

**CHAPTER 5 - GUIDELINES FOR PAYMENT OF COURT-APPOINTED COUNSEL
FEES AND EXPENSES****I. INTRODUCTION**

The General Assembly has established certain statutory limitations on payment of fees from the Criminal Fund, which must be followed by the Office of the Executive Secretary of the Supreme Court. All accounts are audited by the [Auditor of Public Accounts](#) to ensure that they are in accordance with the Code of Virginia. If a court allows more than the statutory limit, then the Supreme Court is required to return the voucher to the court for correction.

The uniform payment criteria in both circuit and district courts are hours of service. The hourly rate shall not exceed \$90 per hour, in or out of court, unless otherwise specified. The total amount allowed for each charge is the sum of the allowable fee and any waiver amount allowed, plus applicable expenses. The fee amount is the total of in-court time and out-of-court time up to the statutory fee amount. The documentation method is on form DC-40, LIST OF ALLOWANCES. Form DC-40, LIST OF ALLOWANCES is to be completed and submitted by the court-appointed attorney within 30 days of the completion of all proceedings in that court- the attorney's in-court time and out-of-court time should be clearly indicated on the form. Form DC-40, LIST OF ALLOWANCES has been designed for use in both district and circuit courts.

While the court generally cannot exceed the statutory fee allowed for a specific type of charge, [Va. Code § 19.2-163](#) provides for a supplemental waiver amount and for an additional waiver amount above the statutory fee to be awarded by the court in which the case is concluded. In these cases, [Va. Code § 19.2-163](#) requires court-appointed counsel to provide a detailed accounting of time expended for each representation.

Court-appointed attorneys who are not public defenders may request a waiver of these limitations on compensation up to a certain specified additional amount when the effort expended by counsel, the time reasonably necessary for the particular representation, the novelty and difficulty of the issues, or other circumstances warrant such a waiver.

Examples of factors to be considered for Fee Cap Waivers include, but are not limited to, the following:

- Single charge representation (especially misdemeanor and juvenile cases)
- Juvenile charged with an offense that would be a felony if committed by an adult
- Jury trials, including misdemeanors
- Extensive travel required during representation
- Juvenile certification/transfer hearings – J&DR court jurisdiction retained
- Issues requiring extensive legal research
- Matters involving DNA and other scientific evidence
- Multiple defendant, victim, or “spree” cases

- Complex fraud cases
- Representation of a client requiring the services of an interpreter
- Representation of a client with serious mental health issues, or accessibility challenges
- Insanity defense
- Complex investigation, considering number and accessibility of witnesses interviewed, record collection, document organization and use of investigative, expert or other services
- Serving as advisory counsel to pro-se defendant during felony trial
- Matters involving unusually long and complex pretrial hearings, trial, or sentencing hearing
- Change of venue cases

Upon submission by counsel of a detailed accounting of time expended for court-appointed representation and an application outlining the justification for the waiver, the court in its discretion and subject to guidelines issued by the Executive Secretary of the Supreme Court of Virginia may waive the limitation on the statutory fee and authorize additional compensation up to the supplemental statutory waiver amount when the effort expended by counsel, the time reasonably necessary for the particular representation, the novelty and difficulty of the issues, or other circumstances warrant such a waiver.

Counsel may also request additional compensation exceeding these amounts by submitting a written request with a detailed accounting of the time spent and justification for the additional amount. The presiding judge shall determine, subject to guidelines issued by the Executive Secretary of the Supreme Court of Virginia, whether this request for additional compensation above the supplemental statutory waiver amount is justified, in whole or part, by considering the effort expended and time reasonably necessary for the particular representation, and, if so, shall forward the request as approved to the chief judge of the circuit court or district court for approval.

If both the presiding judge and the chief judge determine that an additional amount is justified based upon the novelty, difficulty, effort expended and time required for the particular representation and they approve a fee for such an additional waiver amount greater than:

- \$2,000 in any district court,
- \$3,000 in any circuit court misdemeanor or circuit delinquency charge,
- \$5,000 in any circuit court felony, class III to VI charge, or
- \$15,000 in any circuit court felony class II charge,

then such request for an additional waiver amount in excess of the foregoing amounts shall be submitted by the Chief Judge to the Office of the Executive Secretary, with the DC-40A and all supporting documentation, and upon review by the Chief Justice of the Supreme Court, may be paid in full, or, in lieu of full payment, be approved for a partial payment. Partial payments shall be made only in the event the Chief Justice finds such partial

payment is necessary to promote the equitable distribution of waiver funds through the end of the fiscal year.

These guidelines are in addition to guidelines posted at http://www.courts.state.va.us/forms/district/statutory_criteria_fee_cap_waiver_guidelines.pdf

The payment approval process,¹ including review and approval of invoices by the Office of the Executive Secretary, is a function of the Supreme Court of Virginia's oversight of the judiciary's budget and management of funds, including the Criminal Fund. Fee waivers are paid from a finite appropriation allocated to the fiscal year. The foregoing process is necessary to facilitate the fair distribution of funds as provided for in the Code of Virginia and the Budget.²

There is no appeal process available if an application for waiver of fee caps is denied. Additionally, if at any time the funds appropriated to pay for waivers become insufficient, the Executive Secretary of the Supreme Court of Virginia shall so certify to the courts and no further waivers shall be approved or paid.

If court-appointed counsel is not requesting a supplemental waiver amount, then only form DC-40, LIST OF ALLOWANCES needs to be completed and submitted to the court by the Attorney. If court-appointed counsel is requesting a supplemental fee waiver, then counsel must complete and submit to the presiding judge for approval, in addition to form DC-40, List of Allowances, form DC-40(A), [APPLICATION FOR AND APPROVAL/DENIAL FOR WAIVER OF FEE CAP](#) and an Attorney Time Sheet form. Court-appointed counsel must complete a separate application for each charge for which counsel is requesting a waiver of the fee cap. This form, along with the Attorney Time Sheet shall be retained in the court file. Requests for additional amounts above the statutory fee waiver mirror the form requirements for a supplemental fee waiver but would require approval by both the presiding judge and by the chief judge of the circuit court or the district court in which the case was concluded. Depending on the amount of additional waiver amount being sought, review by the Chief Justice of the Supreme Court may be required.

In the event a waiver of compensation has been requested and authorized, and the defendant is convicted, the court shall assess against the defendant as court-appointed attorney costs only an amount equal to the pre-waiver cap. If the judge or clerk is in doubt as to the statutory limit, he/she should consult the [Chart of Allowances](#) or call the Office of the Executive Secretary of the Supreme Court.

¹ See Virginia Code § 2.2-810.

² See Item 34 of 2016-18 Biennial Budget.

II. STATUTORY COMPENSATION FOR COURT-APPOINTED ATTORNEYS

The following chart reflects current statutory compensation for court-appointed attorneys:

Court	Charge*	Statutory Fee	Supplemental Statutory Waiver Amount	Fee by Additional Waiver
District	Misdemeanor	\$120	Up to \$120	Discretion of Court
Juvenile and Domestic Relations District	Delinquency – Equivalent to Misdemeanor or Felony, Class III to VI	\$120	Up to \$120	Discretion of Court
Juvenile and Domestic Relations District	Delinquency – Equivalent to Felony, Class II, or Probation Violation for Felony, Class II	\$120	Up to \$650	Discretion of Court
District	Felony, Class III to VI resolved in District Court	\$445	Up to \$155	Discretion of Court
District	Felony, Class II, resolved in District Court	\$1,235	Up to \$850	Discretion of Court
Circuit	Misdemeanor	\$158	Not Available	Discretion of Court
Circuit	Delinquency	\$158	Not Available	Discretion of Court
Circuit	Felony, Class III to VI	\$445	Up to \$155	Discretion of Court
Circuit	Felony, Class II	\$1,235	Up to \$850	Discretion of Court

*Defense of an unclassified felony punishable by 20 years or less is compensated as a Felony Class III or IV felony; by more than 20 years as a Class II.

Fee waivers may only be awarded by the court in which the case is concluded.

The General Assembly has authorized the above schedule for compensation for an attorney appointed by the court in non-capital cases. If co-counsel (more than one attorney) is appointed to represent a defendant at the same time in a non-capital case, then co-counsel shall share the maximum total compensation permitted for one attorney as set forth above.

Additional guidelines are posted at:

- <http://www.courts.state.va.us/courtadmin/aoc/fiscal/home.html#coa>, and
- http://www.courts.state.va.us/forms/district/statutory_criteria_fee_cap_waiver_guidelines.pdf.

In order to comply with Internal Revenue Service requirements and the state's policy regarding payments for court-appointed counsel, the Office of the Executive Secretary of the Supreme Court of Virginia must have an IRS Form [W-9](#) on file before payment to attorneys can be processed. The name and tax identification number shown on IRS Form [W-9](#) must match Internal Revenue Service records. Examples of proper IRS Form [W-9](#) information are as follows:

- An attorney working for a firm, who ultimately turns over to the firm his/her court-appointed fee, must use the firm's name and tax identification number. He/she cannot use his/ her name and the firms' tax identification number.
- An attorney working for a firm, but who, on occasion, works for himself/herself and receives remuneration direct, should be paid using his/her name and Social Security number.
- An attorney working as an individual or sole proprietor must use his/her Social Security number or he/she can use an employer tax identification number.
- An attorney working for a sole proprietor must use the sole proprietor's Social Security number or the employer's tax identification number and the sole proprietor's name.

The name and tax identification number in which a check is issued is how the income will be reported to the Internal Revenue Service at the end of the tax year. This must be the name and number on file with the federal government. All courts have been notified to issue payment requests as required to meet Internal Revenue Service regulations.

NOTE: Clerks should make every attempt possible to ensure that attorneys have complied with the Internal Revenue Service Regulations regarding the filing of an IRS Form [W-9](#). If assistance regarding this process is needed, please contact:

Supreme Court of Virginia
Office of the Executive Secretary
Accounts Payable Administrator
100 North Ninth St., 3rd Floor
Richmond, Virginia 23219

Expedited Reimbursement: In an effort to expedite the speed and efficiency of the court-appointed counsel reimbursement process of approved court-appointed counsel compensation and to reduce the associated expense involved in processing manual payments, a direct deposit service is available to all court appointed counsel (all vendors, including court reporters, interpreters, etc. are eligible) who register through the Virginia Electronic Data Interchange. You may sign up for this service at the following website:

http://www.doa.virginia.gov/General_Accounting/EDI/EDI_Main.cfm

Upon accessing this site, go to the "Trading Partner Information" subtitle and click on "Trading Partner EDI Agreement and Enrollment Form for Vendors." You will be routed to a PDF form for you to complete and mail. Once registered, you will receive e-mail notices indicating the date and amount of deposit that is being made to your designated bank account, along with a trace number for you to track this transaction.

The provisions of [Va. Code § 2.2-810](#) provide that the comptroller shall not pay any allowance made by any court of the Commonwealth until the Supreme Court of Virginia

has approved such allowance for payment. Pursuant to this section, the Supreme Court has established the policy that the court will not approve any allowance for court-appointed attorney fees that exceed \$90 per hour for in-court or out of court service. Such allowances are subject to any statutory maximum applicable. However, in capital murder cases, the court may allow an amount deemed reasonable.

Counsel appointed to represent an indigent charged with capital murder may submit a monthly bill when the fees and costs incurred during that month exceed \$1,000. If the court deems such charges as reasonable, and they have not been previously paid, then the court may direct that payment be made from the criminal fund. The Supreme Court had suggested a separate hourly rate guideline for capital cases of up to \$200 per hour for in-court and up to \$150 for out-of-court service.

Counsel appointed by the court to represent an indigent charged with repeated violations of the same section of the Code of Virginia, with each of such violations arising out of the same incident, occurrence, or transaction, shall be compensated in an amount not to exceed the fee prescribed for the defense of a single charge, if such offenses are tried as part of the same judicial proceeding.

Clerks of Court, Court-Appointed Counsel and Public Defenders should review the appendix on “Forms” regarding procedures for completion of form DC-40, LIST OF ALLOWANCES for reimbursement compensation.

NOTE: Court-appointed attorneys should be encouraged by court management to submit form DC-40, LIST OF ALLOWANCES immediately upon conclusion of their client's trial. This would facilitate the timely processing of payment to the attorneys by the court and will also enable the court to assess court-appointed attorney costs upon the conclusion of the trial to the accused if such costs are assessable.

The statutory limit to defend a felony charge in a circuit court that is punishable by confinement in the state correctional facility for a period of more than twenty years, or a charge of violation of probation for such offense, is a sum not to exceed \$1235. If a supplemental statutory waiver amount is approved for the above example, the statutory limit to defend such a felony charge in a circuit court is an additional sum not to exceed \$850. Should an additional fee waiver be granted by the circuit court for the above example, it is at the court's discretion to determine the additional amount of compensation.

The statutory limit to defend any other felony charge in a circuit court, or a charge of violation of probation for such offense, is a sum not to exceed \$445. If a supplemental statutory waiver amount is approved for the above example, the statutory limit to defend these other felony charges in a circuit court is an additional sum not to exceed \$155. Should an additional fee waiver be granted by the circuit court for the above example, it is at the court's discretion to determine the additional amount of compensation.

The statutory limit to defend any misdemeanor charge in circuit court that is punishable by confinement in jail, or a charge of violation of probation for such offense, is a sum not to exceed \$158. A supplemental statutory fee waiver is not available for the above example. Should an additional fee waiver be granted by the circuit court for the above example, it is at the court's discretion to determine the additional amount of compensation.

Counsel appointed by circuit court to represent parolees in any proceeding before a hearing officer in [Va. Code § 53.1-165 \(C\)](#) shall be paid according to the hourly rate guideline of \$90 per hour for in-court or out-of-court service.

Counsel appointed by circuit court to assist indigent prisoners confined in a state correctional facility regarding any legal matter relating to their incarceration may be paid up to \$55 per hour with a maximum per diem compensation of \$200. [Va. Code § 53.1-40](#).

[Va. Code § 19.2-163](#) provides that in the event counsel is appointed to defend an indigent defendant charged with any felony, such counsel shall receive compensation as provided in [Va. Code § 19.2-163](#) paragraph 2 for defending such a felony, regardless of whether the charge is reduced or amended to a misdemeanor or lesser felony prior to final disposition of the case in either the district court or circuit court.

Court-appointed attorneys appointed to represent adults charged with a felony for the preliminary hearing in either the Juvenile and Domestic Relations or the General District Court are eligible for compensation up to the appropriate felony rate for the preliminary hearing in the district court that results in a final disposition (i.e.: reduced to misdemeanor, dismissed, nolle prosequi etc.).

Based on the offense and the court's approval, court-appointed counsel defending unclassified felonies disposed of at the district court may be compensated up to a maximum of \$1,235. Court approval of the supplemental statutory waiver or additional waiver fee may increase the amount of attorney compensation.

If a defendant was charged with a class III through class VI felony, the court-appointed attorney could receive compensation up to \$445, and additional compensation of up to \$155 if a supplemental statutory waiver amount is approved. Should an additional fee waiver be granted for the above example, it is at the court's discretion to determine the additional amount of compensation.

For class II felony appointments, the attorney may be eligible for up to \$1,235 whenever the case results in a final disposition at the district court. An additional compensation of up to \$850 may be authorized if a supplemental statutory waiver amount is approved. Should an additional fee waiver be granted for the above example, it is at the court's discretion to determine the additional amount of compensation.

For preliminary hearings in the district court that are certified to the circuit court, the court-appointed attorney is only eligible for compensation up to the normal district court

FEES AND EXPENSES

maximum of \$120. No additional supplemental statutory waiver compensation is allowed in such instances since the case was certified and did not reach final disposition at the district court.

Per [Va. Code § 19.2-163 \(8\)](#), when a felony offense is certified by district court to circuit court, “the court shall also certify any ancillary misdemeanor offense to the clerk of the circuit court provided that the Commonwealth and the accused consent to such certification.” [Va. Code § 19.2-190.1](#). Representation by court-appointed counsel with regard to an ancillary misdemeanor certified to the circuit court along with a felony is eligible for compensation up to the normal district court maximum of \$120 for each misdemeanor. However, that portion of the representation for the ancillary misdemeanor does not involve the final disposition at the district court and therefore, that representation of the ancillary misdemeanor is not eligible for further compensation under the waiver provisions of §19.2-163.

Court appointed attorneys representing juveniles charged with a delinquent act which would be a felony if committed by an adult are eligible for compensation up to the maximum rate of \$120 allowed for district court cases. An additional compensation of up to \$120 may be authorized if a supplemental statutory waiver amount is approved. Should an additional fee waiver be granted for the above example, it is at the court’s discretion to determine the additional amount of compensation.

Under Chapter 9.1 of Title 19.2 ([Va. Code §§ 19.2-152.7:1 through 19.2-152.12](#)), when representation is required for the respondent in protective order proceedings, [Va. Code § 19.2-152.12](#) allows the Court to appoint either a Court appointed attorney or GAL when required by the Servicemembers Civil Relief Act or a “person under a disability” as defined by [Va. Code § 8.01-2](#) (*See* [Va. Code § 8.01-9](#)). Compensation for the Court appointed attorney or GAL shall be paid pursuant to [Va. Code §19.2-163](#), and is limited to a cap of \$120.00 in district courts and to a cap of \$158.00 in circuit courts.

Court management is urged to consult the Supreme Court of Virginia’s [Chart of Allowances](#) for current information and procedures guiding the payment of court-appointed counsel. The chart presented below summarizes the maximum compensation for court-appointed attorneys for preliminary hearings disposed of in the district court.

MAXIMUM COMPENSATION FOR COURT-APPOINTED ATTORNEYS FOR PRELIMINARY HEARINGS IN DISTRICT COURTS **		
<i>Preliminary Hearing</i>	<i>Certified to Circuit Court</i>	<i>Final Disposition in District Court*</i>
<i>Class III through VI Felony</i>	<i>\$120</i>	<i>\$445</i>
<i>Class II Felony</i>	<i>\$120</i>	<i>\$1235</i>
<i>Unclassified Felony</i>	<i>\$120</i>	<i>\$0 - \$1235</i>

*Felony Preliminary hearing resulting in a final disposition in District court (i.e. reduced to misdemeanor dismissed, nolle prosequi, etc.).

** [Va. Code § 19.2-163](#) provides for a supplemental waiver amount and for an additional waiver amount to be awarded by the court in which the case is concluded. Please refer to the current [Chart of Allowances](#) and new form DC-40(A), [APPLICATION FOR AND APPROVAL/DENIAL FOR WAIVER OF FEE CAP](#) for general information and instructions governing the statutory fee waiver process. Based on this amendment, whenever counsel is appointed in the circuit court to defend an indigent charged with a felony, counsel shall receive compensation as provided for defending that class of felony, even if the charge is reduced or amended to a misdemeanor or lesser felony prior to final disposition of the case.

A. District Court

The following examples of how these allowances may be applied in specific situations are offered to assist court management with the court-appointed attorney process:

- Example No. 1

In defending a single charge, court-appointed attorney submits completed form DC-40, LIST OF ALLOWANCES detailing two hours of service. Fees would be calculated as follows: $2 \times \$90 = \180 . The judge may allow a maximum of \$120 in addition to expenses claimed since the fee total exceeded the statutory maximum.

- Example No. 2

In defending two charges, the attorney submits form DC-40, LIST OF ALLOWANCES for two hours of service. His fees would be calculated as follows: $2 \times \$90 = \180 . The judge may allow the \$180 since the fee total did not exceed the maximum allowed by law ($2 \times \$120 = \240). The judge may not allow an amount greater than \$180 since the time sheet did not justify a greater award.

- Example No. 3:

In defending three charges against a single defendant, the attorney submits form DC-40, LIST OF ALLOWANCES for six hours of service. His fees would be calculated as follows: $6 \times \$90 = \540 . The judge may only allow the statutory maximum of \$360 ($3 \times \$120 = \360).

- Example No. 4

In defending an adult defendant charged with a class IV felony on the preliminary hearing, which is reduced to a misdemeanor, and the defendant is convicted in the district court, the attorney submits form DC-40, LIST OF ALLOWANCES for four hours of service. His fees would be calculated as follows: $4 \times \$90 = \360 . The judge may allow the \$360, since the fee total did not exceed the maximum allowed by law (\$445 for class III through class VI felony). The judge may not allow an amount greater than \$360 since form DC-40, LIST OF ALLOWANCES submitted by the attorney did not justify a greater award. The amount awarded to the attorney (\$360) would be assessed as costs to the defendant.

- Example No. 5

For defending an adult defendant charged with a class IV felony on the preliminary hearing in district court. At the preliminary hearing, probable cause was found and the case was certified to the circuit court. The attorney submits form DC-40, LIST OF ALLOWANCES for two hours of service. His fees would be calculated as follows: $2 \times \$90 = \180 . The judge may only allow the statutory maximum of \$120 for district courts since the case was certified and did not reach final disposition at the district court.

- Example No. 6

In defending an adult defendant charged with a class II felony on the preliminary hearing in district court. At the preliminary hearing, the case was dismissed against the defendant. The attorney submits form DC-40, LIST OF ALLOWANCES for nine hours of service. His fees would be calculated as follows: $9 \times \$90 = \810 . The judge may allow the total \$810 since the fee total did not exceed the maximum allowed by law (\$1235 for Class II felony). The judge may not allow an amount greater than \$810 since form DC-40, LIST OF ALLOWANCES submitted by the attorney did not justify a greater award.

NOTE: For appointment of multiple charges, the judge should designate the amount for each charge when approving form DC-40, LIST OF ALLOWANCES. This will allow the clerk to assess the proper amount against the defendant for each conviction. If the amount per charge is not designated for appointment of multiple charges, then the clerk should prorate that amount to all the charges by dividing the total amount awarded the court-appointed attorney by the number of charges represented.

For example, in defending two charges, the attorney submits form DC-40, LIST OF ALLOWANCES for two hours of service. His fees would be calculated as follows: $2 \times \$90 = \180 . The judge may allow the \$180 since the fee total did not exceed the maximum allowed by law ($2 \times \$120 = \240 maximum). The defendant was

convicted on one charge and the second charge was dismissed. If the judge designated \$120 for the charge convicted and \$60 on the dismissed charge, the defendant would owe as court-appointed attorney costs the \$120 amount only. If the judge did not designate the amount for each charge when approving form DC-40, LIST OF ALLOWANCES then the clerk would assess \$90 per charge (\$180 divided by 2 charges) and the defendant would owe as court-appointed attorney costs the \$90 amount only.

- **EXPENSES**

On form DC-40, List of Allowances, there is space provided for itemized expenses, which should be supported by receipts, bills, etc. The judge should review these expenses before certifying them to the Supreme Court of Virginia for payment. These expenses are subject to audit and review by the Supreme Court as well as the [Auditor of Public Accounts](#). Examples include the following: the number of miles traveled for mileage; itemized telephone bills for long distance calls; hotel/motel bills. These bills and statements are to be filed with form DC-40, LIST OF ALLOWANCES claim to the Supreme Court for payment. Receipts are required for any expenses over \$20.00. These provisions for reimbursement of expenses apply to expenses incurred by a public defender as well as other court-appointed counsel.

NOTE: For General District and J&DR court cases, all approved court-appointed counsel expenses (mileage, phone calls, etc.) should be assessed as costs against the defendant upon conviction in the same manner as the imposition of authorized court-appointed attorney fees.

In juvenile cases where the parents are ordered to reimburse the court for court-appointed counsel fees, expenses can be included. However, the total counsel fee and expenses cannot exceed the \$120.00 maximum for each single charge in the J&DR Court and \$100 in the circuit court.

B. Circuit Court

The following examples of how these allowances may be applied in specific situations are offered to assist court management with the court-appointed attorney process:

- **Example No. 1**

In defending a single misdemeanor charge, the attorney submits form DC-40, LIST OF ALLOWANCES and Attorney Time Sheet detailing three hours of court service. The fee charged would be calculated as follows: $3 \times \$90 = \270 . The judge may allow only \$158 since that is the statutory maximum.

- Example No. 2

In defending a single class II felony, the court reduced the charge to a class IV felony and the defendant was convicted. The court appointed attorney submits form DC-40, LIST OF ALLOWANCES for eight hours of service. The fee charged would be calculated as follows: $8 \times \$90 = \720 . The judge may allow \$720 since the fee did not exceed the maximum allowed by law (\$1235 for class II felony). The attorney is entitled to compensation based on the statutory maximum allowed for the class of felony the defendant was charged with at the time of appointment, even if the charge is reduced or amended to a misdemeanor or lesser felony prior to final disposition of the case. The judge may not allow an amount greater than \$720, since form DC-40, LIST OF ALLOWANCES submitted by the attorney did not justify a greater award.