 for paralegals). This would require an additional 13 mitigation specialists and 16 paralegals at an annual cost of approximately \$1.6 million (Table 4-1). Providing sufficient support staff to achieve the ideal ratios (3:1 for mitigation specialists and 4:1 for paralegals) would cost substantially more—\$10 million to hire 100 more mitigation specialists and 75 more paralegals.

TABLE 4-1
Options for increasing mitigation specialist and paralegal positions range from \$1.6 million to \$9.9 million annually

Support staff position	New attorney-to-support-staff ratio	Total additional positions	Annual cost
Mitigation Specialist			
	Current 11:1 ratio as minimum for all offices	13	\$750k
	7:1	22	\$1.3M
	3:1	102	\$6.0M
Paralegal			
	Current 13:1 ratio as minimum for all offices	16	\$825k
	8:1	22	\$1.1M
	4:1	75	\$3.9M

SOURCE: JLARC staff analysis of Virginia Indigent Defense Commission staffing data.

NOTE: Ratios calculated as a statewide average based on Virginia Indigent Defense Commission's total allocated attorney positions and assumes all positions are filled. Additional support staff would be needed to meet these ratios if more attorney positions were allocated to VIDC. Cost based on FY24 entry salary for each position, including differential for Northern Virginia localities.

RECOMMENDATION 5

The General Assembly may wish to consider including funding in the Appropriation Act for additional mitigation specialist and paralegal positions to lessen public defender office attorney workload.

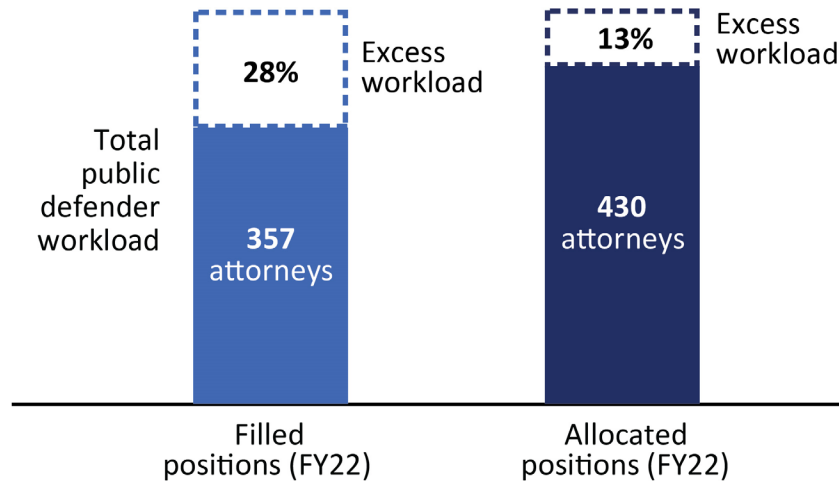
More attorney positions or system expansion can be longer term considerations

While increasing the number of support staff could lessen average attorney workload to some extent, it does not directly address the core issue of having too few attorneys system wide to handle the workload. VIDC employed 357 attorneys in FY22. Utilizing the updated NCSC case times, this number of attorneys was sufficient to handle approximately 72 percent of public defender workload statewide that year. Even if all vacant positions were filled for a total of 430 attorneys, the public defender system would still only have enough attorneys to sufficiently handle 87 percent of its workload (Figure 4-8).

After the full impact of recent salary increases and recruitment efforts on attorney vacancy rates is clear, revisiting the number of allocated positions based on updated workload measures may be needed. As of FY23, the public defender system would require 495 attorney positions to fully meet its workload, an increase of 65 attorneys (15 percent) over existing *allocated* positions. As long as the system continues to have an insufficient number of attorneys to meet workload demands, concerns with attorney burnout, turnover, and quality of representation will persist. Additional efforts

may eventually be needed to bring the number of attorney staff closer to the total number needed to sufficiently handle public defender workload.

FIGURE 4-8
Public defender workload exceeded filled and allocated positions in FY22



SOURCE: JLARC staff analysis of Virginia Indigent Defense Commission caseload data and National Center for State Courts case weights.

In the future, after the currently allocated public defender attorney positions have been filled and the impact on attorney workload assessed, adding new offices could also be considered. Several factors should be considered if the state wishes to expand public defender coverage to one or more localities, including:

- whether there is a sufficient number of quality court-appointed attorneys to handle a locality’s indigent defense workload;
- whether expanded public defender coverage could best be achieved through expansion of an existing office or creation of a new office; and
- the number of public defender attorney positions that would be needed to handle a new locality’s caseload.

Appendix H includes additional information about key considerations for expanding public defender coverage and example staffing calculations.

5 Commonwealth's Attorney Staffing and Workload

The study resolution directed JLARC to review the adequacy of the number of commonwealth's attorneys to appropriately prosecute crimes. Having enough quality prosecutors is important for ensuring that commonwealth's attorney offices can effectively prosecute criminal charges, represent the state's interests, and protect the rights of victims and the accused. Commonwealth's attorney staff are local employees of a locally elected constitutional officer (Commonwealth's Attorney), but offices receive state funding for staff compensation and other office expenses. State funding is determined by the Compensation Board and subject to approval and appropriation from the General Assembly. The Compensation Board uses staffing standards—a formula to calculate staffing needs based on workload—to determine staffing allocations and funding for commonwealth's attorney offices.

Commonwealth's attorney workload is primarily driven by the number of cases they prosecute and the time required to effectively prosecute those cases, as well as the time they spend on other responsibilities (e.g. non-prosecutorial assistance such as legal advice, and administrative tasks). In 2023, the National Center for State Courts (NCSC) quantified the amount of time commonwealth's attorneys typically spend on different types of cases and non-case related activities. The Compensation Board will use the results of that study to inform future commonwealth's attorney staffing allocations.

Commonwealth's attorney vacancies have increased, primarily in lower paying positions and offices

The number of vacant commonwealth's attorney positions has increased recently, indicating greater difficulty for commonwealth's attorneys to recruit and retain staff. Commonwealth's attorney vacancy rates were generally stable from FY18–FY20 but have increased in recent years (Figure 5-1). In FY23, vacancy rates across all attorney positions averaged 6.5 percent, up from 3.1 percent in FY18. Vacancy rates were highest for commonwealth's attorney I positions—which are entry level positions and have the lowest salary—with 41 out of 294 positions vacant (14 percent) (sidebar).

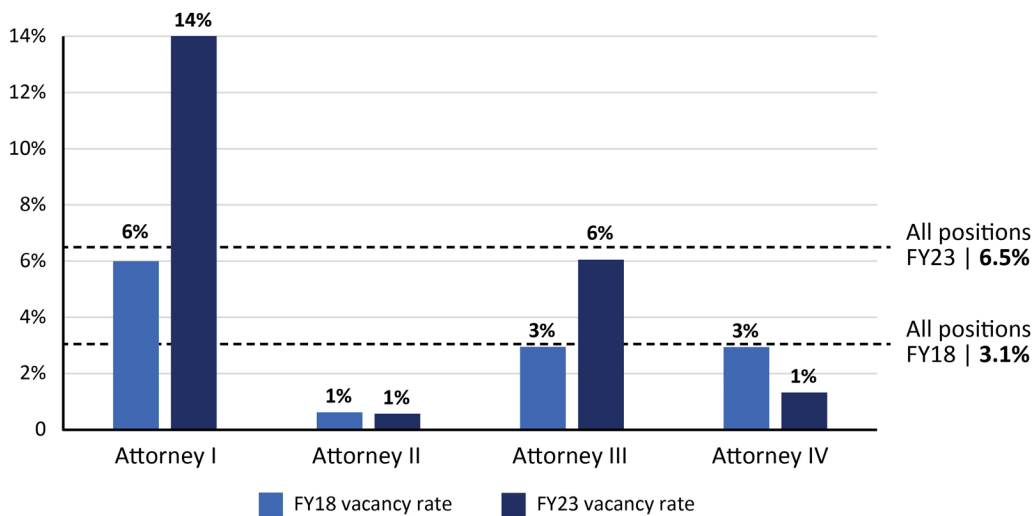
Coinciding with the increase in vacant positions, commonwealth's attorneys are seeing more turnover among attorney positions, and those positions are taking longer to fill. The turnover rate, which is the proportion of attorney positions that became vacant at any point during a year, increased from 23 percent in FY18 to 27 percent in FY23. It is also taking offices longer to fill vacant attorney positions (56 days on average in FY23 compared with 27 days on average in FY18).

Generally, there are five levels of commonwealth's attorney positions: commonwealth's attorneys I, II, III, IV, and the elected commonwealth's attorney.

Vacancies reported here include only **state-supported attorney positions** receiving funding from the state via the Compensation Board. Many offices have attorney positions that are entirely paid for with local funds.

Though lower than public defender vacancy rates, vacancies in a commonwealth’s attorney office can be concerning for several reasons. Not having enough filled positions may hinder an elected commonwealth’s attorney’s ability to adequately prosecute crimes. A vacant position also increases the workload for remaining attorneys, which can hinder their ability to effectively carry out their role. In addition, a higher workload can lead to burnout and increase the chance of additional staff departures, thus worsening turnover and staff vacancies. This is especially problematic for commonwealth’s attorneys because many offices around the state are small, so even a single vacancy can cause significant additional workload for the remaining attorneys; 86 offices are allocated five or fewer attorney positions by the state.

FIGURE 5-1
Vacant commonwealth’s attorney I positions have risen substantially



SOURCE: Virginia Compensation Board, FY18–FY23.

NOTE: Attorney I includes attorney I, juvenile justice attorney I, attorney A (part-time), attorney B (part-time), and juvenile justice attorney A (part-time); attorney II includes attorney II, career prosecutor II, and juvenile justice career prosecutor II; attorney III includes attorney III, drug prosecutor III, gang prosecutor III, and insurance fraud prosecutor. Vacancy rates include only state supported funded attorney positions. Excludes positions that are fully funded by the locality and unfunded state positions. Elected commonwealth’s attorney positions are included in the statewide average vacancy rate; vacancy rates excluding elected commonwealth’s attorneys are 3.7 in FY18 and 7.8 in FY23.

Additional commonwealth’s attorney positions would help handle felony workload more efficiently

Commonwealth’s attorney workload is driven by the number and types of cases they prosecute, and the amount of time it takes to prosecute cases has increased in recent years. Cases now take longer to prosecute for many of the same reasons that defense attorneys need more time to defend each case (Appendix D). These reasons include a proliferation of electronic evidence; statutory changes, such as the elimination of presumptions against bail and the ability for a defendant to receive judge sentencing

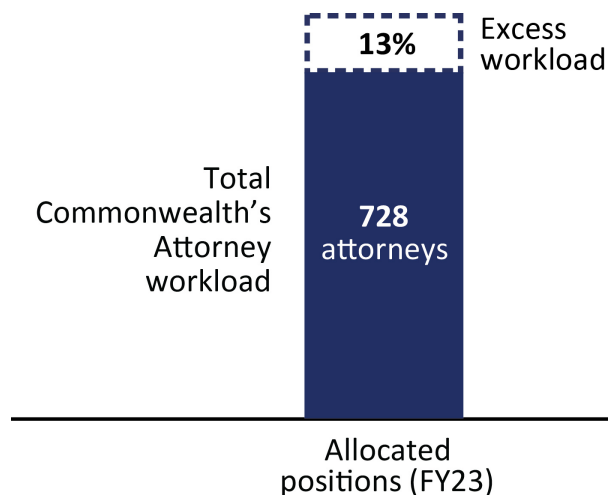
upon conviction in a jury trial; and a more holistic approach to criminal prosecution, including using diversion programs as an alternative to traditional criminal prosecution and detention.

The Compensation Board recently approved changing the staffing standards used to allocate attorney positions to commonwealth's attorney offices to better calculate attorney workload and the number of staff needed in each office to handle that workload. NCSC developed the new staffing standards in 2023, and they will be used during the FY25–FY26 budget request process. The board's previous standards did not differentiate among types of felonies, even though more serious felonies take more staff time to prosecute. The new standards account for the *types* of felony charges prosecuted by each office and the amount of time that it takes to prosecute those types of charges (i.e., “case weights”). In addition, the standards account for other factors affecting prosecutor workload that were not included in the prior standards, such as time spent on non-case-related activities, like professional development, staff supervision, and administrative tasks.

Currently, the state funds 728 commonwealth's attorney positions statewide, which is less than the number requested by the Compensation Board. These positions, if filled, would accommodate 87 percent of the total estimated workload based on the updated workload analysis (Figure 5-2). Allocated positions range from just one attorney—the elected commonwealth's attorney—in 12 offices to 32 attorneys in the City of Richmond office. Localities can provide additional funding to supplement the salary of state-supported attorney positions or fully fund additional attorney positions entirely from local funds. Localities fully funded an additional 292 attorney positions statewide in FY23.

Under the new staffing standards, the state would need to allocate approximately 112 more state funded attorney positions to meet the statewide workload. This would be a 15 percent increase to the 728 state-funded attorney positions currently allocated. These additional commonwealth's attorney positions would cost the state an estimated \$9.2 million annually. Under the new standards, a majority of offices would receive at least one additional attorney position, with several offices receiving more. The largest increases in state-funded attorneys would be for Fairfax (+22 attorneys), Chesterfield (+13), the City of Richmond (+12), Henrico (+9), and Prince William (+9). Nine offices would see a decrease in state-funded attorney positions, eight of which would lose one position and one office that would lose two positions.

FIGURE 5-2
Positions currently allocated to commonwealth’s attorney offices are sufficient to handle 87 percent of current workload



SOURCE: Commonwealth’s attorneys staffing data, Virginia Compensation Board, 2023. National Center for State Courts Virginia Commonwealth’s Attorney workload assessment, 2023.

Filling existing commonwealth’s attorney vacancies would not be enough to fully meet workload demand. Doing so would allow the commonwealth’s attorney workforce to address about 40 percent of the total unmet workload, using the new staffing standards. In addition, filling vacant positions would help address workload only in the 34 out of 120 offices with vacant attorney positions. Several of the offices that have the greatest unmet need have few or no vacant positions. For example, the seven offices that would receive the greatest allocation of additional positions under the new standards did not have a single vacant position in FY23.

Commonwealth’s attorneys generally expressed support for the Compensation Board’s new staffing standards but had concerns that the Board’s adopted standards do not reflect any work for misdemeanor charges (sidebar). Most commonwealth’s attorneys prosecute at least some misdemeanors, which can create a substantial amount of work, but is not accounted for in the state’s staffing standards. As part of its review, NCSC calculated that an additional 391 attorney positions would be required statewide for commonwealth’s attorney offices to sufficiently prosecute all misdemeanors. This would represent a nearly 50 percent increase in attorney staffing relative to the staffing needed based on felony workload, and the funding required for these positions.

Increasing the number of state-funded support staff positions for commonwealth’s attorneys’ offices could be another way to help address concerns about high workloads. Elected commonwealth’s attorneys cited an insufficient number of support staff to help attorneys with administrative and case-related tasks as a factor contributing to higher workload challenges. As of FY23, state funding is provided for 462 total support positions, which are allocated to offices based on ratios. However,

The Code of Virginia requires commonwealth’s attorneys to **prosecute all felony charges**. They have **discretion to prosecute misdemeanors**.

The Compensation Board’s commonwealth’s attorney staffing standards have a mechanism to calculate staffing needs for misdemeanor prosecution.

However, the staffing requests adopted by the Board have traditionally only included workload associated with prosecuting felonies.

this is only about three-quarters of the total needed for support positions, according to the Compensation Board's staffing standards. Fully funding the Compensation Board's staffing standards for commonwealth's attorneys support staff in FY23 would have required 186 additional support positions at an estimated cost of about \$6 million. Despite current funding levels, commonwealth's attorneys still have a more favorable ratio of support staff to attorneys than public defenders. The statewide ratio of commonwealth's attorneys to paralegals was 7:1 and attorneys to administrative positions was 2:1, which are more favorable than the 13:1 and 5:1 statewide ratios for those positions across the public defender system.

6 Commonwealth's Attorney and Public Defender Salaries

The study resolution directed staff to compare salaries paid to public defenders and commonwealth's attorneys, and evaluate the adequacy of their compensation. The resolution also directed staff to estimate the state and local fiscal impact of addressing compensation-related issues.

Commonwealth's attorneys and public defenders are Virginia's publicly funded, full-time attorneys for prosecuting criminal charges and representing indigent defendants. Commonwealth's attorney staff are state-funded local employees, whose salary is set by the Compensation Board and subject to the General Assembly's appropriation (sidebar). Public defenders are state employees, with salary levels set by the Virginia Indigent Defense Commission (VIDC) based on funding appropriated to the commission (sidebar). Beyond the state's base salaries, localities are permitted by statute to provide a supplemental salary to public defenders and/or commonwealth's attorneys within their jurisdiction.

Adequate salaries for both commonwealth's attorneys and public defenders are important to ensure there are enough qualified attorneys to effectively represent the state and indigent criminal defendants. Insufficient salaries can affect recruitment and retention, which can negatively affect the state's ability to maintain an effective adversarial criminal justice system.

General Assembly has increased public defender and commonwealth's attorney salaries

Virginia has increased public defender and commonwealth's attorney salaries in recent years. Public defenders and commonwealth's attorneys received 5 percent across-the-board state salary increases in both FY23 and FY24 and will receive an additional 2 percent increase by January 2024 (Tables 6-1 and 6-2, next page).

In addition to across-the-board state salary increases, the General Assembly allocated an additional \$3.7 million to VIDC in the 2023 Appropriation Act to increase attorney salaries and address employee salary compression for the remainder of FY24 (\$7.4 million in annualized funding for future years). This additional funding will equate to an average annual salary increase of \$12,000 per attorney. In combination with the recent across-the-board state salary increases, the average state-funded salary will increase from about \$76,000 in FY23 to about \$92,000 in FY24 among staff attorneys (21 percent total increase; excluding chief public defenders). Attorneys in localities with a local supplement will receive higher salaries, on average.

The Compensation Board sets staffing levels and state funded salary levels for staff in Virginia's constitutional offices.

The executive director of VIDC is responsible for setting salary levels for attorneys and support staff in public defender offices, upon approval by the Commission.

TABLE 6-1
Recent funding has increased salaries for public defenders

Public defender position	FY23 salary	FY24 salary	Percentage increase
Assistant Public Defender I	\$58,492	\$73,500	26%
Assistant Public Defender II	67,052	82,488	23%
Senior Assistant Public Defender	78,465	94,472	20%
Deputy Public Defender	88,449	104,955	19%
Public Defender	121,265	139,412	15%

SOURCE: Virginia Indigent Defense Commission FY23 and FY24 pay charts.

NOTE: Public defenders in Northern Virginia localities, including Alexandria, Arlington, Fairfax, Fauquier/Warrenton, Fredericksburg, Leesburg, Prince William, and Winchester receive higher salary for each position. ^a As of December 10, 2023.

Similarly, commonwealth's attorneys were allocated \$3.9 million in the 2023 Appropriation Act to increase attorney salaries (\$7.9 million in annualized funding for future years). This equates to an average annual salary increase of \$11,300 per attorney (excluding elected commonwealth's attorneys). In combination with the recent across-the-board state salary increases, the average state funded salary will increase from \$73,000 in FY23 to about \$89,000 in FY24 among assistant commonwealth's attorneys (18 percent total increase; excluding elected commonwealth's attorneys). Attorneys in localities with a local supplement will receive higher salaries, on average.

TABLE 6-2
Recent funding has increased salaries for commonwealth's attorneys

Commonwealth's attorney position	FY23 salary	FY24 salary	Percentage increase
Commonwealth's Attorney I	\$62,509	\$73,500	17%
Commonwealth's Attorney II	62,509	82,488	32%
Commonwealth's Attorney III	79,267	94,472	19%
Commonwealth's Attorney IV	79,267	104,955	22%
Elected Commonwealth's Attorney	138,433 to 165,353 ^a	148,262 to 177,093	Varies ^b

SOURCE: Compensation Board FY23 and FY24 pay charts.

NOTE: ^a Elected commonwealth's attorney salaries are based on the population of the locality and are set in the Appropriation Act; range excludes salaries for elected commonwealth's attorneys in localities with population under 35,000 that serve on a part-time basis. ^b Elected commonwealth's attorney positions receive the 5 percent and 2 percent across-the-board statewide increase but not an increase from additional funds appropriated to target assistant commonwealth's attorney salary adjustments.

The recent salary increases for public defenders and commonwealth's attorneys makes their salaries more comparable with other state-funded attorneys. Previously, state salaries for public defenders and commonwealth's attorneys were generally lower than those of attorneys at the Division of Legislative Services (DLS) and the Office of the Attorney General (OAG). However, following the recent salary increases, median state-funded salaries across all public defender attorneys will be \$95,400 and \$96,600

across all commonwealth's attorneys, compared with \$99,500 for attorneys at DLS and \$107,200 at OAG. Median salaries for public defenders and commonwealth's attorneys who receive a local supplement are higher, at \$105,300 and \$113,000 respectively.

Public defender and commonwealth's attorney salaries were below local government attorney salaries, on average, in the most recent fiscal year, but upcoming salary increases will likely narrow the gap. In FY23, local government attorneys in Virginia were paid an average salary of \$129,714. The average salary for all public defenders, including local salary supplements was 33 percent less than local government attorneys. Likewise, the average salary across all commonwealth's attorneys, including local salary supplements, was 20 percent less. Increased salaries for public defenders and commonwealth's attorneys in FY24 will likely narrow the gaps with other local government attorneys.

Public defender and commonwealth's attorney salaries were also below private sector attorneys, on average, in the most recent fiscal year, but upcoming salary increases will likely narrow the gap. Including local supplements, public defenders were paid an average of 43 percent less than private sector attorneys in the same region of the state in FY23. Including local supplements, commonwealth's attorneys were paid 24 percent less on average than private sector attorneys in their region. Salary increases for public defenders and commonwealth's attorneys in FY24 will likely narrow the gaps with private attorneys but by a relatively small amount.

The value of the comparison to private sector employment has limitations. The nature of the work is generally very different, and income across legal specialties varies substantially. In addition, public defenders and commonwealth's attorneys may have more comprehensive benefits packages (e.g. health insurance, retirement benefits, and leave time) which are not included in salary comparisons.

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

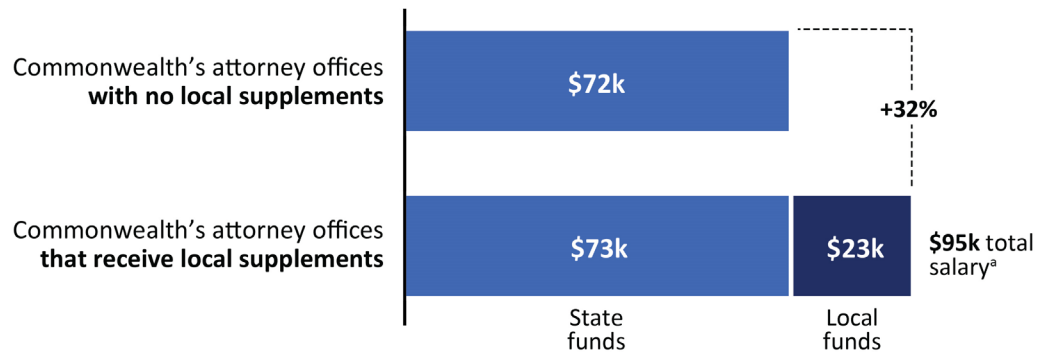
Localities can provide supplemental compensation to public defenders or commonwealth's attorneys within their jurisdiction in addition to state salaries paid to the attorneys. Local supplements can help recruitment and retention because they make salaries more competitive with other attorney salaries. However, because local supplements are discretionary, they increase variation in salaries across offices and regions of the state. Whether localities provide supplements for their commonwealth's attorneys and/or public defenders—and the amount of the supplement—depends on several factors, including (1) total local funding available for supplements and (2) the size of the office/number of attorneys receiving the supplement.

Local supplements help commonwealth’s attorney offices recruit and retain attorneys

Most commonwealth’s attorney offices receive local supplements for attorneys, though the supplement amount varies. In FY23, 87 of 120 offices (73 percent) received local salary supplements, ranging from a per-attorney average of \$51,000 in Prince William County, to less than \$2,500 in five offices. The local supplements can be substantial in some localities. For example, 15 localities provided a supplement that amounts to a 30 to 50 percent increase above the state-provided salary, averaging \$33,000 per attorney.

Because the state sets funding amounts for each attorney position, these local supplements drive the differences in salary among commonwealth’s attorney offices. In FY23, the average salary for all commonwealth’s attorneys was approximately \$72,000. However, the average salary was 32 percent higher (about \$95,000) among offices receiving local supplements (Figure 6-1).

FIGURE 6-1
Commonwealth’s attorney offices that receive local supplements have 32 percent higher salaries on average

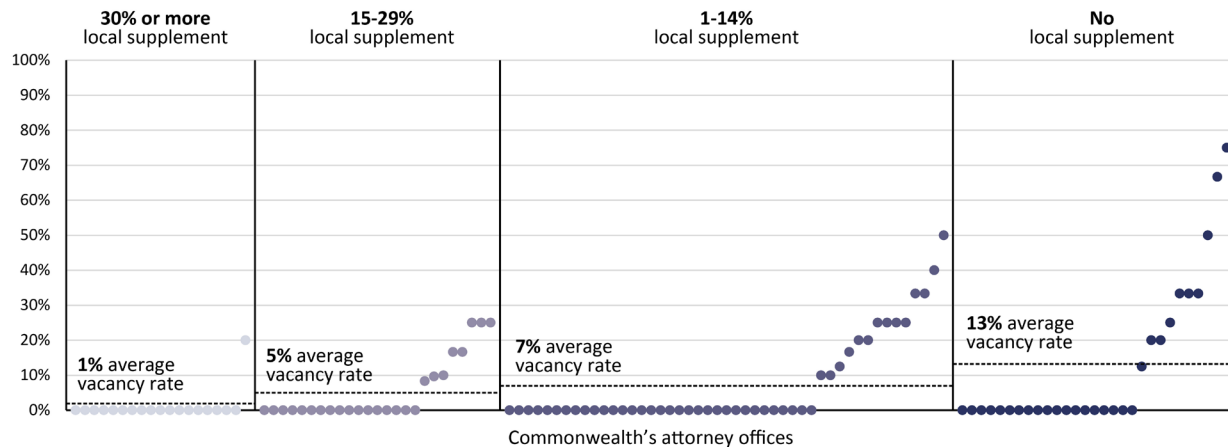


SOURCE: Virginia Compensation Board.

NOTE: Excludes elected commonwealth’s attorney positions; therefore, 14 offices that include only an elected commonwealth’s attorney are not included. Full-time attorney positions only. Includes vacant positions and the expected salary of those positions. ^a Numbers do not sum because of rounding.

Offices with higher local supplements tend to have fewer vacant attorney positions. The statewide average vacancy rate in commonwealth’s attorney offices was 6.5 percent in FY23. However, offices that did not receive local salary supplements had a 13 percent average vacancy rate, with at least one vacant attorney position in 10 of the 29 offices (Figure 6-2). Conversely, offices that received local supplements of 30 percent or more had only a 1 percent average vacancy rate, with just one out of 19 offices having any vacant attorney positions.

FIGURE 6-2
Commonwealth's attorney offices with higher local supplements have lower vacancy rates



SOURCE: Virginia Compensation Board, FY23 (As of December 2022).

NOTE: Local supplement shown as a percentage increase to state salary; represents office-wide average across all filled attorney positions.

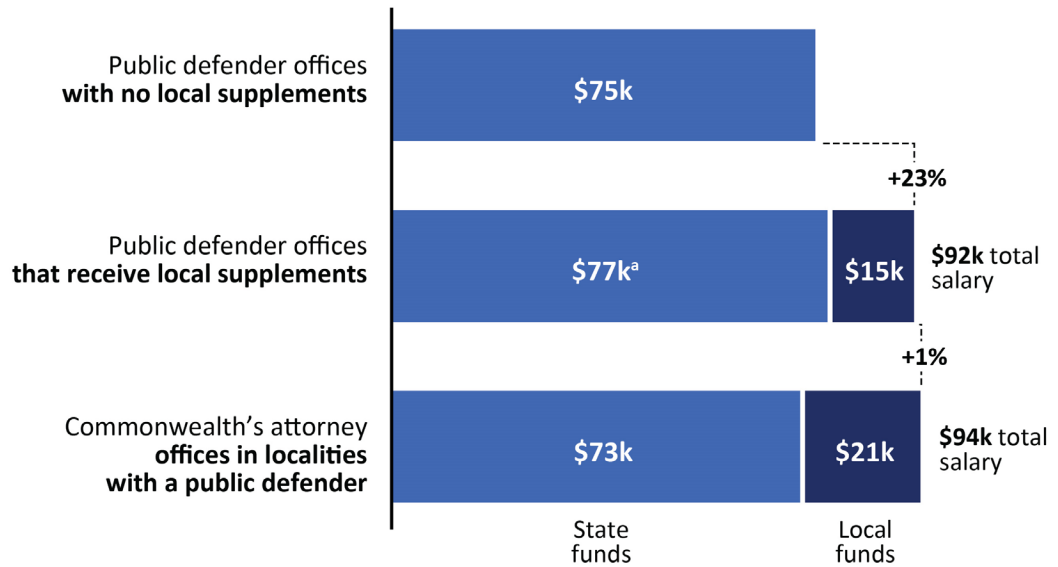
Localities generally choose to provide more supplemental funding to commonwealth's attorneys

Whether, and by how much, a locality supplements funding for commonwealth's attorneys and public defenders is a local policy choice. There is no state policy regarding funding parity between public defenders and commonwealths' attorneys. Local supplements, though, account for a substantial portion of salary in certain jurisdictions and so are relevant when analyzing commonwealth's attorney and public defender salary.

Higher commonwealth's attorney than public defender salaries within the same jurisdiction(s) are largely attributable to commonwealth's attorneys more frequently receiving salary supplements from the locality, which tend to be larger when they are received. The state portion of public defender and commonwealth's attorney salaries is relatively similar, and in many jurisdictions is *higher* on average for the public defender office (Figure 6-3). All public defender jurisdictions encompass one or more commonwealth's attorney offices that 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 (Figure 6-4).

Including local supplements, public defender salaries are lower than commonwealth's attorneys when comparing within specific jurisdictions. Twenty-four out of 28 public defenders offices pay lower average salaries to attorneys than the commonwealth's attorney office(s) in their jurisdiction. While the amounts differ among jurisdictions, attorneys in 11 public defender offices are paid at least 20 percent less than their commonwealth's attorney office(s) (Appendix I).

FIGURE 6-3
Differences in salary between public defender and commonwealth's attorney offices in the same jurisdiction(s)

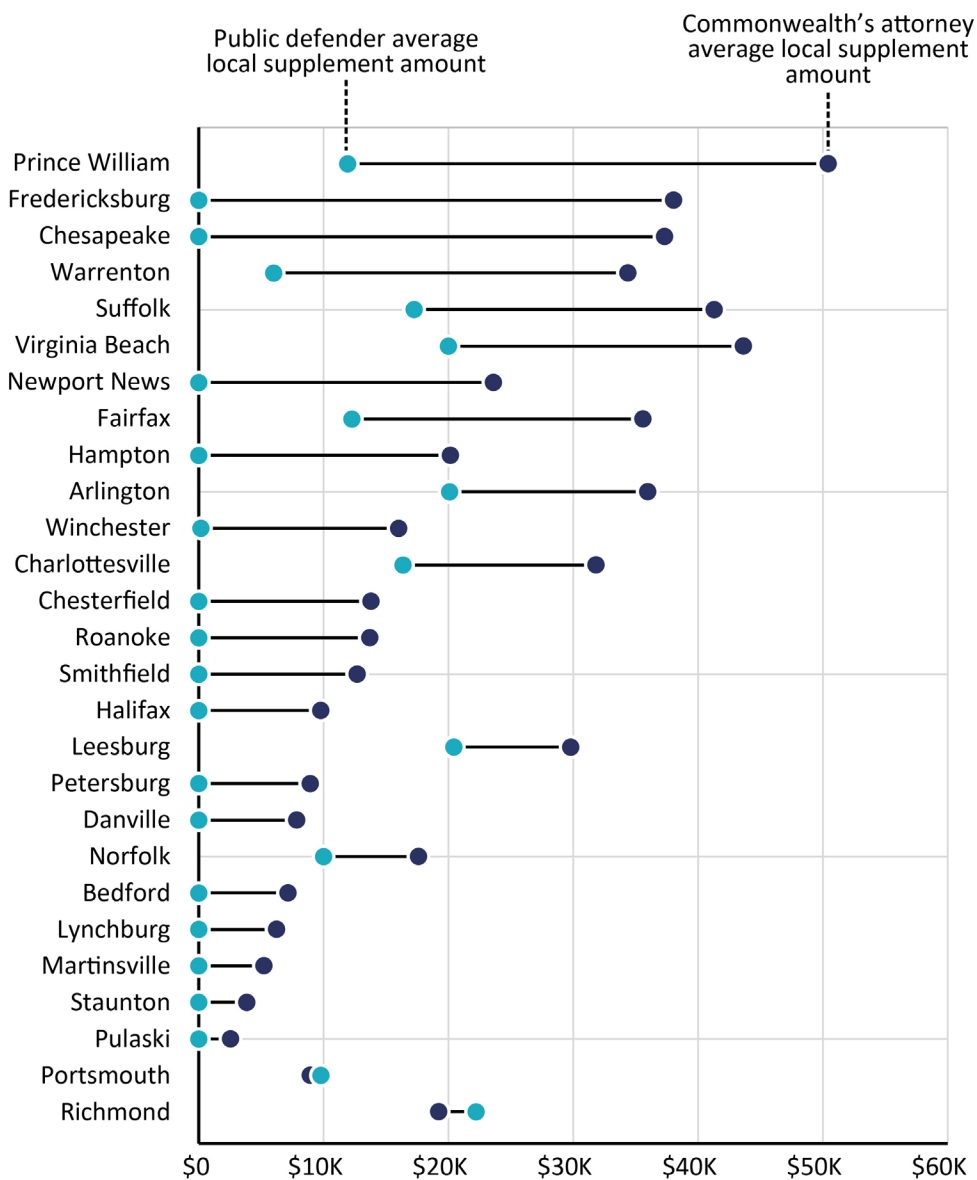


SOURCE: FY23 Virginia Indigent Defense Commission Cardinal salary data, JLARC staff public defender survey, and Virginia Compensation Board.

NOTE: Average salary for commonwealth's attorneys includes all offices within public defender jurisdictions. All public defender jurisdictions encompass one or more commonwealth's attorney office that offers a local supplement. Excludes chief public defender and elected commonwealth's attorney positions. Full-time attorney positions only. Includes vacant positions and the expected salary of those positions. ^a Average state salary is higher for public defender offices that receive a local supplement, because public defender offices in Northern Virginia have higher state salaries and are also more likely to receive local supplements; the state-funded portion of commonwealth's attorney salaries are uniform across all localities.

Public defender offices with a smaller difference between their salaries and the salaries of commonwealth's attorneys in their jurisdiction(s) are typically better able to recruit and retain attorneys. For example, public defender offices that have a 1 to 10 percent salary difference with their commonwealth's attorney office(s) had an average vacancy rate of 12 percent in FY22. Conversely, public defender offices with an 11 to 20 percent difference had an FY22 average vacancy rate of 17 percent, and offices with a 21 percent or greater difference had an average vacancy rate of 22 percent. Similar trends exist for turnover; public defender offices with a smaller difference to commonwealth's attorney salaries in their jurisdiction(s) have lower average turnover rates. These trends were emphasized by chief public defenders, who indicated during interviews and on survey responses that they regularly lose public defenders to higher paying commonwealth's attorney positions in the same jurisdiction.

FIGURE 6-4
Public defenders receive smaller local salary supplements on average than
commonwealth's attorneys



SOURCE: FY23 Virginia Indigent Defense Commission Cardinal salary data, JLARC staff public defender survey, and Virginia Compensation Board.

NOTE: Indicates average local supplement amount per attorney in FY23, excluding chief public defender and elected commonwealth's attorney positions. Average salary for commonwealth's attorneys includes all offices within public defender jurisdictions. All public defenders jurisdictions encompass one or more commonwealth's attorney offices that offer a local supplement. Full-time attorney positions only. Includes vacant positions and the expected salary of those positions. Alexandria receives local supplements for both commonwealth's attorneys and public defenders, but specific information on the average supplement for each public defender attorney was not available.

Several actions could address attorney workforce challenges

The General Assembly provided substantial additional funding for public defender and commonwealth's attorney salaries in FY24 that will likely have a positive impact on the ability of offices to maintain an adequate workforce. Providing additional broad based salary increases may not be necessary or fiscally prudent in the near term, at least until the effects of the recent efforts can be quantified. However, several other targeted actions could help address some of the positions and offices that have the most difficulty maintaining an adequate workforce.

State could expand career prosecutor program to improve retention in commonwealth's attorney offices with the highest vacancy rates

The state could try to further incentivize attorneys to stay who are working in commonwealth's attorney offices having the most difficulty maintaining an adequate workforce. Expanding the existing career prosecutor program to improve attorney salary in offices that *do not* receive local salary supplements could be one approach. The career prosecutor program, which the state currently funds, provides a 19.5 percent annual salary stipend for commonwealth's attorney I positions (about \$15,200 in FY24). To be eligible for a career prosecutor position, attorneys are required to have three years of service as a commonwealth's attorney, received an above average rating on their performance evaluation, and have completed a minimum number of training hours (continuing legal education). Statewide, 148 career attorneys received a career prosecutor stipend in FY23.

The career prosecutor program is available statewide, but a large proportion of attorneys in the program already earn higher salaries because their localities provide supplements. Candidates for the program are awarded the title of career prosecutor and receive the annual stipend on a first-come, first-served basis, as long as they have met program requirements and funds are available (e.g. the program has available slots). Over time, the program has evolved so that offices with greater local salary supplements, and therefore the highest salaries, also have the most career prosecutors. About 20 percent of all attorney positions statewide are designated as career prosecutors in FY23. Only 9 percent of attorneys in offices receiving no local supplement are participating in the career prosecutor program, whereas 26 percent of career prosecutors are in offices with the highest local salary supplements.

Eight out of 33 commonwealth's attorney offices that do not receive a local salary supplement are only allocated a single attorney position, the elected commonwealth's attorney.

The state could fund additional positions as career prosecutor positions in offices with the lowest salaries to aid recruitment and retention. Designating existing positions as career prosecutor positions would cost approximately \$17,000 in state funds per position annually. There are 25 offices that do not receive a local salary supplement and some of these would likely benefit from additional career prosecutor positions (sidebar). Any new career prosecutor positions created for this purpose should be designated only for offices where attorney staff do not receive a local salary supplement.

POLICY OPTION 1

The General Assembly could include language and funding in the Appropriation Act for the Virginia Compensation Board to increase state funds for career prosecutor pay stipends, limiting the new stipends to qualified attorneys in offices in which attorneys do not receive local salary supplements.

Additional funding alone may not be sufficient to achieve greater participation by offices in the career prosecutor program. For example, a small office may find it more difficult to send a potential program participant to the required CLE training. Furthermore, though the Compensation Board staff includes information about the program in a variety of conference and introductory materials, newly-elected commonwealth's attorneys may be unaware of the program and its requirements. If the program is expanded, the Compensation Board and the Virginia Association of Commonwealth's Attorneys should help publicize the expansion and inform offices about the availability of the career prosecutor stipend and its qualification requirements.

Additional actions could be taken to address public defender workforce issues after recent funding increases

The General Assembly's recent substantial additional funding for public defender salaries appears to be helping public defenders recruit attorneys and will likely help offices retain attorneys. However, additional steps could be taken to help retain attorneys. Improving retention helps ensure that a capable and experienced public defender workforce is maintained that can consistently provide quality legal representation to indigent defendants.

Public defenders currently have limited potential for career advancement, which can hinder retention. Each office receives a fixed number of positions at each rank. Furthermore, VIDC's pay scale has no pay bands, but rather allows only one salary level per rank (Table 6-3). The lack of pay bands within each rank (e.g., assistant public defender I), combined with the set number of positions in each office, limits attorneys' ability to receive a salary increase when across-the-board increases are not granted, without seeking a promotion (sidebar). These promotion opportunities occur infrequently, particularly in small offices with few upper level positions. In these instances, taking a job with another public defender office or leaving public defender employment altogether may be the only way an attorney can increase his or her salary.

Public defenders may also receive salary increases when there is a statewide increase for all state employees, or in limited instances where VIDC is able to give merit-based increases. VIDC has also provided retention bonuses in recent years, in which attorneys must sign a one-year retention agreement to receive the bonus. VIDC has given bonuses more widely than salary increases, as they do not require ongoing funding.

TABLE 6-3
VIDC does not have pay bands for public defender attorney positions

Attorney position	Salary (Outside Northern Virginia)	Northern Virginia Salary ^a
Assistant Public Defender I	\$73,500	\$80,850
Assistant Public Defender II	82,488	90,737
Senior Assistant Public Defender	94,472	103,919
Deputy Public Defender	104,955	115,451
Public Defender	139,412	153,353

SOURCE: Virginia Indigent Defense Commission FY24 pay chart.

NOTE: ^a Northern Virginia localities include Alexandria, Arlington, Fairfax, Fauquier/Warrenton, Fredericksburg, Leesburg, Prince William, and Winchester.

Increase the number of senior trial attorneys

Creating more senior trial attorney positions could be a relatively cost effective way to facilitate career growth and retention. The senior trial attorney position allows particularly effective, less experienced public defenders to be promoted to the senior level without assuming the managerial responsibilities required of senior assistant public defenders. A senior trial attorney is a title promotion and salary stipend for existing public defender positions. Senior trial attorneys earn about \$15,000 more than assistant public defender IIs, on average. However, with current funding, VIDC only had 31 senior trial attorneys statewide in FY23. Twenty-three offices each have one senior trial attorney, and four offices (Fairfax, Hampton, Norfolk, and Richmond) have two. There is one senior trial attorney position for every 14 public defender attorneys statewide.

The state could fund more senior trial attorney positions and target offices with the highest vacancy rates. Designating existing positions as senior trial attorney positions would cost approximately \$15,000 per position in state funds annually. The state could provide funding to bring public defender offices closer to or in line with the ratio of career prosecutor attorneys in commonwealth's attorney offices (which is a comparable title designation and salary increase). It would require 53 additional public defender attorney positions to be designated as a senior trial attorney in order to be in line with commonwealth's attorneys.

POLICY OPTION 2

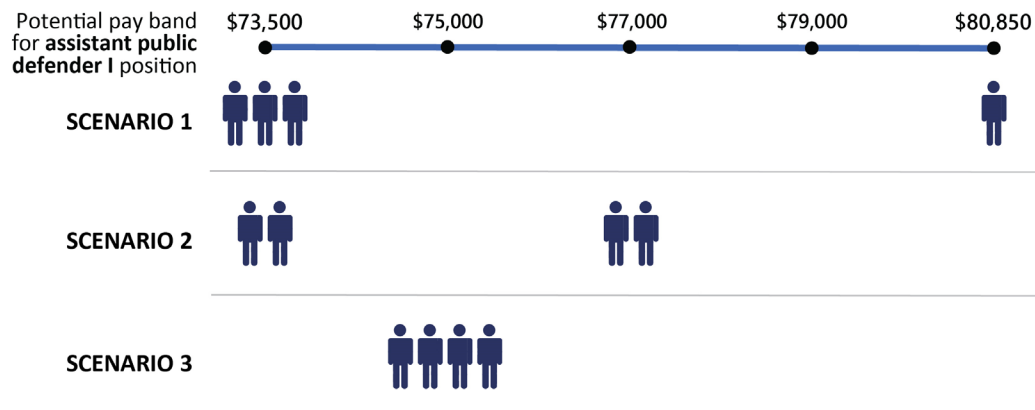
The General Assembly could include language and additional funding in the Appropriation Act for the Virginia Indigent Defense Commission to expand the number of existing positions designated as senior trial attorney positions across public defender offices.

Establish pay bands for public defenders

The state could also establish pay bands for attorney positions. Pay bands would give chief public defenders the ability to pay particularly effective attorneys higher salaries without promoting them to a new title. Pay bands can help provide modest salary increases, which can help improve retention, especially in offices where higher level positions do not frequently become vacant.

Pay bands could be implemented in several ways to help provide additional salary flexibility in compensating public defender attorneys. Pay bands could be set at current salary levels with a range that extends upward. This would give chief public defenders discretion to pay attorneys in their office at different points within the pay band. The cost would be dictated by the range of the band and how much funding was provided to compensate attorneys within the band. For example, a pay band could allow a 10 percent salary *range* for each position with funding provided to each office sufficient to give each attorney a 2.5 percent increase above the minimum salary for the position. The chief public defender would not necessarily need to give each attorney the same increase and could be given the discretion to award some attorneys more and others less based on performance or other factors (Figure 6-5). This scenario would cost approximately \$1 million annually to establish pay bands for all public defender attorney positions.

FIGURE 6-5
Pay bands would give chief public defenders flexibility to set different salary amounts for attorneys in their office



SOURCE: JLARC analysis of potential public defender attorney pay band.
 NOTE: Assumes pay band that has a 10 percent range above minimum salary for each position and funding sufficient for each position to be compensated an average of 2.5 percent above the minimum salary for each position.

POLICY OPTION 3

The General Assembly could include language and funding in the Appropriation Act for the Virginia Indigent Defense Commission to establish pay bands for public defender attorney positions.

7 Counsel at First Appearance and Same-Day Bail Hearings

The study resolution directs JLARC staff to evaluate making two changes to Virginia’s pretrial process by:

- providing counsel at first appearance for all detained defendants, regardless of their financial resources; and
- holding bail hearings on the same day as first appearances (“same-day bail hearings”). The defense or prosecution could request an additional bail hearing if they later learn of new information.

The goals of these policies include improving the quality of legal representation for defendants and helping courts decide more quickly whether to release a defendant on bail. They are intended to minimize the length of detention for defendants who will be released on bail; *not to release* a greater proportion of defendants on bail. Several national organizations, including the National Institute of Corrections, American Bar Association, and National Association of Pretrial Services Agencies, consider these policies to be best practices. Virginia already provides juvenile defendants counsel at first appearance and same-day bail hearings.

However, counsel at first appearance and same-day bail hearings for adults are not pervasive practices nationally and may be difficult to implement. The majority of U.S. states do not provide counsel at first appearance, although the federal government and about a third of states (including neighbor states Maryland, West Virginia, and Kentucky) do. Several of the states that provide counsel at first appearance face ongoing attorney workload and logistical challenges.

Virginia’s pretrial process determines detainment and legal representation; timing at local level varies

Criminal defendants generally have a right to bail before their cases are heard in court, but federal and state law allow pretrial detention in certain cases. The Eighth Amendment to the U.S. Constitution protects defendants from excessive restrictions on their liberty while they await trial. In Virginia, defendants may be detained pretrial *only* if there is probable cause to believe the defendants will not appear for trial or are a danger to themselves or the public.

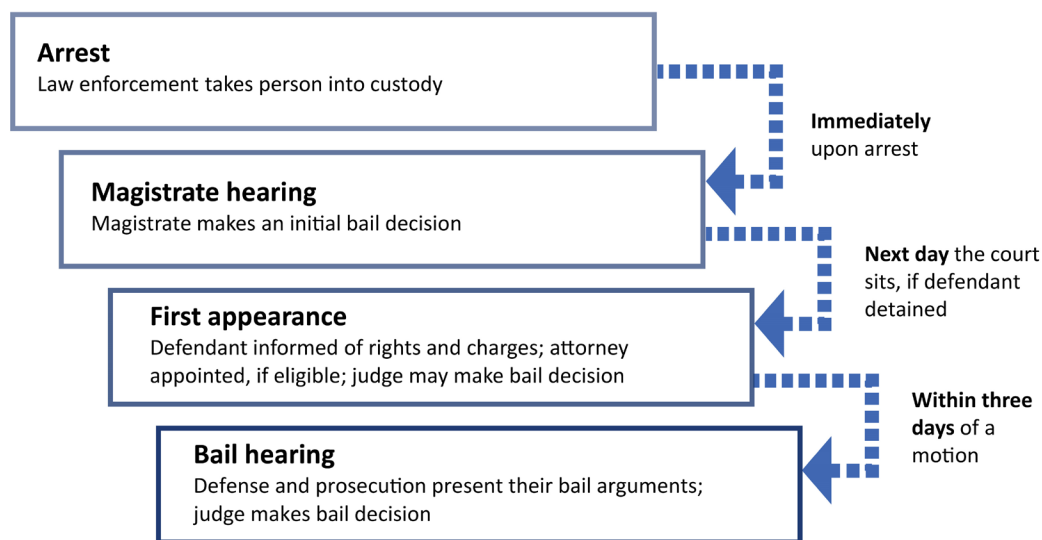
The initial stages of the pretrial process consist of several hearings in which the magistrate and court assess a defendant’s flight and public safety risk to decide whether and under what conditions a defendant will be released on bail (Figure 7-1). The process begins when a defendant is taken into custody (sidebar). The defendant must be

Not all defendants accused of criminal charges will be taken into custody. Law enforcement may release some defendants on a summons to appear in court.

First appearances are typically held in **general district or juvenile and domestic relations courts**, but may be held in circuit courts if the circuit court issued the arrest warrant and is held first.

taken immediately to a judicial officer, typically a magistrate, for an initial bail determination. Next, a defendant who remains detained after meeting with a magistrate will appear in court for a hearing, referred to as a “first appearance,” on the next day that court is held (sidebar). During the first appearance, a judge informs defendants of the charges against them and their right to an attorney, and the judge will typically initiate the process to appoint an attorney for qualifying indigent defendants. A judge may also consider granting bail or changing the conditions of bail at the first appearance. If the defense or prosecution do not agree on bail at the first appearance, they may request (“motion for”) a bail hearing, during which each side can present their bail argument to the judge. Bail hearings are required by statute to be held within three calendar days, barring weekends and holidays, of a motion for a bail hearing.

FIGURE 7-1
Initial stages of Virginia’s pretrial process typically involve a magistrate hearing, a first appearance, and a bail hearing

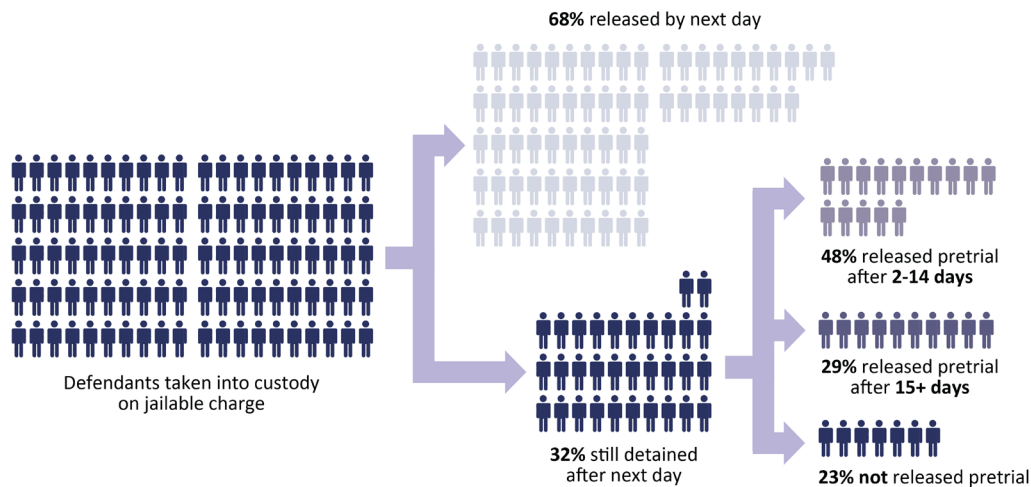


SOURCE: JLARC analysis of Virginia Code and interviews with Virginia stakeholders.
 NOTE: The first appearance does not need to occur on the next day the court sits if defendants are not detained.

Two-thirds of defendants taken into custody released by the following day

About two-thirds (79,000) of the approximately 116,000 defendants taken into custody annually are released by the next day (Figure 7-2). The other one-third (approximately 37,000 defendants) remain detained for longer. Nearly half of defendants who remain detained (approximately 18,000 defendants) are held for two to 14 days before being released on bail, and about 11,000 are detained for longer than 14 days before being released on bail. Approximately 9,000 defendants (23 percent of defendants detained for more than one day) are not released prior to their case’s resolution (Appendix J).

FIGURE 7-2
Two-thirds of defendants released from custody by the day after arrest (FY22)



SOURCE: JLARC analysis of FY22 data provided by the Office of the Executive Secretary of the Supreme Court, the Department of Criminal Justice Services, and the Compensation Board.

Courts vary in timing of key early stages of the pretrial process, which can cause some defendants to be detained longer

The timing of each step in the early stages of the pretrial process varies across courts. These timing differences can extend the amount of time defendants spend detained (Figure 7-3). Several factors affect how quickly a detained defendant goes through the initial stages of the pretrial process (Appendix J):

- **First appearances:** The length of time between a defendant’s arrest and first appearance varies substantially. A detained defendant’s first appearance—which can be in-person in the court or via video—occurs on the next day court is held and (typically) in the jurisdiction of the offense. Some courts are held every weekday, while some are held less than once a week.
- **Counsel appointments and notifications:** Courts vary in how long they take to appoint attorneys to cases and to notify attorneys of their appointments. Some courts appoint an attorney in time for the first appearance, but most only *begin* the appointment process at the first appearance and notify attorneys of their appointment afterwards. Most judges prefer that an attorney be appointed and familiar with the case before bail is considered.

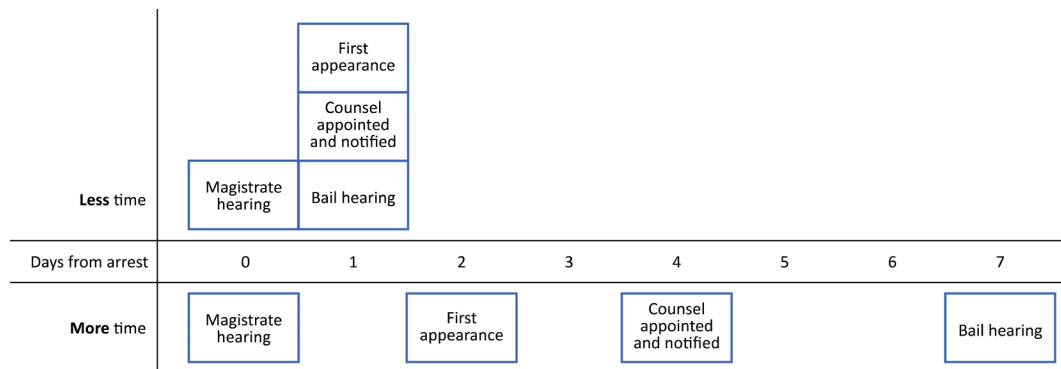
“ Sometimes [defendants] can be unlucky. Like today is the last day I have criminal court in [locality], and next week, we have a judge training, so it’s going to be a couple weeks or so before that bail hearing happens. If they had an attorney with them there today, they may not have gotten bail, but they would have had that hearing today. ”

– Virginia judge

Nearly 25 percent of court-appointed attorneys and 13 percent of public defenders stated that **bail hearings** in their localities *typically* take place more than three days after a motion has been filed.

- **Bail hearings:** How quickly a bail hearing is held following a motion from the defense depends on the court schedule and the availability of the defense attorney and commonwealth’s attorney. Most courts hold bail hearings one to three days after a bail motion is made. Some courts, though, hold bail hearings more than three days after a motion is made, which does not meet state law’s requirement that bail hearings be held within three days of a motion (sidebar).

FIGURE 7-3
Illustration of how timing of initial stages in pretrial process affects how quickly a detained defendant has a bail hearing



SOURCE: JLARC summary analysis of interviews, surveys, and court websites.

NOTE: Examples of how the timeframe of the initial stages of the pretrial process can vary across different localities and cases. Differences in timing may be due to variation in court schedules, local pretrial practices, and arrest date. Not all defendants who are taken into custody require a bail hearing to be released on bail.

Defendants who are released early in the pretrial process include those who are held for two to 14 days before being released pretrial. These defendants are most affected by the speed of the pretrial process.

The initial stages of the pretrial process typically take longer in rural localities or in localities without public defenders, which may result in slightly longer detention periods for defendants in those areas (Appendix J). Defendants released early in the pretrial process spend one day more in detention on average in rural localities without a public defender than those in urban localities with a public defender (median of six versus five days, respectively) (sidebar). This is primarily because urban localities tend to have higher caseloads, and therefore hold court more frequently. Similarly, counsel appointments tend to be faster in areas served by public defenders, because public defenders have formalized processes through which courts notify them of assignments.

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

Under the bill referred to JLARC for study, any defendant detained at their first appearance, regardless of their financial resources, would be entitled to counsel at their first appearance and a same-day bail hearing. Approximately 50,000 defendants may qualify annually.

Counsel at first appearance and same-day bail hearings would reduce or eliminate some of the timing variation of counsel appointments, bail hearings, and bail releases. Counsel at first appearance could provide legal representation to defendants more quickly. Same-day bail hearings could eliminate the time that passes while bail motions are filed and the courts schedule hearings. Together, these policies are intended to decrease pretrial detention, improve court efficiency, and create jail savings.

Achieving these benefits, however, may not be logistically feasible in all Virginia jurisdictions. Some jurisdictions would face substantial challenges if required to provide counsel at first appearance and same-day bail hearings. These challenges include ensuring attorney availability and preparedness, victims' rights, and court access to information.

Proposed policies may reduce lengths of pretrial detention and improve quality of legal representation

Pretrial detention can negatively affect criminal defendants, and shortening pretrial detention can help to mitigate these impacts. Research finds that pretrial detention can lead to loss of employment, financial instability, and other harms to personal well-being within days of arrest.

Counsel at first appearance and same-day bail hearings may shorten lengths of pretrial detention for some defendants, especially for those in localities with longer pretrial processes. The 18,000 defendants each year (about 15.5 percent of defendants taken into custody) released on bail within two to 14 days after arrest are those that would *most likely* be detained for less time under these policies (sidebar). Additionally, other defendants currently being held for longer than 14 days may also benefit, as earlier counsel appointment could allow defense attorneys to more quickly address some of the factors preventing release on bail. The policies would reduce the average length of pretrial detention most in courts that take longer to conduct the initial stages of the pretrial process, typically in rural localities and/or those not served by a public defender.

Counsel at first appearance can also improve the quality of legal representation that defendants receive. Earlier counsel appointments can more quickly foster trust between attorneys and their clients and speed up case resolution because the attorney can become familiar with the case, make motions, and schedule hearings earlier. Furthermore, having counsel means a defendant can receive guidance before or at the first appearance that may prevent them from self-incriminating or help them better advocate for their release. In JLARC surveys, the majority of public defenders (85 percent), court-appointed attorneys (67 percent), and judges (51 percent) agreed or strongly agreed that counsel at first appearance would improve the overall quality of legal representation that defendants receive (Appendix K).

In FY22, 77 percent of defendants released on bail two to 14 days after arrest were released within one day of their bail hearing, indicating that the length of their detention is primarily driven by how quickly the court is able to conduct the initial stages of the pretrial process. Defendants released more than 14 days after arrest may have other factors contributing to the timing of their release—such as awaiting placement in a rehab program.

Decreased detention while awaiting trial could result in cost savings at jails; counsel at first appearance may improve court efficiency

Shorter lengths of pretrial detention could reduce the average daily populations at jails, saving state and local funds. The size of the cost reduction would depend on several factors, including each court's current pretrial process and its ability to implement these policies. The current average length of pretrial detention for defendants released early in the pretrial process is six days. Depending on whether counsel at first appearance and same-day bail hearings shortened pretrial detention by an average of one to four days, the state could annually realize \$139,000 to \$556,000 in jail savings from marginal costs that are most directly affected by variation in the number of inmates, such as food and medical costs (Table 7-1). Similarly, localities could realize total savings of between \$203,000 and \$812,000 annually, depending on the reduction in days of detention. Lower average daily populations could generate further savings by reducing jail staffing needs or future capital costs, but these savings are difficult to quantify and are not reflected in this analysis.

TABLE 7-1
State and localities could save up to \$1.4 million in jail costs

	Reduction in average number of days of detention for defendants who are released on bail within two to 14 days			
	1 day	2 days	3 days	4 days
State savings	\$139,000	\$278,000	\$417,000	\$556,000
Local savings	203,000	406,000	609,000	812,000
Total savings ^a	342,000	684,000	1.0 million	1.4 million

SOURCE: JLARC analysis of data provided by the Office of the Executive Secretary of the Supreme Court, the Department of Criminal Justice Services, and the Compensation Board; review of the Compensation Board's FY21 Jail Cost Report.

NOTE: ^a Total savings includes only state and local savings; a small amount of additional savings would be realized for other sources, such as federal funds. Assumes the average length of detention is reduced for 18,000 defendants annually. Therefore, a one-day reduction represents 18,000 days of detention saved statewide; a four-day reduction represents 72,000 days saved statewide. A four-day reduction from the current average of six days is likely the maximum reduction achievable, because weekends and holidays preclude all defendants from having a first appearance and bail hearing the day following their arrest. The Compensation Board estimates that jail's marginal daily cost is \$20.88 per day for each inmate in FY22. The state pays approximately 37 percent of these costs, and localities pay 54 percent. The other 9 percent of funding is from federal and other funding sources. Additional jail funding was excluded from this analysis as it covers only fixed capital costs.

In addition, counsel at first appearance could enhance court efficiency. Earlier counsel appointment could result in earlier case resolution, and the presence of a defense attorney at a first appearance would increase the likelihood that the court would consider bail at that time. If bail was resolved at the first appearance, the court would not need to hold a separate bail hearing, freeing additional time on the docket. A majority of public defenders (84 percent), court-appointed attorneys (68 percent), and judges (56 percent), agreed or strongly agreed that providing *counsel at first appearance* would improve court efficiency. There was less consensus on whether *same-day bail hearings* would

improve court efficiency, primarily because any efficiency gains could be offset by the additional work of ensuring that the defense and prosecution are both present and prepared and that the court has the information it needs to consider bail that day (Appendix K).

Logistical impediments to counsel at first appearance are primarily related to attorney availability

In the JLARC survey, nearly all judges, court-appointed attorneys, and public defenders cited one or more challenges to implementing counsel at first appearance. The main challenges relate to ensuring an attorney is present and able to provide counsel. The implementation challenge most commonly indicated by stakeholders was appointing counsel in time for the first appearance. Most courts currently appoint attorneys *at (not before)* the first appearance, with attorneys receiving notifications of their appointments afterwards. These courts would need to establish new processes to appoint and notify attorneys *in advance* of the first appearance. Additionally, in localities with fewer attorneys and for attorneys serving multiple localities, courts would likely have difficulty finding attorneys who are available at the dates and times that first appearances are held.

Once appointed, attorneys might find it difficult to prepare in advance of the first appearance. An attorney would often receive their information about the case on the same day as the first appearance, leaving little time for preparation. Furthermore, arranging a private meeting with their client prior to first appearance could be difficult for appointed attorneys and require substantial coordination because of the short timeframe in which it would need to be held and the logistical challenges that would be involved. For example, the attorney might be at the courthouse, but the client is detained in jail. In addition, there might not be adequate space, technology, and/or staff to safely facilitate the meeting (sidebar).

Requiring counsel at first appearance could also increase the risk of ethical breaches. Appointing counsel prior to a first appearance would not leave attorneys with as much time to check for conflicts of interest. Attorneys indicated that this would create a greater possibility that a conflict of interest would not be detected, leading to more ethical violations. Some attorneys indicated this would make them hesitant to serve as counsel at first appearance.

Finally, providing counsel at first appearance would be a new responsibility and more work for some public defenders and most court-appointed attorneys who are already facing staff shortages and high workloads. The work required for counsel at first appearance would vary based on the nature of the case, but public defenders estimate that, on average, it would add 13 minutes of work to a case. Overall, the additional work would entail approximately 15–20 additional hours of work per year for each public defender staff attorney. Court-appointed attorneys with higher caseloads would also have an increase in annual workload.

Stakeholders indicate the increasing reliance on using video for first appearance can make facilitating private attorney-client meetings at first appearances *more* difficult because the defendant and attorney are not physically present in the court together and must meet remotely, which adds another barrier.

Potential impediments to same-day bail hearings include ensuring victims' rights are preserved and bail decisions are fully informed

Nearly all judges, court-appointed attorneys, and public defenders cited one or more challenges to holding same-day bail hearings. Chief among these challenges would be ensuring that victims receive the notice of bail hearings they are entitled to before the hearing is held. Another challenge would be gathering input from victims that might be helpful to assess the risk posed if the defendant were released on bail. In addition, some victims need time to prepare for the defendant's release, which same-day bail hearings would not allow. For example, in some instances, a victim might need to request a protective order or move their residence. Some localities have difficulty ensuring that victims' rights are protected and their input is provided under the current process, and accelerating the timing of bail hearings would make it more challenging.

Furthermore, judges may not be able to collect and review all the information necessary for making a bail decision in time for a same-day bail hearing. Judges use state-provided reports, such as police reports and pretrial investigative reports, to inform their bail decisions. In some localities, these reports are not always complete and available by the day of the first appearance. These delays may be due to the local departments having staffing difficulties and/or other priorities. Holding bail hearings before police reports or pretrial investigative reports are ready could lead to uninformed bail decisions with poor outcomes. Judges were divided in responding to a JLARC survey about whether they would feel comfortable conducting same-day bail hearings, partially due to not having access to full information by the day of the first appearance (Appendix K).

“That delay [between the first appearance and the bail hearing] is a good delay if it results in bond when it might otherwise not have, if the defense attorney doesn't have all the information, or the judge doesn't hear what they need to hear about the circumstances of the case.”

– Virginia judge

Similarly, same-day bail hearings might not give defense attorneys the time needed to be adequately informed and prepared for the hearing. The defense attorney may need to talk to witnesses or help the defendant make arrangements for release, such as securing housing or placement in a rehabilitation program. Lack of defense preparation time could adversely affect a defendant's likelihood of a favorable bail outcome (sidebar).

Other stakeholders in the court process would also face challenges adapting to required counsel at first appearance and same-day bail hearings:

- **Commonwealth's attorneys** should be present to represent the state at first appearances when defense counsel is present and may address bail. Not all commonwealth's attorneys currently send representation to first appearances, so the need to do so would increase their workload (sidebar). Moreover, same-day bail hearings might limit commonwealth's attorneys' ability to adequately prepare for the bail hearing, which could include reviewing the police report and talking to victims or witnesses.
- **Court clerks** would potentially have to change their processes for appointing attorneys or share information among stakeholders more quickly.

While many **commonwealth's attorneys** already attend first appearances regularly, those in the south and southwest areas of the state rarely do, according to a JLARC survey of judges.

- **Law enforcement and pretrial services offices** might have to prepare their reports to the courts more quickly for same-day bail hearings.
- **Victim witness services** staff might have to identify, notify, and assist victims more quickly for same-day bail hearings.
- **Local and regional jails** might need additional staff or space to facilitate attorney-client meetings and/or bail hearings if both were to occur on the same day as the first appearance.

State could help interested localities with counsel at first appearance and same-day bail hearings

Statewide implementation of counsel at first appearance and same-day bail hearings is likely not currently feasible. Along with the logistical challenges and impediments discussed previously, the high workload of public defenders and declining number of court-appointed attorneys would make implementation difficult because of the additional workload these policies would create.

However, if the state is interested in promoting counsel at first appearance and same-day bail hearings when feasible, it could consider gauging courts' interest in adopting these policies and consider providing funding to those courts. The state could also take actions to achieve the goals of the policies, such as facilitating earlier appointment of counsel or creating more flexibility for defense to request bail.

State could gauge court and other stakeholder interest to inform funding needed to implement these policies in interested courts

Stakeholders in some localities (e.g., judges, pretrial service office directors, indigent defense attorneys, and jail superintendents) expressed interest in implementing counsel at first appearance and/or same-day bail hearings for their courts, but they cited several challenges. For example, courts would need additional funding to address some of the impediments. These impediments relate to logistical constraints, such as the physical space or technology needed to facilitate same-day private attorney-client meetings. Likewise, jails and pretrial services offices could have logistical constraints, such as the ability to make a defendant available by video for a meeting with an attorney or complete a pretrial report in time. Some courts may have other challenges, such as attorney shortages, that the additional funding would not directly address. Additionally, judges in some courts are not supportive and would not be willing to implement these policies.

Additional detailed information would be needed to determine which courts would be interested in adopting these policies if they received funding. If the state wishes to support expanded implementation of counsel at first appearance and same-day bail hearings, the General Assembly could direct the Office of the Executive Secretary of the Supreme Court of Virginia (OES) to ask courts whether they would be interested

in implementing the policies if state funding were available to address physical and logistical barriers. The chief judge of each court would need to express interest on behalf of the court as well as on behalf of other key stakeholders, such as pretrial services staff, jail staff, commonwealth’s attorney(s), and local indigent defense attorneys. Likewise, the chief judge would need to identify any logistical barriers faced by the court and other affected stakeholders that could be addressed, if funds were made available.

POLICY OPTION 4

The General Assembly could include language in the Appropriation Act directing the Office of the Executive Secretary of the Supreme Court of Virginia to solicit input from the chief judges of all courts on behalf of all affected stakeholders on (i) interest in implementing counsel at first appearance and same-day bail hearings if state funding was available to address barriers; and (ii) logistical barriers that could be addressed if funds were made available.

If there is strong interest, the General Assembly could consider establishing funding to help interested courts and other pretrial stakeholders address barriers to implementing these policies. The National Association of Criminal Defense Lawyers (NACDL) is undertaking a pilot program to implement counsel at first appearance and same-day bail hearings in four Virginia localities. Part of that program will be to assess costs of policy implementation. The costs identified in the NACDL pilot—which is currently set to conclude in 2025—could be used to inform the funding interested courts would need to implement counsel at first appearance and same-day bail hearings.

A grant program may be the most appropriate funding mechanism since there is no single mechanism in the Appropriation Act to fund all entities that would be affected by these policies, such as local courts, commonwealth’s attorneys, jails, and pretrial services offices. The General Assembly could also consider whether to provide additional funding for the criminal fund to pay for additional court-appointed attorney reimbursement for the time attorneys spend providing counsel at first appearance. Appendix L includes various scenarios for the amount of compensation that could be provided to court-appointed attorneys for performing this role.

Defendants who request counsel must, under oath, complete eligibility paperwork including a financial eligibility statement (form DC-333) and a request for appointment of a lawyer statement (form DC-334).

More flexibility for completing applications for indigent defense could help courts appoint counsel for some defendants more quickly

Defense counsel is typically not appointed for defendants until *after* the first appearance, in part, because courts do not finalize eligibility paperwork until the first appearance. To request indigent counsel, the defendant must execute two statements under oath (sidebar). Once those statements are completed, the court can appoint counsel and notify the attorney of their appointment. Currently, these statements are commonly completed by a defendant and affirmed by a judge on the same day as the first

appearance or during the first appearance. As a result, counsel cannot be appointed until after the first appearance.

Completing a defendant’s eligibility paperwork earlier in the pretrial process could help courts appoint counsel more quickly, at least in some cases. For example, the defendant could execute the statements under oath at the magistrate hearing, or, defendants could do so before a notarized pretrial services officer or jail staff member when committed to jail. This practice is done in some other states (sidebar). Allowing others—such as magistrates, notarized pretrial services officers, and notarized jail staff members—to carry out that responsibility would enable defendants to complete the statements before they appear in court. The completed statements could then be transmitted to the court, giving the court the ability to review the statements and appoint counsel prior to the first appearance, if it wishes to do so.

In West Virginia and Maryland, magistrates appoint counsel at the magistrate hearing so that counsel is provided in time for the first appearance.

RECOMMENDATION 6

The General Assembly may wish to consider amending § 19.2-159 of the Code of Virginia to clarify that magistrates, notarized pretrial services officers, and notarized jail staff members have the authority to affirm a defendant’s sworn financial eligibility statement and request for appointment of a lawyer statement and transmit those statements to the court.

Completing eligibility paperwork earlier in the process may not be a practical solution in all cases. In some cases, individuals may be agitated, under the influence of substances, or non-cooperative when brought before a magistrate or a pretrial services officer. In these instances, the statements may still have to be affirmed in front of the judge during the first appearance, as is current practice in most courts. Additionally, even when statements are completed earlier, the court is ultimately responsible for making a final determination of indigency and eligibility for counsel. Therefore, the court would still be able to conduct a more thorough examination of the defendant’s financial resources, if necessary, pursuant to current statute.

Limited representation could ease concerns around conflicts of interest and help facilitate earlier appointment of counsel

Attorney concerns about potential conflicts of interest when providing counsel at first appearance or same-day bail hearings would need to be addressed. As noted previously, some attorneys are concerned that they may unintentionally commit an ethical breach when providing counsel at first appearance or a same-day bail hearing because they would not have enough time to check thoroughly for conflicts of interest before the hearings. Additionally, providing representation at these hearings could create conflicts of interest for future representation of that defendant or another individual involved in the case, such as a victim, witness, or co-defendant.

The use of “limited representation” could reduce attorneys’ potential for conflicts of interest when providing counsel at first appearance and same-day bail hearings and

increase attorneys' willingness and ability to serve in those roles. In practice, limited representation could involve an attorney receiving only information directly related to making a case for bail. Attorneys would inform defendants of the limited nature of their representation, instructing the defendant not to discuss the full details of the case. Doing so *could* reduce or eliminate the risk of committing an ethical breach related to conflicts of interest when providing representation at first appearance or a bail hearing. It could also limit the potential for creating conflicts of interest in future cases involving the defendant or another person involved in the case.

Limited representation could also enable courts to more efficiently appoint counsel before first appearances by using a duty attorney system—a system in which an attorney is available and present in the court to serve as counsel for all defendants making a first appearance that day (Appendix L).

Virginia has Rules of Professional Conduct addressing limited representation more generally [Rule 1.2(b), comment 6, & comment 7] and in cases when providing nonprofit and court-annexed limited legal services [Rule 6.5].

While the practice of limited representation is already established in Virginia (sidebar), it would be beneficial for the Virginia State Bar (VSB) to consider proposing a Rule of Professional Conduct to clarify whether and, if so, how it can be used to facilitate representation and avoid potential for conflicts of interest for first appearance and or bail hearings. To do so, VSB would need to ask its ethics committee to study limited representation for a first appearance or bail hearing. Topics the ethics committee would need to consider include:

- whether representation can be provided prior to an attorney conducting a full conflict of interest check;
- how to properly inform defendants of the limited scope of the representation;
- responsible use or handling of any information learned during limited representation;
- what is allowable in cases that would typically preclude representation, such as cases with co-defendants; and
- whether providing limited representation could create conflicts of interest preventing an attorney from representing the defendant or another person involved in a future case.

The VSB ethics committee has discretion to decide whether to propose a rule, as well as the content of the proposed rule, after it completes its study and allows for a public comment period. The VSB council and the Supreme Court of Virginia would then need to review the rule and determine whether it is appropriate, before approving the rule to take effect.

RECOMMENDATION 7

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

Statute could be clarified to preserve right to formal bail hearing even if bail is considered at first appearance

Courts have discretion on when and how often a defendant can present a bail argument. Some judges allow the defense to present a bail argument at the first appearance and again at a bail hearing. However, many judges interpret statute as permitting a bail argument from the defense only *one time* in their court and that any subsequent request for bail must be made through an appeal to a higher court. An appeal can lengthen the bail process because the appeal hearing is not required to occur within a specific timeframe. Most appeals occur at the circuit court, which often have dockets that are not conducive to quickly holding a hearing.

When defendants are unable to present an argument both at the first appearance and the bail hearing, they may remain detained longer. For example, defense attorneys who are concerned they will have only one opportunity to present a bail argument (prior to appeal) may be reluctant to present their argument at the first appearance. Instead, they will opt for more time, which may delay a defendant from being granted bail. Additionally, some defendants will argue for bail during their first appearance *before* an attorney is appointed, and if denied bail, they are unable to have the court reconsider bail once they have counsel, thus necessitating an appeal.

If the state would like to accelerate how quickly the defense is able to present bail arguments without mandating a same-day bail hearing, the Code of Virginia could clarify that a defendant who presents a bail argument at the first appearance retains the right to request a bail hearing in the same court at a later date. This change could encourage defense attorneys to accelerate their request for bail consideration at first appearance, because they would no longer risk this being their one chance to argue for bail. It would also help to ensure that defendants retained the opportunity to make their case for bail after counsel was appointed to represent them. Allowing defendants who presented a bail argument at their first appearance to also have a bail hearing could increase court time because bail could potentially be considered at two separate court hearings. However, any increase would likely be minimal. Discussions about bail tend to be brief, not every case would result in discussion at both hearings, and the judges who already allow this practice would not be affected.

POLICY OPTION 5

The General Assembly could amend § 19.2-158 of the Code of Virginia 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.

Appendix A: Study resolution

Public Defenders, Court-appointed Attorneys, and Commonwealth's Attorneys

Authorized by the Commission on November 7, 2022

WHEREAS, the state is to ensure indigent defendants still receive legal counsel when charged with a criminal offense, and a court determines whether a defendant is indigent by considering a variety of factors including receiving public financial assistance or having funds less than 125 percent of the federal poverty level; and

WHEREAS, the Commonwealth provides legal counsel free of charge to defendants through a network of 28 public defender offices throughout the state and private attorneys who can serve as a court-appointed counsel, and the Virginia Indigent Defense Commission establishes standards of practice for public defenders and court-appointed counsel; and

WHEREAS, providing legal representation to indigent defendants requires an adequate number of public defenders and court-appointed counsel who are in reasonable geographic proximity to legal proceedings, qualified, and appropriately compensated; and

WHEREAS, the Commonwealth seeks to ensure public safety through 120 commonwealth's attorney offices that have a responsibility to appropriately prosecute potential crimes; and

WHEREAS, Senate bills 136, 282, 475 and 640 from the 2022 General Assembly were referred by the Senate Finance and Appropriations Committee to the Joint Legislative Audit and Review Commission for consideration for future study; now therefore be it

RESOLVED by the Joint Legislative Audit and Review Commission that staff be directed to review the adequacy and availability of legal representation for indigent defendants, and commonwealth attorney staffing and compensation. In conducting its study shall staff (i) determine the adequacy of the number and location of public defenders and court-appointed attorneys to provide quality legal counsel to indigent defendants; (ii) determine the adequacy of the number of commonwealth's attorneys to appropriately prosecute crimes; (iii) compare compensation for public defenders, court-appointed attorneys, and commonwealth's attorneys and evaluate the adequacy of their compensation, including its impact on quality of representation; (iv) estimate the state and local fiscal impact of addressing compensation-related issues; (v) determine the need for, feasibility of, and fiscal impact of additional public defender offices; and (vi) evaluate the need for and required additional workload of providing defendants with representation at bail hearings.

JLARC shall make recommendations as necessary and review other issues as warranted.

All agencies of the Commonwealth, including the Virginia Indigent Defense Commission, Executive Secretary of the Supreme Court, Office of the Attorney General, Compensation Board, public defender offices, and commonwealth's attorneys shall provide assistance, information, and data to JLARC for this study, upon request. JLARC staff shall have access to all information in the possession of agencies pursuant to § 30-59 and § 30-69 of the Code of Virginia. No provision of the Code of Virginia shall be interpreted as limiting or restricting the access of JLARC staff to information pursuant to its statutory authority.

Appendix B: Research activities and methods

Key research activities performed by JLARC staff for this study included:

- interviews with state agency staff, stakeholders, judges, public defenders, court-appointed attorneys, local and regional jail staff, and a chief magistrate;
- focus groups of court-appointed attorneys, commonwealth's attorneys, local and regional jail officials; pretrial services staff, and local victim witness program directors;
- surveys of public defenders, court-appointed attorneys, and judges;
- analysis of case weight data for public defenders;
- analysis of other states' court-appointed attorney compensation;
- analysis of court-appointed attorney workforce;
- analysis of case outcomes by attorney type;
- analysis of pretrial detention data;
- review of public defender compensation; and
- review of other documents, literature, and media sources.

Structured interviews and focus groups

JLARC staff conducted over 60 interviews. Key interviews included:

- state agency staff, including staff from the Virginia Compensation Board (the Compensation Board), Virginia Department of Criminal Justice Services (DCJS), Virginia Indigent Defense Commission (VIDC), the Office of the Executive Secretary of the Supreme Court of Virginia (OES), Virginia Criminal Sentencing Commission (VCSC), and the Virginia State Bar (VSB);
- indigent defense attorneys including chief public defenders, public defender staff attorneys, and court-appointed attorneys;
- commonwealth's attorneys;
- judges, magistrates, local and regional jail staff;
- stakeholder groups including the Virginia Association of Criminal Defense Lawyers, Virginia Association of Commonwealth's Attorneys, Justice Forward Virginia, Legal Aid Justice Center, National Association of Criminal Defense Lawyers, and National Center for State Courts (NCSC); and
- staff from indigent defense programs in other states.

Staff also conducted eight focus groups. Three focus groups were conducted with a total of 17 commonwealth's attorneys participating; two focus groups were conducted with staff from 10 pretrial services offices; one focus group was conducted with seven victim witness officials; one focus group with six local and regional jail officials; and one focus group was conducted with five court-appointed attorneys. Several public defender focus groups were also conducted as part of the methodology used

to update public defender case weights. Additional information about this effort can be found in Appendix G.

Surveys

Three surveys were conducted for this study: (1) a survey of public defenders, (2) a survey of court-appointed attorneys, and (3) a survey of judges.

Survey of public defenders

JLARC staff administered an electronic survey to all public defender staff statewide. In total, JLARC staff sent the survey to 604 public defenders and their support staff, and received a total of 466 survey responses (77 percent). The sample consisted of staff across all 28 public defender offices across the state.

The survey covered numerous topics, including motivations behind working as a public defender, perspectives on current workload, adequacy of training, availability of resources and support from the VIDC central office, ability to provide quality legal representation, satisfaction with compensation and potential access to local supplements, workforce recruitment and retention, and perspectives on counsel at first appearance and same-day bail hearings.

Survey of court-appointed attorneys

JLARC staff administered an electronic survey to court-appointed attorney across the state. In total, JLARC staff sent the survey to 1,593 current and former court-appointed attorneys and received a total of 580 survey responses (36 percent).

Survey topics included challenges in providing quality representation; factors influencing an attorney's decision to start and remain on the state's court-appointed counsel list; and perspectives on training and training requirements, compensation and workload, and counsel at first appearance and same-day bail hearings. Former court-appointed attorneys also received questions about why they stopped serving as court-appointed counsel and what would make them consider returning to the work.

Survey of judges

JLARC staff administered an electronic survey to all Virginia judges for general district, juvenile and domestic relations, and circuit court judges (435 total). JLARC received survey responses from 297 judges (67 percent). Topics included quality of representation for indigent defendants by public defenders and court-appointed attorneys and the need for and feasibility of counsel at first appearance and same-day bail hearings.

Data collection and analysis

JLARC used quantitative data from several sources for the analyses in this study:

- OES court case management data for general district, juvenile and domestic relations (adult), and circuit court;
- Fairfax County Circuit Court case management system data;

- VCSC sentencing guidelines data;
- Staffing data from the Department of Human Resource Management (DHRM) on compensation and staffing across public defender offices;
- VIDC case management data for adult and juvenile cases handled by public defender offices;
- OES court-appointed attorney reimbursement data;
- OES eMagistrate data;
- DCJS pretrial data (Pretrial and Community Corrections Case Management System, or PTCC);
- Virginia Compensation Board Local Inmate Data System (LIDS) data; and
- Virginia Compensation Board commonwealth's attorney salary data.

Case outcomes by attorney type (Chapter 2)

JLARC conducted three regression analyses related to case outcomes for all defendants based on the type of attorney (public defender, court-appointed, or privately retained) that represented them. The analyses used OES and Fairfax court case management system data for adults and VCSC sentencing guidelines data. The outcomes analyzed were sentence length for certain felony convictions, resolution with a plea or a trial, whether a charge resulted in a conviction, and whether a charge was reduced upon conviction. JLARC staff examined the influence of other factors, including race/ethnicity, gender, a defendant's criminal history, and nature of the offense committed. See Appendix E for more detailed information about these analyses.

Other states' court-appointed attorney compensation (Chapter 3)

JLARC staff gathered data for hourly rates for court-appointed counsel as well as maximum compensation caps in other states. In total, 17 other states' hourly rates and pay caps were collected and compared with Virginia's current hourly rate and compensation caps.

Number of court-appointed attorneys (Chapter 3)

JLARC staff used OES court-appointed attorney reimbursement data for FY13 through FY23 to determine the number of court-appointed attorneys active in Virginia over time and average court-appointed attorney workload. JLARC staff calculated the total number of court-appointed attorneys per year by counting the number of attorneys reimbursed for at least one charge during that year. Court-appointed attorney workload was calculated by dividing the total number of charges by the total number of court-appointed attorneys each year for a statewide average, as well calculating workload for individual attorneys. JLARC staff analyzed this data statewide, by locality, and by judicial district.

Fiscal impact of raising court-appointed attorney reimbursement caps (Chapter 3)

JLARC staff used case weights from the NCSC analysis of public defender workload to serve as the time required for an attorney to provide defense representation and to serve as the basis for calculating new court-appointed attorney reimbursement caps that more closely reflect that time. To do so, the

estimated amount of attorney time per charge was multiplied by the current hourly rate for court-appointed attorneys (\$90 per hour).

The number of charges in each category were calculated through the following:

- **Violent and nonviolent felonies:** Using circuit court data from FY22, JLARC calculated the proportion of charges that are violent and nonviolent felonies.
- **Misdemeanor driving while intoxicated (DWI) and other misdemeanors:** Using general district court data from FY22, JLARC staff calculated the proportion of charges that are misdemeanor DWIs. Any misdemeanors not in the DWI category were assigned to the general misdemeanor category.
- **Juvenile cases:** JLARC used FY22 court-appointed attorney reimbursement data to calculate the number of juvenile cases court-appointed attorneys handled.

Ranges for fiscal impacts were calculated.

For the low end of the range, JLARC staff used the following calculation:

$$(Average\ of\ new\ cap\ and\ old\ cap \times Number\ of\ cases\ that\ currently\ hit\ cap) + (Current\ average\ actual\ payment \times Number\ of\ charges\ that\ do\ not\ currently\ hit\ cap)$$

The average of the new and old cap was used based on the assumption that not everyone will meet the new caps.

For the high end of the range, JLARC staff used the following calculation:

$$(Full\ case\ weight\ cap \times Number\ of\ cases\ that\ currently\ hit\ cap) + (Current\ average\ actual\ payment \times Number\ of\ charges\ that\ do\ not\ currently\ hit\ cap)$$

The numbers cited on Figure 3-7 are the midpoint of these two numbers.

Court fees recouped from convicted defendants (Chapter 3)

JLARC calculated the court fees recouped from convicted defendants using court-appointed attorney data from FY18–FY22. Using the five-year average for total amounts assessed and recouped, JLARC calculated the proportion recouped on average for FY18–FY22. In addition, JLARC reviewed 738 court case files by using the Officer of the Court Remote Access in three localities to analyze the total amount of time public defenders charged a defendant for their defense services per case. JLARC compared the median amount of indigent defense costs charged by court-appointed attorneys to costs charged by public defenders and found that there was not a significant difference in the amount assessed against one group.

Public defender staffing and vacancies (Chapter 4)

JLARC staff reviewed position-level data from DHRM to assess changes in (1) vacancy rates, (2) turnover rates, and (3) years of experience for public defender attorneys and support staff. JLARC assessed these metrics from FY13 to FY23 by position, by public defender office, and statewide to identify any trends in difficulty recruiting and/or maintaining a sufficient public defender workforce.

Public defender workload and case weights (Chapter 4)

To assess changes in public defender workload, JLARC staff worked with NCSC to update public defender case weights and analyzed caseload data from VIDC, both statewide and by public defender's office. Case weights account for differences in the amount of time estimated necessary to provide quality legal representation for specific case types, as different types of cases vary in complexity and therefore take varying amounts of time to provide a quality legal defense (e.g., felony vs. misdemeanor). Using the updated case weights and VIDC caseload data, JLARC staff calculated the differences in workload across public defender's offices, accounting for changes in both the total number and nature of cases from FY13 to FY22. More detailed information about the case weights and the public defender workload analysis can be found in Appendix G.

Salaries across state-funded public sector attorneys in Virginia (Chapter 6)

To compare salary across public sector attorney positions in Virginia, JLARC staff collected and analyzed position-level salary data from Cardinal (for public defenders) and the Virginia Compensation Board. JLARC staff also compared attorney salaries for commonwealth's attorneys and public defenders within the same jurisdiction(s), comparing the average attorney salary in each public defender's office to the average attorney salary in the commonwealth's attorney office(s) covering the same jurisdiction(s). JLARC also compared public defender and commonwealth's attorney salaries to other state funded attorneys at the Office of the Attorney General and Department of Legislative Services.

Local government attorney compensation and private sector attorney salary (Chapter 6)

JLARC staff collected FY22 data on private sector attorney salaries from the Bureau of Labor Statistics (BLS) for each of Virginia's metropolitan and nonmetropolitan areas, as defined by BLS, to compare public defender and commonwealth's attorney salary to private sector attorney salary, by region and statewide. JLARC also compared public defender and commonwealth's attorney salary to the BLS statewide average salary for local government attorneys.

Local salary supplements (Chapter 6)

JLARC staff analyzed differences in local salary supplements provided to public defenders and commonwealth's attorneys. Data on local supplements was collected from the Compensation Board for commonwealth's attorneys and from each chief public defender via JLARC's public defender survey. Local supplements were then compared across each public defender office/commonwealth's attorney jurisdiction(s) to determine the extent to which they contribute to differences in total salary. JLARC staff analyzed differences in average local supplement amounts—both as a total dollar amount and as a proportion of state salary—across public defender and commonwealth's attorney offices and between offices in the same jurisdiction(s) to determine any compensation gaps attributable to local supplements.

JLARC staff also compared vacancy rates and local supplement amounts for each public defender and commonwealth's attorney office to identify any relationship in local supplements and the ability of each office to recruit and retain a sufficient workforce.

Pretrial detention (Chapter 7)

For analyses of Virginia's pretrial process, JLARC obtained data from OES, DCJS, and the Compensation Board. The data sets were combined using defendants' names, social security numbers, dates of birth, arrest and commitment dates, FIPS codes, and charge information when available. Data from FY16 to FY22 was used.

- OES provided data from its eMagistrate System and Case Management System. OES's eMagistrate system contained information on commitment dates, release dates, and bail conditions at commitment and release for all defendants who were taken to a magistrate for a bail determination. OES's Case Management System provided data on bail hearing dates and case dispositions in general district courts and juvenile and domestic relations courts.
- DCJS provided data from its Pretrial and Community Corrections Case Management System. This data provided information on defendant demographics (employment status, income level), commitment dates, court dates, bail outcomes, and defendant risk levels for defendants for whom pretrial services staff performed risk assessments.
- The Compensation Board provided data from its Local Inmate Data System. This data system provided commitment dates, offense dates, arrest dates, release dates, release reasons, disposition dates, and other jail information for defendants who were detained pretrial.

JLARC used the combined dataset to determine the number of defendants appearing in front of magistrate, the rate and timing of when defendants were released pretrial, the timing in which defendants had bail hearings after arrest, and the degree to which bail changed during a defendant's pretrial detainment. Where data allowed, JLARC compared trends across years, localities, racial groups, and income levels.

Review of documents and literature

JLARC staff reviewed other documents and literature pertaining to publicly funded indigent defense for criminal defense and prosecution in Virginia and other states, such as:

- Virginia laws, regulations, policies, and guidance documents;
- attorney standards and best practices;
- prior studies and reports on issues related to indigent defense, counsel at first appearance, and same-day bail hearings;
- other states' laws, regulations, and policies;
- national, state, and local media reports; and
- research related to the effects of court costs on defendants.

Appendix C: Agency responses

As part of an extensive validation process, the state agencies and other entities that are subject to a JLARC assessment are given the opportunity to comment on an exposure draft of the report. JLARC staff sent an exposure draft of the full report to the Virginia Indigent Defense Commission (VIDC), the Office of the Executive Secretary of the Supreme Court of Virginia (OES), and the Compensation Board. Portions of the report were shared with the Virginia Association of Commonwealth's Attorneys (VACA) and the Virginia State Bar.

Appropriate corrections resulting from technical and substantive comments are incorporated in this version of the report. This appendix includes response letters from VIDC, OES, the Compensation Board, and VACA.



November 1, 2023

Joint Legislative Audit and Review Commission

Dear Commission Members and Staff:

I would like to first thank the members of the JLARC staff for their hard work and professionalism throughout the course of this study. The report captures the outstanding quality of the work done by public defenders across Virginia. Despite being generally less experienced than many court-appointed and retained counsel, Virginia's public defenders are getting the same results. We believe this is due to the excellent lawyers serving in the public defender offices. Additionally, the supervision and training afforded these lawyers is paying off in real results achieved by public defenders.

What is impossible to capture in the report is the system-wide impact that Virginia's public defenders have had in the communities we serve and across the Commonwealth. Some of this is apparent in the Judicial survey. We are grateful for the overwhelming acknowledgement from Judges throughout the Commonwealth of the high quality legal work performed by public defender attorneys. Judges frequently noted that the quality of representation from the public defenders was "excellent."

Perhaps a better source to note the contributions of the public defenders is the annual Reentry Report published by the Virginia Department of Corrections. This report reveals significant system changing work being done in every Public Defender office across the Commonwealth. For example, Drug Treatment Courts, Behavioral Health Dockets, Veterans Dockets and many more similar programs would not succeed without the involvement and support of the Public Defender offices. These are just a few well known examples of our move towards a more holistic form of defense.

The report also details what public defenders have been experiencing for many years - a significant increase in the workload required for each of our cases due to a number of factors. For public defenders, the biggest drivers of workload have been the increase in electronic evidence and technology, the higher incidence of mental health and substance use issues among our clients, and our shift to providing a more holistic defense. As the report correctly notes, if all 430 attorney positions were filled, the VIDC could handle 87% of the workload applying the revised case weights. That is why the recommendation to increase the number of Mitigation Specialist and Paralegal positions is so important. The recent increase in funding provided by the General Assembly and approved by the Governor has enabled us to raise our attorney salaries to a much more competitive level and should help our recruitment and retention. We are grateful and hopeful that this will reduce our vacancy rates to more manageable levels.



VIRGINIA DEFENDERS

INDIGENT DEFENSE COMMISSION

We agree with many of the report's recommendations and take no position on others. In all instances we stand ready to work with stakeholders to implement any that the Commission endorses.

The IDC would like to highlight three recommendations in particular. The first is the recommendation to fund more Mitigation Specialist and Paralegal positions. Many of our current Mitigation Specialists have a background in social work and are transforming our clients' lives in so many ways from accessing substance use treatment to locating housing assistance. They have proven to be the fastest growing need across all of our offices. These positions allow the attorneys to focus on legal advocacy while helping the clients address the underlying problems that bring our clients into the criminal legal system.

The second recommendation we would highlight is the recommendation to grow our Senior Trial Attorney track. The Commonwealth Attorneys have long had the career prosecutor track that is a similar position. Growth of Senior Trial Attorney positions would allow us to retain more experienced attorneys resulting in even better client and system outcomes.

Finally, the IDC joins and urges the full adoption of the recommendation to raise the rate of compensation for the private court-appointed attorneys. We are witnessing first hand the reduction in lawyers willing to provide court appointed representation to the indigent population. The vast majority of those attorneys that have stopped accepting court appointments have cited the unfair compensation. Virginia will always need these attorneys. They serve a valuable role across the Commonwealth and the Commonwealth cannot meet its constitutional burden without them. Across most case types, the current compensation is the lowest in the country and insufficient for attorneys to meet their ethical obligations. In addition, the VIDC has recently endorsed a statutory change to clarify that Public Defenders can decline to accept appointments when they determine that their current active caseload would preclude adequate representation of the new clients. This will require active and fairly compensated court-appointed attorneys who can take appointments in those situations. Adoption of these recommendations are overdue.

Sincerely,

Maria Jankowski
Executive Director

EXECUTIVE SECRETARY
KARL R. HADE

**ASSISTANT EXECUTIVE SECRETARY &
LEGAL COUNSEL**
EDWARD M. MACON

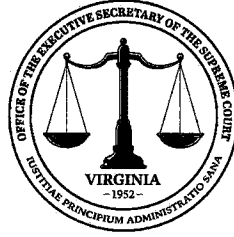
COURT IMPROVEMENT PROGRAM
SANDRA L. KARISON, DIRECTOR

EDUCATIONAL SERVICES
CAROLINE E. KIRKPATRICK, DIRECTOR

FISCAL SERVICES
BARRY M. WENZIG, DIRECTOR

HUMAN RESOURCES
RENÉE FLEMING MILLS, DIRECTOR

SUPREME COURT OF VIRGINIA



JUDICIAL INFORMATION TECHNOLOGY
MICHAEL J. RIGGS, SR., DIRECTOR

JUDICIAL SERVICES
PAUL F. DELOSH, DIRECTOR

LEGAL RESEARCH
STEVEN L. DALLE MURA, DIRECTOR

LEGISLATIVE & PUBLIC RELATIONS
ALISA W. PADDEN, DIRECTOR

MAGISTRATE SERVICES
JONATHAN E. GREEN, DIRECTOR

OFFICE OF THE EXECUTIVE SECRETARY
100 NORTH NINTH STREET
RICHMOND, VIRGINIA 23219-2334
(804) 786-6455

November 6, 2023

Mr. Hal E. Greer, Director
Joint Legislative Audit and Review Commission
919 East Main Street, Suite 2101
Richmond, Virginia 23219

Dear Mr. Greer:

Thank you for the opportunity to review and comment on the exposure draft of the JLARC report, "Review of Indigent Criminal Defense and Commonwealth's Attorneys." I appreciate you taking the time to meet with me and my staff and incorporating our feedback into your report.

The Office of the Executive Secretary (OES) is the administrative office of the court system. We provide administrative support to the courts of the Commonwealth in areas such as human resources, information technology, accounts payable, and education and training for judicial branch employees. OES is also responsible for administration of the criminal fund, from which court-appointed counsel are paid. We recognize the vital role of court-appointed counsel in our criminal justice system and are concerned about the effects on the court system of the declining numbers of attorneys willing to serve as court-appointed counsel. The Supreme Court of Virginia and the Court of Appeals of Virginia have recently increased fees for court-appointed counsel in the appellate courts; however, action by the General Assembly is needed to change statutory caps on compensation for court-appointed counsel in the trial courts. We support an increase in compensation for court-appointed counsel.

Most courts and court-appointed counsel use OES's Electronic Voucher Payment System (EVPS) for online submission and processing of payment requests submitted by attorneys and approved by the courts. Substantial programming changes to EVPS would be needed if new offense categories for compensation caps for court-appointed counsel were implemented as recommended in the report. We are currently in the process of analyzing the potential fiscal impact and the necessary timeframe that would

be needed to implement those changes in EVPS. OES would likely need funding to implement changes to the offense type categories for compensation caps, in addition to the funding needed for the criminal fund to increase payments to attorneys for which JLARC has provided the fiscal impact analysis.

Thank you again for the opportunity to review the draft report and provide feedback. I would be happy to answer any additional questions from you or your Commission.

With best wishes, I am

Very truly yours,

A handwritten signature in black ink, appearing to read 'K R Hade', written in a cursive style.

Karl R. Hade

KRH:ap



JEFFREY PALMORE
CHAIRMAN

ROBYN DE SOCIO
EXECUTIVE SECRETARY

CRAIG BURNS
STACI HENSHAW
EX-OFFICIO MEMBERS

COMMONWEALTH OF VIRGINIA

Compensation Board

P.O. Box 710
Richmond, Virginia 23218-0710

November 3, 2023

Mr. Hal E. Greer, Director
Joint Legislative Audit and Review Commission
919 East Main Street, Suite 2101
Richmond, Virginia 23219

Dear Mr. Greer:

Thank you for the opportunity to review an exposure draft of the JLARC report, *Review of Indigent Criminal Defense and Commonwealth's Attorneys*. We provided your staff information during the review and technical comments on the exposure draft in the relevant sections of the report. Our review of the exposure draft was generally related to discussion of the Compensation Board, and of funding, compensation, and staffing in Commonwealth's Attorneys' offices.

We appreciate the time, research and effort that have gone into producing this report and believe that stakeholders will find it informative. We also hope the General Assembly finds the information about workload and staffing useful in future considerations of matters related to Commonwealth's Attorneys' funding, compensation, and staffing levels.

Thank you again for the opportunity to have input into the development of a quality study by your team.

Sincerely,

A handwritten signature in blue ink, appearing to read "Robyn M. de Socio".

Robyn M. de Socio
Executive Secretary

C: Jeffrey Palmore, Chairman

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November 6, 2023

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Mr. Hal E. Greer
Director, Joint Legislative Audit & Review Commission
919 E. Main Street, Suite 2101
Richmond, VA 23219

Dear Mr. Greer,

Thank you for consulting with the Virginia Association of Commonwealth's Attorneys (VACA) in response to the study resolution directing your staff "to review the adequacy and availability of legal representation for indigent defendants, and commonwealth attorney staffing and compensation." We are pleased your research benefitted from our thorough workload assessment project recently completed in collaboration with the National Center for State Courts (NCSC) and the Compensation Board. In addition, we appreciate your staff taking the time to meet with us on several occasions.

As your report highlights, the workload of Commonwealth's Attorneys extends well beyond the prosecution of criminal cases. The Code of Virginia is rife with civil and administrative duties and responsibilities, which are enumerated in the Commonwealth's Attorney Handbook by chapter.

- Chapter 1 - Attorney for the Commonwealth - The Position Itself
- Chapter 2 - Attorney for the Commonwealth - As Prosecutor
- Chapter 3 - Attorney for the Commonwealth - Representing the Locality
- Chapter 4 - Attorney for the Commonwealth - Representing the Commonwealth
- Chapter 5 - Attorney for the Commonwealth - As Office Manager

The 215-page document prepared by the Commonwealth's Attorneys' Services Council (CASC) was updated in 2022 and should be reviewed to fully appreciate the actual workload of Virginia's prosecutors.

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Also, we ask that your members review the Rules of Professional Conduct from the Virginia State Bar, specifically Rule 3.8 Additional Responsibilities of a Prosecutor. It documents a prosecutor's ethical responsibility to a defendant and victim which is unique to prosecutors. Comment [1] states, "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."

It is because of our equal ethical obligation to a crime victim and the defendant in the pursuit of justice that we encourage improved compensation for our public defender and court-appointed colleagues. Still, given the all-encompassing workload of Virginia's prosecutors surpasses that of our defense counterparts, we certainly champion for our elevated compensation.

Thank you again for consulting with us during your research. Please contact me and Amanda Howie, VACA Administrator, if you require additional information.

Sincerely,

A handwritten signature in blue ink that reads "Shannon L. Taylor". The signature is written in a cursive, flowing style.

Shannon L. Taylor
2022-2023 VACA President
Henrico County Commonwealth's Attorney



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919 East Main Street Suite 2101 Richmond, VA 23219