

**CHAPTER 3 - PROGRAMS FOR HANDLING ADVISEMENT/APPOINTMENT OF
COUNSEL AND INDIGENCY DETERMINATION PROCEDURES**

While the filing of a written financial statement is required, an additional change made in the statutes allows the courts greater flexibility in the handling of right to counsel procedures. Under [Va. Code § 19.2-159](#), in-person examinations of the defendant's financial status by the judge are optional rather than mandatory. The judge reviews the financial statement and makes the decision on eligibility but this need not take place in open court.

A number of courts have established “pre-trial” procedures for conducting advisements, appointments of counsel, and collection of the needed financial data from the defendant. Such procedures have a number of time saving advantages. First, having the applicant advised of his right to counsel and interviewed for indigency prior to the court hearing reduces bench time for the judge and waiting time for witnesses and victims in other cases. It also reduces the number of appearances in court both for defendants and victims/witnesses. Members of the bar, particularly those serving as court-appointed counsel, favor this approach because it lessens their time in court. Examples of these programs and procedures follow:

I. USE OF THE MAGISTRATE’S OFFICE

In a few judicial districts, magistrates assist both the general district and juvenile courts (adult defendants) with right to counsel matters. While the programs operate differently in each area, the steps involved are essentially the same. Under procedures developed by the chief magistrate and the courts, magistrates interview all persons brought to the magistrate for bail hearings and who are charged with offenses for which they may be incarcerated. Typically, magistrates do not include questions relating to the determination of eligibility for court-appointed counsel in those bail hearings where the defendant is intoxicated. Individuals released on summonses by the arresting officer simply appear in court on the specified return date either for advisement or trial.

Magistrates generally collect the information concerning court-appointed attorney eligibility before concluding the bail hearing. After determining bail, magistrates advise defendants of their right to be represented and of the options of employing private counsel, of waiving counsel, or of having the court appoint counsel if the defendant is indigent.

If the defendant waives counsel, the necessary forms are completed and the magistrates set the cases for trial according to prescribed schedules worked out with the appropriate clerk's office.

In some cases subpoenas are issued by the magistrates for both the witnesses of the complainant and the defendant, and all case papers are forwarded to the clerk. On the trial date, the judge reviews with the defendant his decision to proceed without counsel and asks him, if he has not indicated otherwise, to reaffirm the waiver.

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If the accused decides to employ counsel, the magistrate sets a date (established by the courts) on which the defendant must appear for an advisement hearing, unless his attorney has notified the clerk's office that counsel has been retained, in which event a trial date may be set. Using such a procedure eliminates the possibility that a defendant who has chosen to retain counsel will appear at trial not having secured counsel, thus requiring a continuance and inconveniencing witnesses, victims, etc.

If a defendant charged with an offense punishable by incarceration requests a court-appointed lawyer, the magistrate uses the financial statement form during the interview with the defendant. Experience has proven it easier for magistrates to obtain the information by oral examination rather than having defendants complete it by themselves. Magistrates explain to the defendant why the information is being asked and conducts the interview in a professional manner.

The chief magistrate and the magistrate regional supervisor should develop written procedures for the magistrate and set a date after implementation to evaluate its success. Suggested steps in developing such a program are as follows:

- The magistrate regional supervisor, chief magistrate, the chief judges and clerks of the district court, and the chief law enforcement officer should hold an initial meeting to discuss the concept. The feasibility of such a project is dependent upon the workload of the magistrates - in high volume magistrate offices the concept might not be practical.
- If, as a result of the initial meeting, all parties agree upon the concept of magistrates collecting data to determine eligibility for court-appointed counsel, the chief magistrate and magistrate regional supervisor must meet with the clerk of each court to be served. The Department of Judicial Services recommends that the procedures for program operation be uniform throughout the magisterial region when more than one locality is involved. Court schedules and methods of forwarding financial statement forms to the court need to be discussed and agreed upon.
- Once the magistrate regional supervisor and chief magistrate have developed written procedures, they will forward them to the judges, clerks, and law enforcement agencies for review and comment.
- The chief magistrate is responsible for providing magistrates with procedural training.
- The courts and magistrates need to evaluate the effectiveness of the program and assess both the positive and negative consequences relating to the program's implementation. The parties should meet within the first six months of the implementation to determine whether to modify or extend the program.

II. USE OF PROBATION COUNSELORS IN THE COURT SERVICE UNIT

[Virginia Code § 16.1-267](#) specifically provides that staff from the juvenile court services unit may be assigned by the judge to investigate the financial status of parents to determine their ability to pay for an attorney for their child. In a few units, counselors also handle “arraignments” in which the charge(s) against the juvenile is read from a prepared statement, the advisement of counsel is given and the counselors assist the parties in filling out a financial form for submission to the court. Minimum standards adopted by the Department of Juvenile Justice permit counselors to receive workload credit for preparing these and other types of financial reports for the court.

In cases where juveniles are not detained, the summons is issued and a return date, place, and time are specified for the arraignment. This meeting is usually scheduled to take place in the court service unit offices. If the parties request court-appointed counsel and are eligible (given the charges involved), the financial statement is filled out with the probation counselor. If, after approval by the judge, counsel is to be appointed, the probation officer notifies the next attorney on the court-appointed list of the assignment. The case is then set for trial. Thus, the first appearance the juvenile makes before the court is at the trial.

In cases where the juvenile is detained, the judge may designate a counselor to be present at a specified time prior to or immediately following the detention hearing to help parents complete the financial forms. Obviously, the proximity of the detention center must be considered in determining whether or not to follow this practice.

III. USE OF COURT VOLUNTEERS

The services of volunteers also are utilized to question defendants on their financial eligibility for court-appointed counsel. Those volunteers have been recruited to work daily at the court to interview bonded and summonsed defendants as well as those held in custody.

Where these programs exist, arraignments are held daily at the beginning of court. All defendants requesting court-appointed counsel are advised by the judge that they must meet with the volunteer who will assist them in completing a financial statement. The bailiff provides the defendants a card specifying the time for the meeting.

Typically, the volunteer uses an office adjacent to the court to conduct the interview. Following the meeting, the individual is instructed when to return to court.

Volunteers should use a secure area of the jail to question a defendant held in custody. After the interviews, the volunteer provides the judge with the returned case files and completed financial statements. The duties of the volunteers in some district courts have been expanded to include interviews of defendants appearing in circuit court by direct indictment.

Court personnel emphasized the need to have either the clerk or a deputy clerk available to train the volunteer and monitor the project's effectiveness. The following suggestions are offered to other jurisdictions interested in establishing similar programs:

- An initial meeting should be held between the clerk and judge(s) to discuss the feasibility of the project for the court.
- If the concept is approved, the clerk or other designated persons should draft guidelines for the program's operation, including how it will be fit into the court's schedule, interview hours, and instructions for volunteers. It is recommended that primary consideration be given to efficiency in the court's calendar and that volunteers be chosen with these time frames in mind. These guidelines should be reviewed and approved by the judges.
- Many courts find it helpful to develop a written job description and “contract” for the volunteer to insure that responsibilities to the court are fully understood.
- Determine potential sources of volunteers. One court worked with a local university to secure interns/volunteers from particular interest areas such as political science, sociology, and law courses. These students receive class credits for participating in such projects. Other potential sources of volunteers are voluntary action centers, retired senior volunteer programs, and local civic organizations.
- Once the volunteer is selected, an implementation date should be set. The clerk may find it helpful to meet with the sheriff, probation counselors, Commonwealth's attorney and jail personnel to acquaint them with the new procedures and/or to distribute written guidelines and procedures to them.
- The volunteer must receive thorough information, training, and instruction regarding the use of forms involved in interviewing defendants. General information about the court's operation and policies also needs to be provided. Special care must be taken to caution the person to avoid responding to questions regarding the need for a lawyer or names of specific attorneys and their qualifications.
- Court personnel responsible for overseeing the program initially should closely monitor the volunteers in the performance of their duties to insure that guidelines are followed and that objectives of the program are being met.
- It may be helpful to evaluate the program within the first few months of operation. Input should be solicited from the judges, volunteers, court-appointed attorneys and defendants concerning any problems encountered or enhancements that would serve to improve the program.

IV. OTHER OPTIONS AVAILABLE TO THE COURT

Other options available to assist courts in handling indigency determination are the use of the Commonwealth's Attorneys offices and the clerks' offices. Under [Va. Code § 19.2-159.1 \(C\)](#), the Commonwealth's Attorney's office may be required by the court to make investigations as to the indigency of an applicant for court-appointed counsel. He/she is also authorized by statute to delegate this responsibility to any state or local agency that possess the facilities necessary to quickly make such investigations. While this continues to be an option for the courts, it appears that few Commonwealth's Attorneys offices currently are able to provide this type of assistance.

District court clerks and deputy court clerks assist in gathering the financial data from persons requesting court-appointed counsel in a number of courts throughout the Commonwealth. To accommodate schedules in the clerks' offices, specific times for the interviews to take place have been established. The notice of right to counsel and financial statement are mailed to or are attached to the summons served on the defendant along with instructions on the date, time and place for individual(s) to be present in the clerk's office. In other courts, the judge has the defendant proceed to the clerk's office immediately following arraignment for help with the form and notification of a trial date.

One final method of collecting the financial data would be for the court to explore using staff from pre-trial release programs and/or personnel from Offender Aid and Restoration programs. While these programs currently are not utilized to provide this type of assistance, their staff and volunteers generally are available in jails and may be especially appropriate to interview those defendants held in custody who have requested court-appointed counsel.