

**CHAPTER 4 - SUGGESTED PROCEDURES FOR APPOINTMENT OF
COUNSEL/MAINTAINING ATTORNEYS LISTS****I. INTRODUCTION**

The 2004 General Assembly enacted House Bill 1056 (Chapter 921) that established a Commission to develop criteria for court-appointed lawyers as well as to assume the duties of the existing Public Defender Commission. The General Assembly created this independent oversight commission to provide a unified voice for Virginia's indigent counsel, naming it the [Virginia Indigent Defense Commission](#) (VAIDC). The VAIDC is responsible for providing oversight and support for all attorneys who furnish indigent defense service in the Commonwealth, both public defenders and members of the private bar. The VAIDC provides information on indigent defense to the public and reaches out to the courts and Commonwealth's Attorneys as partners in the criminal justice system.

A few of the duties of the [Virginia Indigent Defense Commission](#) include the following:

- To maintain a list of attorneys admitted to practice law in Virginia who are qualified to serve as court-appointed counsel for indigent defendants based upon the official standards and to disseminate the list by July 1 of each year and updates throughout the year to the Office of the Executive Secretary of the Supreme Court for distribution to the courts.
- To develop initial training courses for attorneys who wish to begin serving as court-appointed counsel, and to review and certify legal education courses that satisfy the continuing requirements for attorneys to maintain their eligibility for receiving court appointments.

Beginning July 1, 2005, all attorneys wishing to represent accused persons qualifying for the appointment of counsel through the courts must be certified and included on VAIDC's list of qualified attorneys. The Commission's goal is to ensure that every attorney has the time, training, and resources necessary to provide each client with high quality indigent defense services, a necessary component of a fair and reliable criminal justice system. The list will be distributed through the Office of the Executive Secretary and will be available on the court's website (under the "Directories" category):

<http://www.courts.state.va.us>

Interested persons may also visit the Virginia Indigent Defense Commission (VAIDC) website at the following address:

<http://www.indigentdefense.virginia.gov/>

After the decision has been made to appoint counsel, the court must now select an attorney and confirm the appointment. [Virginia Code § 19.2-159](#) states in part: "Except in

jurisdictions having a public defender, or unless (i) the public defender is unable to represent the defendant by reason of conflict of interest or (ii) the court finds that appointment of other counsel is necessary to attain the ends of justice, counsel appointed by the court for representation of the accused shall be selected by a fair system of rotation among members of the bar practicing before the court whose names are on the list maintained by the Indigent Defense Commission pursuant to § 19.2-163.01. If no attorney who is on the list maintained by the Indigent Defense Commission is reasonably available, the court may appoint as counsel an attorney not on the list who has otherwise demonstrated to the court's satisfaction an appropriate level of training and experience.

The court shall provide notice to the Commission of the appointment of the attorney by sending a copy of District Court form DC-334, Request for Appointment of a Lawyer, to the Indigent Defense Commission. There is no statutory requirement as to the frequency of mailing such notices. Therefore, it is recommended that copies be sent to the Commission at least once a month. Copies should be mailed to:

Virginia Indigent Defense Commission
Administration Office
1604 Santa Rosa Road, Suite 109
Richmond, VA 23229
Attn: Attorney Certification Section

In capital cases the [Virginia Indigent Defense Commission](#) provides periodically to each clerk's office a current statewide list of attorneys qualified to represent indigent defendants charged with capital murder or sentenced to death. This list should be maintained with your local court appointed counsel list. However, it should not be integrated into that list since it is only used in capital cases.

Form DC-51, ROTATION LIST COURT-APPOINTED ATTORNEY has been designed to assist all courts in complying with [Va. Code § 19.2-159](#). The form's "Date Appointed" column will help document the rotation sequence, and the column headed "Comments" will assist in documenting the reason for refusal of appointment or why the court selected the attorney out of sequence. For example, if the court contacts the next attorney on the list due for appointment and for some reason there is a conflict, i.e. disqualification, then "disqualification" can be entered in the "Comments" field. If the selected attorney refuses to accept appointment because of a schedule conflict, then "scheduling conflict" may be entered. Examples of other comments that could be entered include "vacation, refused, recidivist appointment, unavailable," or any other appropriate, brief comment.

The date of contact in the foregoing examples should be entered in the "Date Appointed" column of the form and a line drawn through the "Defendant" name column. Through the use of the "Comments" column, the court will be able to document the rotation and the reason for no appointment, if such is the case.

There are several suggested methods the court may use for the selection process:

- **Individual Appointment:** An attorney is selected from a rotating list to represent a single defendant. The next defendant qualifying for appointed counsel receives the next attorney on the list.
- **Multiple Appointments or Time Segment:** The court selects an attorney to take all court appointments during a given time frame, i.e. by day, week, or month.
- **Recidivist Appointment:** The court appoints the same attorney that was appointed originally to represent the defendant on repeated charges. The advantage in this type of appointment is that the attorney is already familiar with the person and his/her background.
- **Selective Appointment:** This method is not used as frequently as others, but in some of the more serious crimes the court may desire to select a more experienced attorney and therefore may bypass the normal rotation sequence.

Regardless of the selection method used by the court, the selection process should be documented and a rotation schedule established. Care should be exercised to assure that all new attorneys who wish to be appointed are added to the list.

The court should maintain a master list with only the names of the attorneys. This will enable the court to photocopy the list for actual use, without having to type a new list each time the list being used has been fully rotated. The list should be maintained until the court's accounts have been audited.

II. APPOINTMENT OF COUNSEL IN CAPITAL CASES

[Virginia Code § 19.2-163.7](#). Counsel in capital cases - In any case in which an indigent defendant is charged with a capital offense, the judge of the circuit court, upon request for the appointment of counsel, shall appoint at least two attorneys from the list or lists established by the Supreme Court and the Indigent Defense Commission or as provided in subsection C of [Va. Code § 19.2-163.8](#) to represent the defendant at trial and, if the defendant is sentenced to death, on appeal. In all cases where counsel is appointed under this section after July 1, 2004, one of the attorneys appointed shall be from a capital defense unit maintained by the Indigent Defense Commission. This section shall be construed in conformity with the provisions of §19.2-163.4. If prior to indictment the attorney for the Commonwealth declares in writing that the Commonwealth will not seek the death penalty, the capital defense unit attorney may upon motion before the circuit court seek to withdraw as counsel. The circuit court judge having heard the motion to withdraw shall permit the capital defense unit attorney to withdraw and shall appoint another attorney pursuant to the provisions of §19.2-159. If the sentence of death is affirmed on appeal, the court shall, within 30 days after the decision of the Supreme Court of Virginia, appoint counsel from the same list, or such other list as the Supreme Court and the Commission may establish, to represent an indigent prisoner under sentence of death in a state habeas corpus proceeding. The Attorney General shall have no standing to object to the appointment of counsel for the petitioner.

[Virginia Code § 19.2-163.8 \(C\)](#). Notwithstanding the requirements of [Va. Code § 19.2-163.7](#), the judge of the circuit court may appoint counsel who is not included on the list, but who otherwise qualifies under the standards established and maintained by the Court and the Commission.

The text of the standards for the qualifications of appointed counsel in capital cases as promulgated by the Supreme Court and the Virginia Indigent Defense Commission are as follows:

A. Standards for Counsel in Capital Cases

“Pursuant to [§ 19.2-163.8\(E\)](#) of the Code of Virginia of 1950, as amended, the Supreme Court and the Indigent Defense Commission shall, in conjunction with the Virginia State Bar, promulgate and thereafter maintain standards for the qualifications of counsel who shall be considered eligible to be placed on the list of qualified attorneys” in capital cases. When Circuit Courts, pursuant to §19.2-163.7 of the Virginia Code, appoint counsel for an indigent defendant charged with a capital offense or under sentence of death, such Court shall appoint two (2) attorneys for trial, appellate, and habeas proceedings. Accordingly, these standards often refer to "lead counsel" and "co-counsel.” (Whenever the term “lead counsel” is used, this would also include an attorney acting as sole counsel in the case). “Since the General District Court or Juvenile and Domestic Relations District Court often will make the initial appointment(s), such Court should consult with the Chief Judge of the Circuit Court with regard to appropriate appointments. If a Public Defender is appointed and is either "lead" or "co-counsel", the other attorney should be appointed from the private bar. If counsel is retained, it is recommended that the Circuit Court make known to the defendant and/or counsel, the standards required for capital defense counsel.”

B. Trial Counsel

Lead counsel must:

1. Be licensed to practice law and in good standing of the Virginia State Bar or admitted to practice *pro hac vice*;
2. Initial Capital Certification Training; and
3. Describe with particularity the basis of the attorney’s belief that he or she is qualified for such appointment, including:
 - a. A listing of each capital and non-capital murder case in which the attorney served as counsel over the previous ten years, naming the client, jurisdiction,

judge, prosecuting attorney, and co-counsel if any (For the purpose of this subparagraph, whenever the term "Capital Case" is used, it shall mean a case in which the death penalty was sought and which was concluded after the jury was impaneled);

- b. A listing of all relevant training experiences during the previous five years; and
 - c. Any other experience or employment bearing on the attorney's qualifications.
4. Co-counsel must meet all of the requirements of "lead counsel".

Re-certification for lead counsel and co-counsel: Within two years after being initially certified, complete at least ten hours of specialized training in capital litigation. (The Annual Capital Defense Workshop will meet the re-certification requirement).

C. Appellate Counsel

Appellate counsel must meet the following requirements:

- 1. Be licensed to practice law and in good standing of the Virginia State Bar or admitted to practice *pro hac vice*;
- 2. Initial Capital Certification Training;
- 3. Be thoroughly familiar with the rules and procedures of appellate practice;
- 4. Have experience as counsel in direct appeals of felony convictions; and
- 5. Have demonstrated a commitment to providing zealous advocacy and high quality legal representation.

Re-certification: Within two years after being initially certified, complete two hours of particularized capital appellate training.

D. Habeas Corpus Counsel

Habeas Corpus counsel must satisfy the following requirements:

- 1. Be licensed to practice law and in good standing of the Virginia State Bar or admitted to practice *pro hac vice*;

2. Initial Capital Certification Training;
3. Six additional hours of particularized training in capital habeas procedure and practice (Attorneys with significant experience in capital habeas litigation may apply for a waiver by calling (804) 662-7249 ext. 139);
4. Be thoroughly familiar with the rules and procedures related to habeas proceedings;
and
5. Have demonstrated a commitment to providing zealous advocacy and high quality legal representation.

Re-certification: Within two years after being initially certified, complete six hours of particularized capital habeas training.