

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

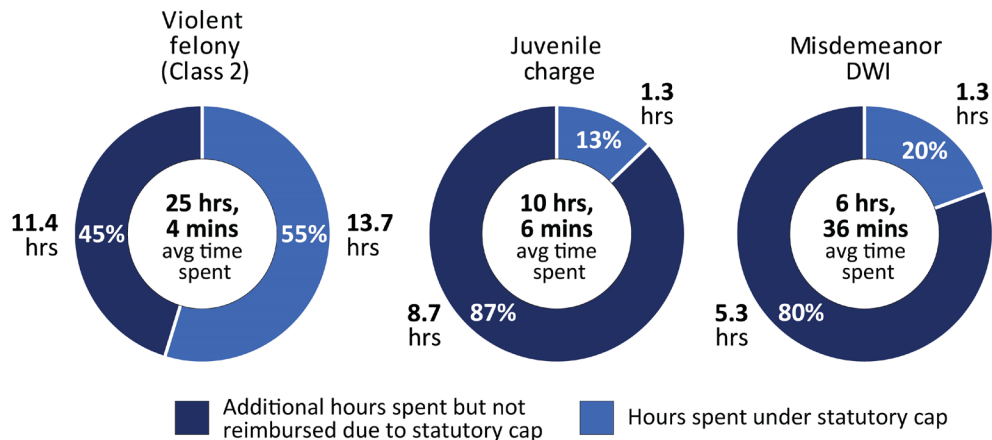
Virginia’s publicly funded indigent defense system provides defense representation to indigent criminal defendants through a hybrid system of (1) state-funded, locally based public defenders in 28 offices serving 56 localities, and (2) private attorneys who are compensated by the state when they serve 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

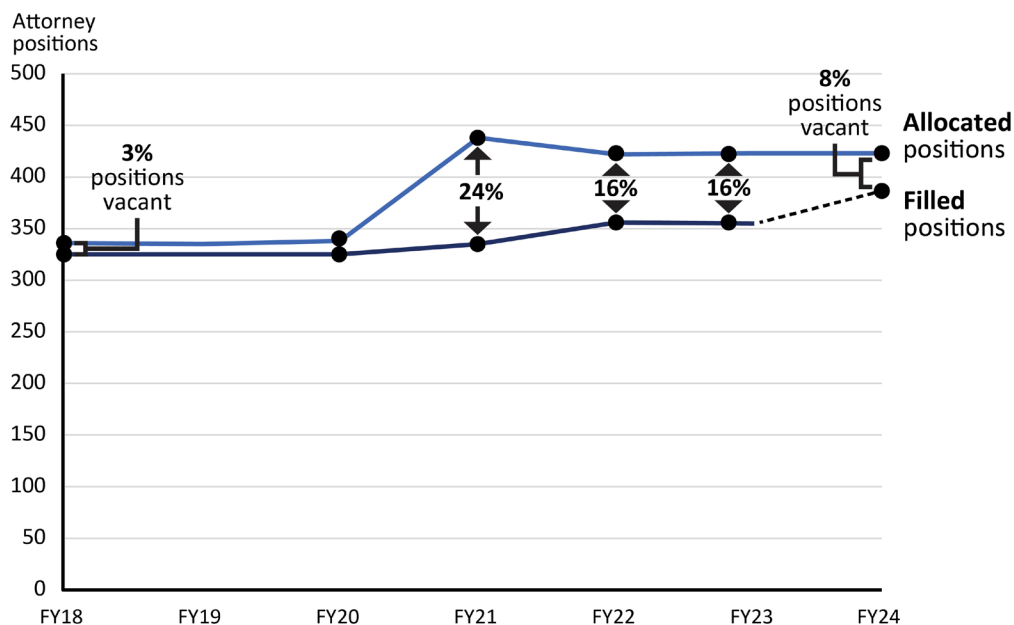
After a period of very high vacancy rates in the state's public defender offices, vacant attorney positions are beginning to be filled. In FY21, the General Assembly allocated 59 new attorney positions for the existing public defender offices, plus positions to

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.

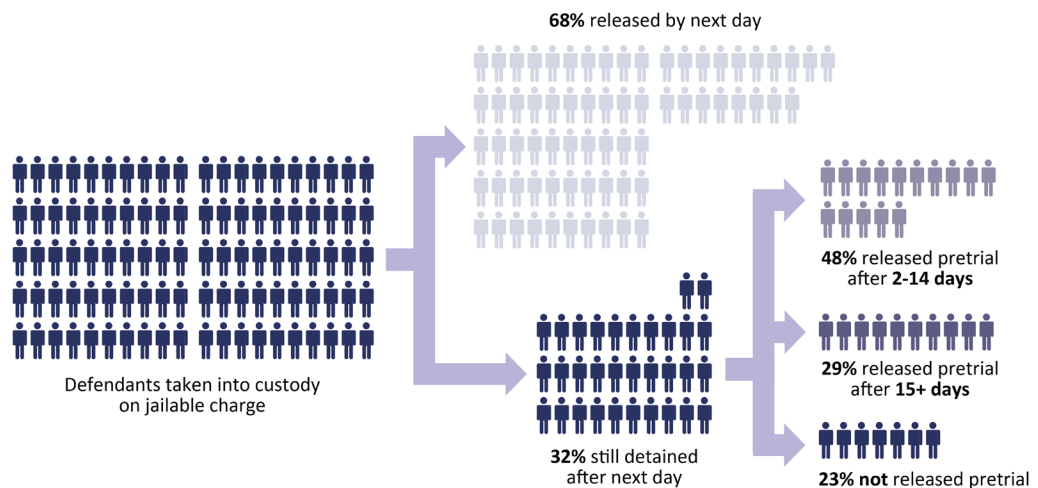
Even if all vacant positions were filled, there would not be enough commonwealth's attorneys to fully meet the estimated workload. The Compensation Board recently updated commonwealth's attorney staffing standards to better calculate attorney workload and the number of staff needed in each office to 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.