

# Virginia

## An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings

The American Bar Association  
Juvenile Justice Center

and the

Mid-Atlantic Juvenile Defender Center

in collaboration with

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## TABLE OF CONTENTS

EXECUTIVE SUMMARY .....	1
INTRODUCTION .....	7
A. Due Process and Delinquency Proceedings .....	7
B. Methodology .....	8
CHAPTER ONE	
THE ROLE OF COUNSEL IN DELINQUENCY PROCEEDINGS .....	11
A. Due Process and the Juvenile Justice System .....	11
B. Development of the Indigent Defense System .....	13
C. The Role of Defense Counsel in Delinquency Proceedings.....	14
CHART – Critical Stages of the Juvenile Justice Process .....	18
CHAPTER TWO	
ASSESSMENT FINDINGS .....	19
A. Barriers that Limit Access to Counsel .....	19
B. Barriers to Effective Practice .....	24
C. Barriers to Just Outcomes .....	31
CHAPTER THREE	
PROMISING APPROACHES/INNOVATIVE PRACTICES .....	41
CHAPTER FOUR	
CONCLUSION AND RECOMMENDATIONS .....	43
APPENDIX .....	45
ENDNOTES .....	49

## EXECUTIVE SUMMARY

In 1995, a national assessment of the legal representation of children in delinquency proceedings was conducted by the American Bar Association (ABA) Juvenile Justice Center, in collaboration with the Youth Law Center and Juvenile Law Center. The findings were published in *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*. The findings and recommendations embodied in *A Call for Justice* laid the foundation for closer examination of the juvenile indigent defense systems in the individual states. These examinations are required to ensure that state indigent defense systems adequately protect poor children in light of their particular vulnerabilities.

This assessment of access to counsel and quality of representation that children receive in delinquency proceedings in the Commonwealth of Virginia is part of a nationwide effort to address deficiencies and identify strengths in juvenile indigent defense practices. Thirty-five years after the United States Supreme Court decided that children have a constitutional right to counsel, the spirit and promise of the *Gault* decision has been largely unfulfilled. With little exception, juvenile indigent defense practices have gone unchecked. The purpose of this assessment is to take a closer look at juvenile defense practices in Virginia, identify the systemic and institutional barriers that impede the development of an improved legal service delivery system, highlight innovative practices and offer recommendations for change.

Throughout the course of conducting this assessment, the investigative team encountered many devoted and talented lawyers for children who, despite the odds, provided remarkable legal services to children. Their commitment, dedication and zeal were palpable. But across the state, this type of vigorous representation is not widespread, or even very common. This assessment reveals significant gaps in indigent defense practices, including flaws in the appointment process, lack of time and resources to adequately prepare a case, a tendency to accept plea offers rather than aggressively protecting the rights and needs of children and the near absence of any post-dispositional legal representation. The system as it is presently structured, is, at best, uneven, and clearly has had a disproportionate impact on poor and minority children.

In May of 1979, the Virginia State Crime Commission issued “Children and Youth in Trouble in Virginia, Phase II” a report on the concept of family courts and a review of the key stakeholders in the juvenile justice system. The similarities between the findings in that report—almost 23 years old—and those of this assessment are most telling. Among other criticisms and observations of the Crime Commission researchers and staff, the report cited: a concern “over a lack of preparation of and available training opportunities for...defense attorneys...serving the juvenile court”;<sup>1</sup> the status the juvenile court would gain “by becoming a court of record”;<sup>2</sup> the apparent lack of advocacy on behalf of children;<sup>3</sup> and the second rate status of juvenile practice.<sup>4</sup> The Virginia State Crime Commission reported:

Juvenile justice system personnel throughout the state voiced concern about legal representation of juveniles. Some court service unit staff and judges said on many occasions attorneys, particularly those appointed by the court, come unprepared, see clients only minutes before the hearing, do not take time to subpoena witnesses, and are not aware of community resources or dispositional alternatives which may be appropriate for their clients.<sup>5</sup>

This current assessment of defender practice in the delinquency courts of Virginia looked at many of the same issues confronted by the Commission's staff and found a number of the same problems facing children in the justice system.

Using a variety of modes of data collection, a team of national and state-based experts was assembled to conduct extensive interviews and meetings with judges, prosecutors, defense attorneys, probation officers, detention center staff and administrators, children and families, policymakers, and bar association leaders across the Commonwealth. In addition, the teams observed juvenile court proceedings in selected counties and conducted an extensive literature review.

All the information and data were synthesized into this report; some of the key findings include:

- **Timing of Appointment of Counsel**

Under Virginia law, counsel is not appointed until after the initial hearing, referred to as the advisement hearing. For detained youth the advisement hearing is combined with the detention hearing. The delayed appointment process supports the perception that the system is non-adversarial, that assistance of a trained legal advocate in the early stages of the process is unimportant, and that delinquency proceedings are routine, uncomplicated, and without consequence. However, children do have the right to a detention review hearing after the appointment of counsel has been made, when a lawyer may request a reconsideration of the detention decision. As a practical matter, detention review hearings are rarely conducted. Thus, most children are detained without the benefit of counsel. Furthermore, it is well documented that children who are detained at their initial hearings are far less likely than their counterparts to have favorable outcomes at adjudication or disposition. Detention is a pathway to subsequent incarceration.

Defense counsel's inability to participate early in the process hinders representation. Defenders are not appointed at: arrest, to protect the rights of their clients; intake, to prevent inappropriate entry into the system; initial detention hearings to present evidence in support of release; or arraignments, where youth are informed of the charges against them. Additionally, defenders do not have access to most information collected by the Commonwealth's Attorney prior to trial. Early appointment enables defense counsel to argue for diversion, identify special needs of youth, prevent the misuse and overuse of detention and prepare for pre-adjudicatory motions practice.

- **Waiver of Counsel**

A related outcome of absence of counsel is the high incidence of children waiving their right to counsel without prior consultation with a lawyer or trained advocate. This study uncovered disturbing numbers of children waiving counsel who do not appear to understand the gravity or consequences of their actions. Because counsel is not provided at the start of the process, waivers result from the momentum of the system: skilled prosecutors representing the Commonwealth, judges, police and probation, each take part in the process while a child without counsel must quickly decide whether or not to request a lawyer. The desire to go home, faulty advice, confusion, ignorance, the pressure of family or adverse parties appear to be some of the reasons children decide to travel the system unguided.

While no verifiable data was available to show overall how many children waived their right to counsel; in one jurisdiction interviewees estimated that more than 50% of the youth charged with misdemeanors waived counsel. In most jurisdictions investigators were told that judges did not allow youth charged with felonies to waive their right to counsel. However, in one jurisdiction interviewees estimated that 50% of youth waived counsel regardless of the seriousness of the offense.

- **Public Defender Offices**

The delivery of indigent defense services in Virginia is varied and unequal. Public defenders represent less than half of the population. The lack of a statewide public defender system is by far one of the largest barriers to access to counsel and quality of representation for children. Despite criticism that public defenders need more training and stability in juvenile court, juvenile court professionals in public defender jurisdictions overwhelmingly believed that representation dramatically improved since the establishment of the offices. Judges and Commonwealth's Attorneys in court-appointed-only jurisdictions expressed the strong need to create public defender offices to improve the quality of representation.

While not a perfect delivery system, the investigators found that public defender offices represented children more effectively than their counterparts in appointed counsel systems, achieving better outcomes for their clients, and did so without compromising public safety. Appointed counsel in jurisdictions without public defender offices face inadequate remuneration, high volume practice, lack of available training, and few ancillary resources.

- **Untrained and Inexperienced**

In both appointed counsel and public defender office jurisdictions there is a lack of required juvenile specific training and experience. While some training opportunities exist, attorneys reported that issue-specific training was not required, unavailable and even unnecessary. However, investigators observed numerous deficiencies in basic defense practices (from open-ended cross examinations to belated motions) that proper training could correct. A lack of experience also struck a discordant note across jurisdictions. Public defender offices experience high rates of turnover and a pervasive view of juvenile court as a training ground for new attorneys. In appointed counsel jurisdictions, counsel reported a greater number of years in practice, but overall handling of juvenile delinquency matters as a small portion of their work.

- **Inadequate Ancillary Resources**

A lack of ancillary resources, including the assistance of support staff, investigators, paralegals and social workers was present throughout the system; it was recognized, however, that the entire juvenile justice system in Virginia is under funded and overburdened. Nevertheless access to resources was inequitable with defense counsel having fewer available resources than judges, Commonwealth's Attorneys and court service units. Representing young clients presents a challenge to juvenile defense counsel in that it requires knowledge of many disciplines including mental health, education and development. To skillfully represent young clients, juvenile defenders need access to support staff, investigators, experts and training.

The matter of access to investigators, independent experts or sentencing advocates is not uniform around the state. Some public defenders reported that the courts would not pay for experts and others reported that current available resources are sometimes



underutilized. Court appointed attorneys claimed that they do not receive enough money through fees to pay for experts or other resources. Some judges, however, reported that they would be willing to pay for experts and investigators if lawyers would be more assertive and file motions requesting access to these resources.

- **Inappropriate Referrals**

Despite the diversity of individuals interviewed for this assessment, a consistent view emerged that the juvenile justice system was being loaded down with inappropriate referrals—particularly mental health and school-related cases. Detention rates in some jurisdictions increase during the school year because youth are sent to detention for failing to attend school. In one of the busiest juvenile courts in the state, and to the chagrin of many juvenile court judges, several court dockets were devoted almost exclusively to school conduct cases. Children and youth with mental health needs are funneled into the juvenile justice system at alarming rates, with anywhere from 50% to 85% of youth in detention in need of medication. There is ample evidence that the juvenile court has become the dumping ground for unwanted children with mental health and school-related problems.

Access to mental health services for children in Virginia is a complex issue and those interviewed for this assessment offered many reasons for the lack of services available for kids in need. However, there was unanimous agreement among those interviewed that children with disabilities are overrepresented in the justice system and the juvenile court is the mental health service provider for poor children in the Commonwealth. Moreover, studies on Virginia's access to mental health services show that children denied access to mental health treatment services are being funneled into the juvenile justice system.

Referring to the vast majority of cases referred from schools, those interviewed for this study expressed strong sentiment that these cases are better handled at the school or in the community. Some interviewees believed that the zero tolerance policies allowed schools in their jurisdictions to practice "dumping" kids from one school to another. Some reported that the practice of dumping most affected children and youth who need special education services and older youth who are sent to adult education programs.

There are a few very successful community-based legal services and law school clinical programs in Virginia that represent kids in school related cases. Through their advocacy they are often able to prevent matters from being referred to juvenile court. However, field observations and interviews revealed that they are the exception to the norm. Juvenile defenders are not effectively advocating for diversion and dismissal because they are not trained in state and federal laws governing suspension, expulsion and special education services that protect youth from inappropriate school action.

- **Second-Rate Status**

Many people view juvenile court as "kiddy court" and the overall practice of delinquency law as unimportant. The indigent defense system still uses juvenile court as a training ground for lawyers to gain courtroom experience, where Commonwealth's Attorneys allow probation officers to prosecute cases, court proceedings lack formality and decorum, hearings are not recorded, and children and families are often treated with contempt. Across disciplines, the notion that juvenile court is a second rate judicial forum was pervasive.

Inside and outside juvenile court, being a juvenile defender is not viewed as a respectable profession. Court appointed lawyers stop taking delinquency cases when they become more experienced and many public defender offices rotate experienced juvenile defenders to the felony division. Public defender offices also seemed to experience extreme turnover rates in both front-line and supervisory juvenile positions. An experienced juvenile prosecutor said, “[e]verybody thinks of [juvenile court] as the short end of the stick.”

- **Over Reliance on Court Service Units**

In Virginia the Department of Juvenile Justice is a powerful executive branch agency that manages community programs and services, community supervision and case management, and custody and care of committed juveniles. The Department’s case management division or court service unit bears enormous responsibility in juvenile court, making decisions that affect children at every stage of the process, at times performing functions traditionally slated for judges and prosecutors including keeping a child out of the system, authorizing detention, presenting the detention case to the court, advising youth of their rights, and presenting misdemeanor petitions to the court. Juvenile court personnel were concerned with what appears to be subjective decision making and overall influence over the process. Juvenile defense counsel expressed frustration with the court’s total reliance on court service units to make recommendations and their almost absolute deference to those recommendations. In the end, youth are left confused about the roles of court personnel and the system overall.

- **Prosecutorial Discretion**

Defenders in several jurisdictions reported abuse of prosecutorial discretion by the Commonwealth’s Attorney in leveraging negotiations by threatening to transfer cases to circuit court. Almost all youth transferred to adult court who are sentenced as juveniles (blended sentencing) waited in detention for extraordinarily long periods of time before receiving circuit court orders that begin the clock on their sentences. During that time, youth do not receive rehabilitative services or credit for time served.

- **Overrepresentation and Disparate Treatment**

Reports of disparate treatment of minority youth and the sentiment that skin color matters in Virginia were pervasive and glaring. Despite demographic differences, there was agreement in every jurisdiction that children and youth of color are overrepresented in Virginia’s juvenile justice system. Studies by national advocacy groups and the Virginia Department of Criminal Justice Services show that minorities are overrepresented at every stage of the process. Across disciplines, there was an overarching sentiment and perception that children and youth of color are disparately treated, that race matters. No one could say for sure why minorities in their jurisdiction were treated differently. Interviewees proffered many reasons for the disparate treatment including biased police patrol, lack of parental empowerment and access to resources.

Even though many detention centers are regional, housing youth from several different counties with varying demographics, staff reported predominantly African-American detention populations. In a recent detention report, the Virginia Department of Juvenile Justice projected that the number of African-American youth at risk for being detained will increase by 11% between 2000 and 2010.

- **Attorney Compensation**

One of the lowest in the country, the \$112 maximum paid to defense counsel to see a child’s case through the delinquency system inadvertently places a premium on high vol-

ume and dispensing with cases quickly, typically through a hurried plea process. Investigators also found that appointed counsel received little training, if any, in juvenile defense and were typically expected to pay for ancillary services (paralegal assistance, investigative services, social work assistance) out of the fee they received on the case—financially a losing principle in any matter.

Most private lawyers interviewed claimed low payment rates did not affect the level of representation provided in juvenile cases. However, investigators found the quality of defense drastically affected by the low court fees, especially in those counties where there is no public defender system. Attorneys described a willingness to zealously advocate on behalf of their client; however, one attorney noted that a lawyer exceeds the cap by the time he prepares and files a motion for review of detention. The judges, Commonwealth's Attorneys and juvenile court personnel interviewed agree that low fees are a disincentive to zealous advocacy. They believed that the fee dissuaded lawyers from "doing a good job" including filing motions, preparing for trial, investigating dispositional alternatives, appealing cases to circuit court and continuing to practice in juvenile court once experienced.

## INTRODUCTION

*If the public were more educated [about the juvenile justice system], kids would benefit.*

*-Virginia Juvenile Court Judge*

This assessment of access to counsel and quality of representation in Virginia delinquency proceedings is part of a national undertaking to review indigent defense delivery systems and evaluate how effectively attorneys in juvenile court are fulfilling constitutional and statutory obligations to their clients. This study is designed to provide a broad range of information about the role of defense counsel and the delinquency system, identify structural or systemic barriers to more effective representation of youth, to identify and highlight promising practices within the system, and to make viable recommendations for ways in which to improve the delivery of defender services for youth in the justice system.

This examination is especially important in light of the particular challenges and vulnerabilities that children present to the justice system. Working with adolescents requires a special understanding of the principals of child and adolescent development. Ensuring that youth and their families fully understand and participate in the justice system process requires a patient and dignified system. Dealing with the extraordinarily high number of children in the justice system with mental health and/or learning problems mandates specialized training and skill development. Understanding a child's level of maturity and competency can require access to specialized experts. The system's tendency to rely on institutional placements when community-based alternatives are limited requires monitoring. For all these reasons and more, it is imperative that the juvenile indigent defense system be assessed in order to ensure that children are receiving the constitutional protections to which they are entitled.

Juvenile defense practices must keep pace with the changing nature of the juvenile court. New juvenile laws have been enacted over the last decade in Virginia and these sweeping changes have significantly impacted juvenile court policies and practices. With harsher and more punitive approaches in place, juvenile and adult court sanctions have become increasingly severe. Thus children face serious consequences and the impact of a juvenile court adjudication or criminal court conviction for a youth can be long lasting. In addition, some of the collateral consequences youth may face include numerous offense categories that are subject to enhanced punishments. Juvenile delinquency adjudications count as prior convictions when sentencing an adult for a felony conviction. Military service, future ability to lawfully possess a firearm, Department of Motor Vehicles driving records, mandatory HIV testing all may be areas that are impacted by juvenile court adjudications.

Research indicates, however, that there are scientifically tested interventions and programs that do work. Matching a child with the appropriate interventions not only reduces recidivism but also saves unnecessary public expenditures and long term costs.

### **A. Due Process and Delinquency Proceedings**

The United States Supreme Court in a series of cases recognized the bedrock elements of due process as essential to delinquency proceedings.<sup>6</sup> Through the most sweeping of

these cases, *In re Gault*, the Court focused attention on the treatment of youth in the juvenile justice system, spurring the states in varying degrees to begin addressing the concerns noted in the Court's decision. Evincing concerns over safeguarding the rights of children, Congress enacted the Juvenile Justice and Delinquency Prevention Act in 1974. This Act created the National Advisory Committee for Juvenile Justice and Delinquency Prevention. The National Advisory Committee was charged with developing national juvenile justice standards and guidelines. Published in 1974, these standards require that children be represented by counsel in all proceedings arising from a delinquency action from the earliest stage of the process.<sup>7</sup>

Beginning in 1971, and ensuing over a ten-year period, the Institute for Judicial Administration/American Bar Association Joint Commission on Juvenile Justice Standards promulgated twenty-three volumes of comprehensive juvenile justice standards.<sup>8</sup> The structure of the project was as intricate as the volumes of standards it produced: the Joint Commission consisted of twenty-nine members and four drafting committees supervised the work of thirty scholars who were assigned as reporters to draft individual volumes. The draft standards were circulated widely to individuals and organizations throughout the country for comments and suggestions before final revision and submission to the ABA House of Delegates. Adopted in full by 1981, these standards were designed to establish the best possible juvenile justice system for our society, not to fluctuate in response to transitory headlines or controversies.

Upon reauthorizing the Act in 1992, Congress re-emphasized the importance of lawyers in juvenile delinquency proceedings, specifically noting the inadequacies of prosecutorial and public defender offices to provide individualized justice. Also embedded in the reauthorization were the seeds of a nationwide assessment strategy.

In the fall of 1993, the American Bar Association Juvenile Justice Center, in conjunction with the Youth Law Center and the Juvenile Law Center, received funding from the federal Office of Juvenile Justice and Delinquency Prevention to initiate the Due Process Advocacy Project. The purpose of the project was to build the capacity and effectiveness of juvenile defenders through increasing access to lawyers for young people in delinquency proceedings and enhancing the quality of representation those lawyers provide. As part of the Due Process Advocacy Project, the collaboration produced *A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*<sup>9</sup> in 1995, the first national assessment of the state of representation of youth in juvenile court and an evaluation of training, support, and other needs of practitioners. Since that time, juvenile defender assessments have been published covering the states of Texas, Louisiana, Georgia and Kentucky with investigations ongoing and reports being prepared in an additional six states.

## **B. Methodology**

The American Bar Association Juvenile Justice Center and the Mid-Atlantic Juvenile Defender Center joined forces to produce this study. A team of regional and national experts was convened to take part in the assessment, including private practitioners, academics, former public defenders, defender organization administrators and juvenile advocates. Data collection for the study included: on-site observations; interviews with key personnel; gathering statistical data on crime, arrest, detention and confinement rates; verifying caseload statistics, census information and community profiles; and, a review of all relevant research and reports on the defender system. In the final analy-

sis, a cross-section of nine counties was selected for intensive study. Together the nine sites comprise approximately 30% of the Commonwealth's total population, represent urban and rural areas, counties and cities with and without public defender offices, and reflect the geographical diversity of the state.

A team of investigators visited each site to conduct the interviews (pursuant to standardized protocols), observe judicial proceedings, and gather documentary evidence. The focus of these investigations centered on the role of defense counsel; it was necessary, however, to interview various people involved in the process to flesh out a complete picture of the system and its effectiveness. Investigators interviewed and talked with judges, juvenile public defenders, court appointed counsel, Commonwealth's Attorneys, court personnel and administrators, probation personnel and administrators, case managers, mental health experts, school resource officers, detention center personnel and administrators, service providers, key state stakeholders, policy advocates, children and parents. The investigative teams also observed court proceedings, toured facilities, and—to the extent possible—collected statistical and documentary evidence. When necessary, follow-up phone calls were conducted to collect additional or clarifying information.

This report represents the distillation of months of work by the investigative team and support staff. Chapter 1 provides information on the role of defense counsel in delinquency proceedings and places Virginia's system within the historical context of this country's guarantee of assistance of counsel. Chapter 2 presents the findings of the investigation and discusses specific issues and systemic barriers facing the juvenile defender system. Chapters 3 and 4 highlight successful strategies and offer recommendations regarding improvement to the indigent defense system available to children. Anonymity was assured all participants in this study. Gender references (he and she) are used interchangeably throughout this report.



## **CHAPTER ONE**

### **THE ROLE OF COUNSEL IN DELINQUENCY PROCEEDINGS**

The importance of trained, well-resourced advocates to work on behalf of children in the justice system cannot be overstated. As society's view of the framework of how we deal with children accused of delinquent acts has moved between *parens patriae* and a strict due process model, the system itself has become more complex, the lasting consequences on those in the system have become more fundamental and far-reaching, and our ability to fashion favorable outcomes for children has become more difficult. Advances in child psychology, our understanding of the physiological changes taking place during adolescence, and our understanding of factors contributing to the condition of at risk children are only a few of the areas of research which are continually advancing and must be part of the dialogue concerning justice in the delinquency system.

#### **A. Due Process and the Juvenile Justice System**

The history of juvenile delinquency proceedings as separate and distinct from adult criminal proceedings dates to 1899 when the first children's court was established in Cook County (Chicago), Illinois. As similar courts around the country developed, so did the law pertaining to these specialized proceedings.

In 1963, the United States Supreme Court held in *Gideon v. Wainwright*<sup>10</sup> that the federal constitutional right to counsel requires the appointment of an attorney to represent a poor person accused of a felony offense. The Court emphasized, "[i]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."<sup>11</sup> The Court, in 1966, ruled that in making a decision as important as the one to withdraw the benefits of the juvenile justice system from a youth, the state (in this case, the District of Columbia) must provide the child with counsel, conduct a hearing on the question of whether the waiver or transfer of jurisdiction is proper, afford the child access to records considered by the trial court, and must produce reasons supporting the trial court's decision to waive the juvenile court's jurisdiction.<sup>12</sup>

A year later, in *In re Gault*, the Supreme Court explicitly extended federal constitutional protections to children in juvenile delinquency proceedings. The Court held in *Gault* that juveniles facing "the awesome prospect of incarceration" have the right to counsel under the Due Process Clause of the United States Constitution.<sup>13</sup> *Gault* recognized that "a juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."<sup>14</sup> Noting that the "absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment," the Court determined that a child's interests in delinquency proceedings are not adequately protected without adherence to due process principles.<sup>15</sup> Reaffirming this view in a later case, the Supreme Court stated, "[w]e made clear in [*Gault*] that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile court" and established that juveniles are constitutionally entitled to proof "beyond a reasonable doubt" during an adjudication for delinquency charges.<sup>16</sup>

Virginia's juvenile courts were historically part of the county court system. In 1972 and 1973 the Virginia General Assembly created a statewide system of juvenile and domes-



tic relations district courts. Four years later the General Assembly enacted a comprehensive revision of the juvenile justice laws and delinquency system. In 1992 the Virginia Supreme Court adopted the Juvenile and Domestic Relations District Court rules as part eight of the Rules of the Virginia Supreme Court.<sup>17</sup> In 1996, the most significant transformation of the juvenile court occurred when the General Assembly made sweeping changes to the juvenile code emphasizing punishment over treatment and rehabilitation.

The law dealing with delinquency actions is found in Chapter 11 of Title 16.1 of the Virginia Code. Section 16.1-227 of this Title codifies the philosophy underlying the entire juvenile law—which necessarily deals with actions in addition to delinquency proceedings. Last amended in 1996, the section reads:

This law shall be construed liberally and as remedial in character, and the powers hereby conferred are intended to be general to effect the beneficial purposes herein set forth. It is the intention of this law that in all proceedings the welfare of the child and the family, the safety of the community and the protection of the right of victims are the paramount concerns of the Commonwealth and to the end that these purposes may be attained, the judge shall possess all necessary and incidental powers and authority, whether legal or equitable in their nature.

This law shall be interpreted and construed so as to effectuate the following purposes:

1. To divert from or within the juvenile justice system, to the extent possible, consistent with the protection of the public safety, those children who can be cared for or treated through alternative programs;
2. To provide judicial procedures through which the provisions of this law are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other rights are recognized and enforced;
3. To separate a child from such child's parents, guardian, legal custodian or other person standing in loco parentis only when the child's welfare is endangered or it is in the interest of public safety and then only after consideration of alternatives in out-of-home placement which afford effective protection to the child, his family, and the community; and
4. To protect the community against those acts of its citizens, both juveniles and adults, which are harmful to others and to reduce the incidence of delinquent behavior and to hold offenders accountable for their behavior.

The Juvenile and Domestic Relations District Court (juvenile court) has original and exclusive jurisdiction over juveniles<sup>18</sup>—defined as persons under the age of 18—accused of acts that would be crimes if committed by an adult (misdemeanors and felonies), traffic violations,<sup>19</sup> as well as status offense jurisdiction over a child who commits an act prohibited by law that would not be a crime if committed by an adult.<sup>20</sup>

Once a child is transferred or certified for trial as an adult, and is convicted as an adult in the circuit court, the juvenile court will no longer have jurisdiction to handle the youth

as a juvenile for criminal acts that would otherwise constitute delinquency.<sup>21</sup> The juvenile court's jurisdiction over a "violent juvenile felony" allegedly committed by a juvenile 14 or older is limited to the holding of a preliminary hearing unless the Commonwealth's Attorney elects not to give notice of intent to file in criminal court.<sup>22</sup> A "violent juvenile felony" is one of those offenses delineated in Subsections (B) and (C) of Section 16.1-269.1 when committed by a youth 14 years of age or older.<sup>23</sup> Jurisdiction over an "ancillary charge" (a delinquent act committed by the juvenile as part of the same act or transaction as a felony delinquent act) is also divested when the principal charge is transferred or certified.<sup>24</sup>

Jurisdiction over a person, once obtained by the juvenile court, may be retained until the person reaches the age of 21, except when custody is in the Department of Juvenile Justice or when the person has been transferred to adult jurisdiction.<sup>25</sup>

## **B. Development of the Indigent Defense System**

The Sixth Amendment to the United States Constitution as well as various United States and Virginia Supreme Court cases and statutory provisions provide that children charged as delinquents will be provided the assistance of counsel. The Commonwealth of Virginia currently uses two separate systems for the delivery of defense services to indigent children: the Public Defender Office and the Court Appointed Attorneys structures.<sup>26</sup> Under the provisions of Virginia Code §16.1-266(B), the court is required to advise the child or her parent or guardian of the child's right to assistance of counsel. If the parent or guardian is unwilling or unable to retain counsel, the court will determine whether the child is indigent and thus eligible for a court appointed attorney under Virginia Code §19.2-159. If the court determines that a parent or legal custodian could afford to retain counsel, the court has the authority to order reimbursement of the fee awarded the court appointed counsel.<sup>27</sup>

Begun in 1972 to address the provision of defense services in three localities, Public Defender Offices today are established in 47 localities<sup>28</sup> under the direction of 20 different offices; this system covers approximately 48 percent of Virginia's population.<sup>29</sup> The salaries and office expenses of these offices are paid by appropriations administered by the Public Defender Commission.<sup>30</sup> In those areas served by a Public Defender Office it is assumed that the office, rather than court appointed counsel, will handle the vast majority of cases arising in that jurisdiction. The Public Defender system is located throughout the state and under the supervision of the Public Defender Commission, which selects each locality's supervising Public Defender.

Court Appointed Attorney systems are in place in all areas not covered by Public Defender Offices. While Public Defender Offices work much like law firms, appointed counsel are independent attorneys that may work in firms, partnerships or as solo practitioners. Typically, the court will appoint counsel from a list of eligible attorneys in the jurisdiction on a rotating basis as the cases are called for assignment. Court Appointed Attorneys are paid according to a fee schedule: currently an attorney is paid a total of \$112 for each delinquency case handled in district court and \$100 for work done on appeals on behalf of juveniles in circuit court.<sup>31</sup> The fees paid to Court Appointed Counsel are taken from the Criminal Fund administered by the Virginia Supreme Court.<sup>32</sup> Although the law requires that courts use a "fair system of rotation among members of the bar practicing before the court," there is no standardized method for appointment. There are no uniform criteria or qualifications for an attorney to be added to the roster

of those eligible for appointment; also lacking are uniform standards or procedures for an attorney's removal.

Regardless of the appointment system in place in a particular jurisdiction, the duty of counsel to her juvenile client—once appointment has taken place—is identical.

### **C. The Role of Defense Counsel in Delinquency Proceedings**

Juvenile defense attorneys bear an enormous responsibility in representing their youthful clients. In addition to the responsibilities of preparing and presenting the criminal case, defenders must understand and apply principles of adolescent growth and development and must prepare social history backgrounds in order to advocate for their clients. To meet these duties, attorneys must be aware of the strengths and needs of their clients and their families, their educational status, community resources and other social structures, and must work with their clients to present information that will lead to appropriate outcomes.

Thus, to be effective, juvenile defenders must establish good relationships with their clients, something that cannot be accomplished in the few minutes before a court hearing or solely through telephone interviews. Lawyers must build relationships with their young clients that will enable them to share deeply personal and, at times, painful information. It is vital in this relationship that defense attorneys carefully explain that what clients tell them is confidential.

Equally important, defenders must take the time to keep clients informed before and after court appearances and other important events relating to their cases. Children interviewed in detention centers consistently spoke about the need to know the status of their case, when they can go home, and what will happen to them. Clients and their families should be told exactly how to get in touch with counsel and when their lawyer will next be in contact. Clients and families should be advised of their responsibilities between court appearances.

#### ***Arrest and Detention***

Upon arrest, if a child is not immediately released to the custody of her parents or guardians, she must be placed in a detention home or group home approved by the Department of Juvenile Justice.<sup>33</sup> In Virginia, during the arrest process a child has no right to counsel unless invoked as part of a custodial interrogation.

A child taken into custody "shall immediately be released, upon ascertainment of the necessary facts, to the care, custody and control of such child's parent, guardian, custodian or other suitable person able and willing to provide supervision and care for such child."<sup>34</sup> A child, once in custody, may be detained if certain criteria are met, including the type of charge and the danger posed to the child or the danger to the person or property of others.<sup>35</sup> If a child is detained, she must be brought before the juvenile court within 72 hours.

#### ***Initial Detention Hearing***

In Virginia, a child is not statutorily entitled to counsel at the initial detention hearing. Although it has been recognized that counsel should become involved as early as possi-

ble and that detention “remains one of the most challenging problems for the juvenile justice system,”<sup>36</sup> the Commonwealth does not provide for the assistance of counsel at this critical juncture of the proceedings.

Despite the absence of counsel at this hearing, the initial detention hearing is not an innocuous proceeding. In addition to the strict time limitations, the court is also responsible for providing notice of the hearing to the child’s parents or guardians, to the child if 12 or older, and to the attorney for the Commonwealth.<sup>37</sup> Once before the court, the child must be informed of her rights and informed of the contents of the petition charging her.<sup>38</sup> Despite the absence of counsel on behalf of the detained, charged child, the Commonwealth’s Attorney must be given an opportunity to be heard.<sup>39</sup>

### ***Detention Review Hearing***

When the decision is made at the initial detention hearing to continue the detention of a child and that child was not represented, the court must provide an opportunity for a review of the initial decision after counsel has been secured for the detained child.<sup>40</sup> Upon the request of counsel, a review of continued custody must be heard by the court as soon as is practicable, but no later than 72 hours following the request.

At the detention hearing, counsel should argue that detention is only appropriate as a last resort for children who are a danger to the community or unlikely to appear in court. Counsel should offer the court information about the child’s family and community ties and support. Children in the delinquency system do have a right to bail in Virginia, although this option appears to be “seldom argued.”<sup>41</sup> It should be noted, however, that the IJA/ABA Juvenile Justice Standards strongly discourage money bail for juveniles: “The use of bail bonds in any form as an alternative interim status should be prohibited.”<sup>42</sup>

Existing alternatives to secure detention - such as conditional release, electronic monitoring, shelter care, contract homes or house arrest - should be explored and proffered to the court as another means of guaranteeing the appearance of a child in court. The IJA/ABA Standards state a strong presumption for interim release and consider the following as the only permissible factors for pretrial detention:

- A. Protecting the jurisdiction and process of the court [to assure appearance of a child in court];
- B. Reducing the likelihood that the juvenile may inflict serious bodily harm on others during the interim period; or,
- C. Protecting the accused juvenile from imminent bodily harm upon his or her request.<sup>43</sup>

Virginia’s statutes for pretrial detention closely adhere to the IJA/ABA Standards.<sup>44</sup>

### ***Pre-Trial Advocacy and Preparation***

The pre-trial stage of the proceedings sets the foundation for strategies at adjudication, negotiations with prosecutors, and development of appropriate dispositions. It is a crit-

ical period in which attorneys must investigate the facts; obtain discovery from prosecutors; acquire additional information about a client's personal history through school authorities, probation officers, child welfare personnel; and file pre-adjudication motions. Attorneys must confer with a client "without delay and as often as necessary to ascertain relevant facts and matters of defense known to the client."<sup>45</sup>

Lawyers have a responsibility to understand children's educational rights as well as students' rights in educational institutions given the proliferation of school conduct cases in delinquency court. Acquiring an understanding of a client's educational needs may help lawyers in raising issues of competency at trial or to waive certain rights and requisite intent, negotiating with prosecutors, or developing appropriate disposition plans. Children eligible for or receiving special education are afforded protections by federal statutes such as the Individuals with Disabilities Education Act ("IDEA"),<sup>46</sup> Section 504 of the Rehabilitation Act,<sup>47</sup> and Americans with Disabilities Act,<sup>48</sup> from being subjected to disciplinary actions without due process or discriminatory actions by the school.

During the pre-trial period there is a great danger of lost opportunities to provide effective representation. Meeting these responsibilities at the outset of a case is a daunting, if not impossible task for many defenders who are facing staggering caseloads with limited time and scarce resources. However, without the proper pre-trial preparation, the outcomes of many juveniles' cases are severely compromised.

### ***Adjudication and Plea Negotiation***

A juvenile's guilt or innocence is determined at the adjudication hearing or trial where the state has the burden to prove the delinquent act beyond a reasonable doubt. Juveniles are not entitled to jury trials in Virginia; rather, adjudications are presided over by a judge. Many lawyers believe it is more difficult to get an acquittal from a judge than a jury, especially when judges are routinely privy to more confidential information than juries. Even when an adjudication ends in a delinquency finding, the mitigating evidence that counsel presents at the adjudication stage is critical for the judge to make an individualized, fair and reliable determination at disposition. Thus, it is important that counsel advocate zealously at adjudication, investigate the facts thoroughly, meet and prepare witnesses, utilize experts and other resources, and emphasize the prosecution's heavy burden to prove guilt beyond a reasonable doubt.

### ***Disposition***

The purpose of the dispositional process is to develop plans for juveniles that meet their educational, emotional and physical needs while protecting the public from future offenses. In order to impose any disposition plan on a child found delinquent, the court must find that he is in need of treatment, rehabilitation, or supervision. The disposition hearing is an opportunity for the trial judge to receive evidence from the state, the defense, the probation department and other people, concerning the child's care and custody. Judges have the authority to order an array of expert evaluations to assist in this process, including psychiatric, psychological, educational or neurological reports.

Counsel has a responsibility to explore every possible resource during the dispositional process to advocate for a favorable plan for the client. Counsel should work with the client and the family to ensure that relevant information gets to probation officers for the predisposition report, review the predisposition report, and present the evidence of

the child's specific needs, limitations, or other facts to enable the court to make an individualized determination of disposition. In addition, the IJA/ABA Juvenile Justice Standards recognize counsel's continuing duty to "maintain contact with both the client and the agency or institution involved in the dispositional plan in order to ensure that the client's rights are respected and, where necessary, to counsel the client and the client's family concerning the dispositional plan."<sup>49</sup>

### ***Post-Dispositional Representation***

Children often need lawyers after the dispositional hearing: direct appeals of issues arising during the pretrial process or adjudication hearings, reviews of dispositions, collateral reviews of adjudication, the need for particular services such as drug or mental health treatment, or challenges to dangerous or unlawful conditions of confinement. The IJA/ABA Standards provide that lawyers who represent juveniles at trial or on appeal ordinarily should be prepared to assist clients in post-disposition actions to challenge the proceedings leading to placements or to challenge the appropriateness of treatment facilities.<sup>50</sup>

In reality, *de novo* appeals of juvenile cases to the circuit court are rarely taken in Virginia. Systemic barriers often prevent juvenile public defenders from providing continuous representation and following clients post-disposition into placement. For appointed counsel, the current fee structure discourages lawyers from following a client's progress after disposition and from providing post-disposition representation. Nonetheless, there are important reasons to pursue appeals in cases of felony adjudications. For example, designated felony adjudications, which carry severe sanctions, have important implications for plea bargaining or sentencing in the future if the youth becomes involved again with the juvenile court or adult criminal court.

## Critical Stages of the Juvenile Justice Process

The Virginia Code provides that a court shall appoint counsel for an indigent child for all detention review, adjudicatory or transfer hearings. Below is an outline of critical stages of the delinquency process.

**Arrest:** A child is not entitled to counsel nor provided counsel when taken into custody by the police. The police must inform youth of the right to remain silent and the right to assistance of counsel during a custodial interrogation.

**Detention:** After arrest, some children are brought to a place of detention where a court service unit officer makes the initial decision as to whether a child should be detained pending a first appearance in court. The officer bases the decision on information solicited from the child about the child's background and alleged delinquent conduct. No counsel is provided during this stage.

**Initial Detention Hearing:** Virginia requires that a hearing be held before a judge, or in some cases a magistrate, within 72 hours of detention, although most review hearings take place within 24-48 hours. The law does not provide for representation at this hearing.

**Detention Review Hearing:** If a child was without counsel during the initial detention hearing, the court must appoint counsel at this point. If a request is made, a review hearing must be held within 72 hours of the request.

**Filing of the Petition:** In Virginia, an intake officer makes the initial decision to remove a complaint from the system, divert the child to another agency or court program, or file a petition to initiate formal court action. If the charge involves a Class 1 offense, a magistrate may review most actions at the complainant's request. The Commonwealth's Attorney may act as an advisor to the intake officer. A child has no right to counsel at this stage.

**Arraignment or Advisement Hearing:** Virginia Supreme Court Rule 8:16 provides that a child charged with a delinquent act must be advised of the charges in an arraignment hearing. When a child has been detained, this procedure is satisfied during the initial detention hearing; in cases when a child is released, the hearing will be scheduled following the filing of the petition. A child has no right to counsel at this stage.

**Transfer Hearing:** Under certain circumstances, a child may be given a hearing prior to the juvenile court's transfer of jurisdiction to the circuit court. The time limitations are identical to those of an adjudicatory hearing. In the event of a hearing, the child has the right to be represented by counsel.

**Adjudicatory Hearing:** In an adjudicatory hearing, as in the trial phase for an adult, the Commonwealth must prove its charges beyond a reasonable doubt; the child has the right to contest the evidence, cross-examine witnesses, remain silent, subpoena witnesses, and appeal adverse rulings. An adjudicatory or transfer hearing must take place within 21 days from the date of detention. If the release is after arrest or a detention hearing, the hearing must take place within 120 days from the date the petition was filed. Every child has a right to counsel during an adjudicatory hearing.

**Disposition Hearing:** Following a finding of delinquency in the adjudicatory hearing, the judge must hold a disposition hearing, wherein a dispositional plan will be issued. The child has a right to counsel during the disposition hearing.

**Post-Disposition Proceedings:** After disposition, a child may request a review hearing or appeal the adjudication *de novo*. The child also has the right to challenge unconstitutional conditions of confinement. Children have the right to counsel in post-dispositional review hearings (although hearings are seldom requested) and on appeal.

## CHAPTER TWO ASSESSMENT FINDINGS

### A. Barriers that Limit Access to Counsel

#### ***Restrictions on Attorney Compensation - "Cheap Lawyering"***

*I think court-appointed attorneys need to be paid more, definitely.*  
-Juvenile Court Judge

*What [the low rate of payment] does, and what's sad about it, is that the best [defense attorneys] won't practice here.*  
-Juvenile Court Judge

By a wide margin, Virginia provides one of the lowest compensation rates for court appointed lawyers in the country.<sup>51</sup> Media coverage depicts Virginia as third in the nation on police and corrections expenditures<sup>52</sup> contrasted with one of the lowest attorney compensations available. The amount of money paid to lawyers to represent poor people in Virginia has been the topic of debate in the Virginia General Assembly for years. In fact, the Virginia Crime Commission has been studying the costs of indigent defense services and recently issued its findings. For private practitioners the debate does not focus solely on the issue of their fee but costs associated with representing a client. In addition to their own salary, private practitioners must pay support staff, investigators, and expenses such as phone, travel, rent and copies.

Compensation rates are particularly important because the juvenile defense bar is comprised mainly of court appointed lawyers with public defenders handling juvenile cases in a limited number of jurisdictions. Attorneys appointed by the court are paid based on a fee scale established by the Virginia Supreme Court.<sup>53</sup> Court-appointed attorneys are paid \$75/hour for in-court time and \$50 for out-of-court time. The maximum fee that can be awarded is dependent on the nature of the charges and the court involved.<sup>54</sup> Juvenile cases are capped by statute at \$120 per charge but the court is only funded to pay \$112 per charge.<sup>55</sup> A juvenile court judge may not waive the cap even for a complex case. A recent Crime Commission study also revealed that the fee for a juvenile appeal to circuit court is \$100.<sup>56</sup>

Most private lawyers interviewed claimed low payment rates did not affect the level of representation provided in juvenile cases. However, investigators found the quality of defense drastically affected by the low court fees, especially in those counties where there is no public defender system. Attorneys described a willingness to zealously advocate on behalf of their client; however, one attorney noted that a lawyer exceeds the cap by the time he prepares and files a motion for review of detention. An investigator found that court appointed lawyers in one rural jurisdiction were able to make a decent salary with the low fees by creating a plea mill. One lawyer takes several cases on a docket, goes to court, accepts the Commonwealth's Attorney's plea offers in all of the cases, gets paid \$112 per case for a few hours worth of work which in the end amounted to \$250 per hour.

The judges, Commonwealth's Attorneys and juvenile court personnel interviewed agree that low fees are a disincentive to zealous advocacy. They believed that the fee dissuad-



ed lawyers from “doing a good job” including filing motions, preparing for trial, investigating dispositional alternatives, appealing cases to circuit court and continuing to practice in juvenile court once experienced.

*The fee cap definitely has an adverse impact on the quality of representation. If you live on court-appointed work alone, you have to take too many cases to do it right. You have to have a well-established retained practice on the side. But, if you are only getting \$100, you are only going to do so much. Attorneys are not filing motions that could be filed; they are talking to clients on the phone instead of in person; they are more likely to strong-arm pleas; and they take investigation shortcuts.*

*- Interview with Court Appointed Counsel*

One appointed lawyer confirmed their beliefs, “I stopped taking delinquency cases a couple of years ago because of the money. The dollar amount is a losing proposition.” Another went so far as to suggest that there is a disincentive to prevent a case from being transferred to adult court because the fee cap is higher in circuit court. Most lawyers said they were making \$112 per case in juvenile court and several thousand in circuit court for equally complex cases.

### **High Caseloads**

The average caseloads for juvenile defense attorneys are large and often overwhelming. In Virginia, there are no mandatory caseload limits for juvenile public defenders and court appointed counsel.<sup>57</sup> Until recently the Public Defender Commission did not have the technological resources to track juvenile caseloads within all of its offices. Additionally there is no requirement that court appointed counsel track delinquency cases.

At the time of this report there were not specific data available in every jurisdiction showing the annual delinquency caseload for public defenders or court appointed counsel. However, caseload reports from those interviewed ranged from 679 delinquency cases per year per public defender in rural jurisdictions to 1,500 delinquency cases per year in urban jurisdictions. In urban jurisdictions with a

*The numbers are staggering.*

*- Commonwealth Attorney*

*Caseloads are way too high. Public defenders are overwhelmed and have insufficient time.*

*- Parole Officer*

*We are just treading water to keep from drowning.*

*- Juvenile Public Defender*

*[The number of cases] is way too many. I think a lot of people quit because of burnout. Its so intense for so long.*

*- Juvenile Public Defender*

public defender office, court appointed lawyers reported handling anywhere from 200 to 500 delinquency cases a year and in rural jurisdictions without a public defender office court appointed lawyers reported handling approximately 150 to 200 delinquency cases per year which accounted for 5% to 30% of their overall practice. A recent study by the Virginia Crime Commission found that the overall workload for public defenders and court appointed counsel has increased over the past few years.<sup>58</sup>

The harm associated with high caseloads was evident to many who work in juvenile court. Defense counsel, Commonwealth's Attorneys and others related that juvenile public defenders burdened with high caseloads are unable to effectively protect the rights of children and youth in Virginia. Many believed high caseloads prevented well-intentioned and skilled public defenders from visiting their clients in detention, filing pre-trial motions, preparing for trial and seeking *de novo* appeals because they simply do not have the time. Many verified that caseloads do impede their ability to spend meaningful time with clients and to explain the process, consequences and options available to them before adjudication.

There is no question for many juvenile public defenders that they do not have the support staff or resources necessary to manage their caseloads. One juvenile defender said, "at some point you have an ethical obligation to your client to stop taking cases." The workload strain associated with high caseloads leads to burnout and public defender offices are confronted with an inability to retain talented career defenders.

### ***Timing of Appointment of Counsel***

*"A lot of times people get appointed just a few days before trial."*

*-Juvenile Court Judge*

If a child or parent cannot afford to hire an attorney, or a parent indicates an unwillingness to hire a lawyer and the court determines the child is indigent, the court will appoint counsel for the child.<sup>59</sup> The point at which counsel is appointed and participates in the process can make a difference in the outcome of a child's case. Standards call for the appointment of counsel as early as arrest and intake.<sup>60</sup> In Virginia counsel can be appointed before the detention review hearing, the adjudicatory or transfer hearing.<sup>61</sup> The law does not specifically provide the right to counsel at arrest, intake, or the initial detention hearing.<sup>62</sup> Virginia detains youth at almost double the national average yet does not provide the right to counsel at the initial detention hearing.<sup>63</sup>

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*In some jurisdictions the administrators have not established a system for appointing counsel at the initial hearing or at the point when an accused is brought initially before the court. In one instance that I observed, an indigent young man brought into court . . . requested an attorney. The judge rapidly explained the process (that the accused should contact the office of the public defender, etc.), but the judge failed to interact with the accused in a manner that ensured understanding. As the accused left the courtroom, a confused look on his face, the arresting police officer said to him, "Come here . . . I'll explain it to you."*

*- Juvenile Court Observer*

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Defense counsel's inability to participate early in the process hinders representation. Defenders are not appointed at: arrest, to protect the rights of their clients; intake, to prevent inappropriate entry into the system; initial detention hearings, to present evidence in support of release; or arraignments, where youth are informed of the charges against them. Additionally, defenders do not have access to most information collected

by the Commonwealth's Attorney prior to trial.<sup>64</sup> Early appointment enables defense counsel to argue for diversion, identify special needs of youth, prevent the misuse and overuse of detention and prepare for pre-adjudicatory motions practice.<sup>65</sup>

Defense counsel and the Commonwealth's Attorney do not normally participate in the intake process. At intake, Court Services Unit staff collects information about the child, reviews the allegations and identifies cases to divert from and petition to juvenile court.<sup>66</sup> The law does not require the Commonwealth's Attorney to be present at this stage<sup>67</sup> and it does not allow defense counsel to be appointed. The law prohibits statements made by youth to the intake officer from being used against them at trial but it does not protect youth, especially those who have needs that could be addressed elsewhere, from inappropriately entering the system.

While the particulars of appointment vary from jurisdiction to jurisdiction, investigators found that the court routinely appoints counsel at the arraignment/advisement hearing but does not require counsel to be present at the hearing. Counsel does not receive notice of the appointment until after the hearing. Whether detained or released, all youth are advised of their right to counsel at the arraignment/advisement hearing. For detained youth this hearing is part of the initial detention hearing. Non-detained youth are summonsed to court for the hearing.

Field observations revealed that the appointment of counsel is an informational process only. The child is informed of the charges she is alleged to have committed and advised of her right to counsel. Investigators observed advisement by a judge, court personnel or video. Investigators noted that the advisement of the right to counsel differed little from an adult advisement calling into question the child's ability to understand the importance of the role of counsel. Following the advisement the child must decide whether or not she wants a lawyer. If the child chooses to exercise her right to counsel the court determines eligibility and appoints a lawyer. In every jurisdiction, appointment means that the youth is given her lawyer's name but she does not meet him on that day. One defender described advisement hearings as "lawyer information day." In his jurisdiction this informational appointment practice does not apply to adults. If an adult is being arraigned, the court will send someone "through the halls to find a lawyer to represent him."

Investigators found that generally lawyers are not present at the arraignment/advisement hearings. Additionally, only retained private counsel took the initiative to participate at arrest, intake and initial detention proceedings.

Further complicating advisement for youth in detention is Virginia's move toward the use of two-way electronic video and audio communication or video conferencing.<sup>68</sup> Decision-makers in Virginia cite transportation, public safety, staff time and expense as the reason for implementing

*Video arraignments are awful.*

*- Juvenile Court Services Staff*

*There are disadvantages to the system [video arraignment], particularly the inability to discuss anything with your client during the hearing!*

*- Juvenile Public Defender*

this procedure.<sup>69</sup> During a video detention hearing the child remains at the detention center and sits alone in room with a television monitor that transmits to the courtroom. No one is present in court on behalf of the child. Some detention workers stated because there is no lawyer, they feel compelled to help the child understand the process, answer questions and provide support.

One investigator had an opportunity to observe the room in detention. *"It was a teeny tiny space with a TV monitor in it and one chair for the child. You could not fit two people in this room. They put the child in there, show him how to work the controls, and stand outside the door or nearby in the hallway."*

### **Waiver of Counsel**

One of the most important decisions a child can make at an arraignment/advisement hearing is whether she needs a lawyer. Since 1967, the importance of defense counsel in

*About 50% of kids waive on the misdemeanor cases. On violation of probation cases many kids know what is going to happen [i.e. the judge will do whatever the PO requests] so they will waive also.*

*- Juvenile Court Observer*

delinquency proceedings has been recognized. Virginia does not provide for an unwaivable right to counsel or even a provision requiring a child to confer with counsel before waiving her rights.

*He waived counsel, but I did not see a colloquy with the judge to ensure that the child was knowingly and voluntarily making the waiver.*

*- Juvenile Court Observer*

Children in Virginia are advised of the right to counsel at arraignment/advisement hearings. At the arraignment/advisement the Court must advise the child of her right to counsel, ask her if she wants a lawyer, appoint a lawyer if she does and if she is indigent, ensure

that she has knowingly and intelligently waived her right to counsel if she does not want a lawyer, inform her of the charges alleged in the petition and schedule the case for adjudication. The child does not enter a plea at that time unless she waives her right to counsel and chooses to plead guilty. Some investigators found youth waiving counsel and pleading guilty to charges at arraignment or leaving the hearing confused about what happened.

No data was available to show overall how many children waived their right to counsel. In one jurisdiction interviewees estimated that more than 50% of the youth charged with misdemeanors waived

*About 50% of the kids that appeared before the judge waived their right to counsel.*

*- Juvenile Court Observer*

*There are a lot of waivers of counsel in misdemeanor cases.*

*- Juvenile Court Judge*

counsel. In most jurisdictions investigators were told that Judges did not allow youth charged with felonies to waive their right to counsel. However, in one jurisdiction inter-

viewees estimated that 50% of youth waived counsel regardless of the seriousness of the offense.

No one could specifically identify why kids in Virginia waive the right to counsel. There was some speculation that a judge's ability to assess the costs of appointed counsel against a parent encouraged parents to advise their children to waive counsel. One court observer overheard a bailiff tell a father, who was found by the court not to be indigent, that the court would not be further inconvenienced with his son's case and would proceed the next time he came to court even if his child did not have a lawyer. One youth in detention thought the decision to waive counsel depended on whether or not you were able to hire a lawyer. He believed it was better to waive counsel and plead guilty rather than take the chance of being represented by appointed counsel.

*The administrator handling the advisement hearing said to a twelve-year-old boy, "If you don't like the results, you can ask for another trial." This administrator acknowledged, in a conversation with me afterwards, that most children end up pleading guilty and that few children request a trial de novo. Further, the administrator acknowledged that this information (i.e., the high percentage of pleas and the low percentage of requests for new trials) would be relevant and meaningful information for the children to have prior to deciding whether to waive the right to counsel.*

*- Juvenile Court Observer*

Investigators who observed court proceedings were deeply troubled that children waived their right to counsel without the benefit of conferring with counsel and, in many instances, without the benefit of a colloquy. Investigators observed some judges not advising youth about their right to counsel and the potential consequences of waiving the right. Others observed judges proceed so quickly that they questioned whether the youth understood what was said. None of the observers witnessed an opportunity for youth to ask the judge questions.

## **B. Barriers to Effective Practice**

### ***Preparation, Client Contact and Investigation***

*The biggest problem is that attorneys don't prepare clients properly.*

*- Court Appointed Counsel*

Members of the investigative team who observed hearings in juvenile court came away with the impression that most juvenile defenders do not adequately prepare delinquency cases. One juvenile court observer remarked that, "Despite [the attorney's] very pro-child thinking and attitude, I was quite disturbed by what appeared to be lack of thorough pre-hearing preparation. There was no written submission to

*Defense attorneys have minimal contact with prosecutors and with their clients before coming to court.*

*- Commonwealth Attorney*

*Often, court appointed attorneys are expected to have a trial on the same day that we were appointed. But you can often work out a plea in that first court appearance.*

*- Court Appointed Counsel*

*the court, no legal pad, and it was clear that [the attorney] was still thinking about what to say moments before the hearing.”*

Interviews with youth, court personnel and defense counsel confirmed that most juvenile defense counsel do not spend the time necessary to prepare cases through client meetings and investi-

*The Public Defender may be ineffective because they get the case a few days ahead of time, and not enough preparation time. They are overwhelmed and have insufficient time.*

*- Department of Juvenile Justice Staff*

gation. Interviewees noted that among other things defense counsel’s inability to participate early on in the process, restrictions on attorney compensation, and overwhelming caseloads make it virtually impossible for even well intentioned and dedicated juvenile defense counsel to adequately prepare a case.

Client contact and investigation are of paramount importance in delinquency cases. The Virginia Public Defender Commission acknowledges the importance of client contact in

*One must conclude that defense attorneys make many, and perhaps the vast majority of these plea arrangements, without having investigated the facts, without having requested and received all discoverable material, and without having researched and pursued relevant legal issues.*

*- Juvenile Court Observer*

its policy requiring all public defenders to have contact with a client within “48 hours” of appointment. However, juvenile defense counsel in Virginia are not connecting with clients or gathering critical information related to the allegations, the child’s family history, and medical or educational history with regularity.

Several investigators had the opportunity to visit detention centers and speak with youth and staff about access to counsel and quality of representation. Most youth and detention center staff reported that juvenile defense counsel rarely contact young clients in detention. Overall, retained counsel most often frequented detention centers, public defenders contacted clients in detention more often than appointed counsel and rural defenders faced the most challenges in contacting clients due to geographic limitations.

Complicating the good intentions of policies and standards is the fact that juvenile defense counsel is not appointed until after a detention or advisement hearing. In essence many days may pass following arrest before defense counsel is even permitted to visit with a client in detention and many months may pass following arrest before counsel can meet with a client who was not detained. The lapse in time can impede counsel’s ability to collect timely and accurate information and identify and locate witnesses.

*I just wish my lawyer would come see me, I don't know what's going on.*

*I tried to call him, but he won't come see me.*

*I should have gotten a paid lawyer.*

*I got witnesses, how do I let my lawyer know if he don't come to see me?*

*I just have some questions to ask.*

*- Detained Youth Comments about Contact with their Attorneys*

The law governing the timing of appointment is not the only barrier impeding communication between lawyer and client. Lack of resources and sufficient compensation for support staff and investigators to assist defense counsel also impede client contact. Most public defender offices have investigators on staff, however they are rarely available to assist juvenile public defenders because adult cases take priority. Court appointed lawyers find the restrictions on compensation debilitating and cannot spend the time or money to contact a young client or hire an investigator. Most

*There is very little pre-trial investigation.*  
*- Juvenile Court Judge*

private counsel are not willing to go to a detention center to meet with a client because of the costs associated with traveling long distances.

While many lawyers in Virginia overcome these barriers, members of the investigative team were troubled by youth reports that not only did their lawyers have little to no contact with clients at the detention center, lawyers did not interview youth over the phone, did not contact their families and some lawyer's offices even refused collect calls from clients in detention. Detention center staff confirmed these reports. Some detention staff related personal attempts to contact lawyers on behalf of kids finding defenders unresponsive even when youth alleged police brutality and abuse. One lawyer viewed client contact as burdensome and remarked that he did not have time to "hold hands" with his clients.

### **Motions, Adjudication, Disposition and Post-Disposition**

*[The] system is not geared for motions...and the defense attorneys don't have the time.*  
*- Commonwealth Attorney*  
*Pre-trial motions are rarely filed.*  
*- Juvenile Court Judge*

Investigators found that the inability to adequately prepare directly impacted the level of advocacy at all hearings. Juvenile defense counsel do not file many motions; rarely go to trial at adjudication; do not have the information necessary to contest dispositional recommendations; and do not follow a case post-disposition. Overall the level of practice in Virginia is minimal, rendering the ever important role of counsel meaningless.

### **Motions**

Defense counsel who do not collect information about the client and the offense are ill equipped to advocate for clients through aggressive motions practice. Most juvenile defenders reported that they do not routinely file motions for detention reviews, discovery, competency, suppression or experts. Judges confirmed that they received few pre-trial motions. Some judges believed high caseloads and

*There is no discovery in Virginia. It is trial by ambush.*  
*- Juvenile Public Defender*  
*[D]efense attorneys, who have limited discovery rights anyway, do not seek much pre-trial discovery.*  
*- Juvenile Court Judge*

*To tell you the truth, [high caseloads] is why I do not file discovery motions on all misdemeanors.*

*- Juvenile Public Defender*

limited discovery provisions presented barriers to motions practice. One defender believed that there was little value in filing motions to suppress

because many of his clients admitted to their charges. Some prosecutors were disturbed by the fact that defenders do not file motions for discovery. One Commonwealth's Attorney was shocked about how little defense attorneys know about their own cases.

*Most of the kids are guilty anyway, so what's the point?*

*-Department of Juvenile Justice Management*

*The trick is learning to cut the corners that have the least detrimental impact on the client.*

*-Court Appointed Counsel*

Those who reported filing motions reported successful results. One public defender reported that she requests detention review hearings in 80% of her cases and secures release for 50-70% of her clients.

### **Adjudication**

Many juvenile defenders do not investigate, file motions, or aggressively prepare because most juvenile delinquency cases are resolved through guilty pleas. Court observations and interviews revealed that few cases go to trial. Some attorneys and judges estimated that 85-90% of youth plead guilty.

*Only occasionally do lawyers put on a dispositional phase as it is well known that the judges follow what the probation officers recommend.*

*- Court Appointed Counsel*

Some speculated that the culture of juvenile court to "work things out" provided a disincentive to go to trial. One defender reported that he does not want his client to risk a felony conviction so he regularly accepts

the Commonwealth's Attorney's offer to plead to a misdemeanor.

In addition to infrequency, some court clerks reported that adjudications are abbreviated, lasting no more than 15 minutes at a time. In some jurisdictions, an adjudication that will require more than 15 minutes must be specially scheduled.

What investigators found most disturbing was that in almost all jurisdictions judges failed to adequately advise children and youth of the rights they gave up when they plead guilty through a colloquy. One court observer noted, "[t]here were no plea colloquies in any cases where someone 'plead guilty.'" One youth related that neither the judge nor his lawyer explained his rights to him but his probation officer spent time explaining them after the case was over.

### **Disposition**

A disposition hearing provides the court with an opportunity to learn about who the child is and how he came to be in court through evidence about the child's educational, medical and social history. The role of defense counsel is vital in informing the court about his client.



Across the board, interviewees stated that there are very few contested dispositional hearings in juvenile court, few witnesses testify and hearings last for less than ten minutes. Court observation confirmed that defense counsel did not prepare for disposition and that most defenders play a limited role at the hearing, frequently acquiescing to the court service unit recommendation without question. Defenders admitted that they do not participate often at disposition citing unfamiliarity with available resources and procedures governing dispositional recommendations. Because resources are scarce, the juvenile court judge, prosecutor and defense counsel rely on the probation department to gather personal histories of children and their families.

Some lawyers noted futility in dispositional advocacy, as they find judges prone to follow probation's recommendation, raising concern about the powerful influence of court services over judges. Lawyers were very concerned that the reliance of judges on the court services was inappropriate given that probation officers employment and allegiance to the Department of Juvenile Justice may color their opinions. Many believed it is critical that defense counsel should have access to resources to develop independent mitigation on behalf of their clients. Some probation officers disagreed and said that it was not the defender's job to make a recommendation at disposition.

*There are few appeals taken to Circuit Court.*  
- Juvenile Court Judge

### **Post-Disposition**

Following disposition there are two opportunities available to review a child's case that require the guiding hand of counsel: review of a commitment order and an appeal *de novo*. Once a child is sentenced in Virginia and committed to the Department of Juvenile Justice, the judge has authority to review the commitment order upon motion by defense counsel for up to 60 days. After the time elapses, the judge loses jurisdiction to amend the order. Most judges reported that defenders rarely file motions requesting commitment reviews.

*Children are not well represented in this court.*  
- Juvenile Court Judge

*Lawyers are in great need of more training and oversight. The quality of representation is pitiful.*  
- Juvenile Court Services Staff

*A lot of appointed counsel are new, here for less than 2 years, and never quite grasp all of the issues.*  
- Juvenile Court Judge

A child or youth adjudicated delinquent has the right to appeal her case to the circuit court if she disagrees with the outcome of the case. There was no information available to document the number of cases appealed from juvenile court to circuit court. However, an overwhelming number of defenders admitted that they do not appeal cases to circuit court. Juvenile defenders are not appealing cases to circuit court for sev-

eral reasons, including: overwhelming caseloads, lack of juvenile expertise in circuit court and less compensation to take an appeal.

### **Training & Experience**

The Virginia Code sets a framework to ensure quality representation by capital defend-

ers stating that they must be trained, experienced and proficient.<sup>70</sup> Similar guidelines are enumerated for *guardian ad litem* attorneys. The Code does not require training or experience for juvenile defense attorneys. As a result, juvenile court judges shoulder the responsibility of ensuring that lawyers representing children and youth in the justice system provide adequate representation.

Investigators found overall that judges have not established standards or practices for ensuring quality juvenile defense in the state. While well intentioned and compassionate, most juvenile defenders who were observed lacked the basic skills necessary to present evidence and demonstrated little knowledge of the law. One observer noted that, "at the end of the cross [examination], the defense attorney ma[de] a motion to suppress, which of course [was] after the gun has been admitted [into evidence]." Another stated, "[i]t appeared from her cross-examinations that she had not done much preparation, had no real awareness of what the prosecutor's witness would testify to, and her crosses were fishing expeditions."

Most juvenile court personnel interviewed have opportunities to observe juvenile defenders in court. Many were able to identify what made a juvenile defender a good lawyer and what lawyers in their jurisdiction needed. One clerk noted that a good lawyer interviews witnesses, researches the law, shows a concern for the client and makes an effort to know the family. Some believed that in addition to legal skills both public defenders and appointed counsel need "juvenile court 101" because few understand how the delinquency system works and what services are available for clients.

*"At one time the court started cutting lawyers off the [court appointed] list who were not meeting expectations. They ended up with a list that was two people long."*

*- Official of the Department of Social Services*

*...lawyers have no clue about the juvenile justice system. A training program to explain the issues to lawyers would start to raise awareness.*

*- Appointed Counsel*

Lawyers interviewed suggested that the court's failure to implement training and experience standards for juvenile defenders allowed for substandard representation. They reported that there is only one annual juvenile court training available in the state, yet

no requirements for attendance and that it was too easy for new lawyers to "hang a shingle" and accept delinquency appointments. Some lawyers suggested mentoring programs for new lawyers in addition to training. One new court appointed attorney suggested replicating the *guardian ad litem* practice in delinquency by requiring continuing legal education for attorneys to remain on an appointment list.

Overall defenders interviewed welcomed the idea of delinquency training. One of the barriers to accessing training is the lack of funding available to pay for training. Court appointed counsel must pay for his own continuing legal education seminars. The Public Defender Commission pays for public defenders to attend training seminars but only up to the requisite hours necessary to remain barred in the Commonwealth. If a public defender wants to attend an additional seminar, she must pay for it herself.

What investigators found most disturbing was that despite witnessing less than adequate performance, judges made no effort at oversight and continued to re-appoint

*The lack of resources all through out the juvenile court and related systems is abysmal.*

*- Juvenile Court Judge*

*The system does not give you the tools or resources to mount an appropriate defense on behalf of these children."*

*- Virginia Lawyer Who Won't Take Delinquency Cases*

unskilled and inexperienced lawyers to represent children and youth.

### **Resources**

Investigators recognized that the entire juvenile justice system in Virginia is under funded and overburdened. Access to

resources however was inequitable with defense counsel having less available resources than judges, Commonwealth's Attorneys and court service units. Representing young clients presents a challenge to juvenile defense counsel in that it requires knowledge of many disciplines including mental health, education and adolescent development. To skillfully represent young clients, juvenile defenders need access to support staff, investigators, experts and training.

In some jurisdictions visited the office space provided to public defenders was adequate and comfortable, yet access to support staff, law clerks and literature was lacking. Some juvenile defenders reported that they do not use independent social workers, investigators, experts or law clerks to assist them in preparing for juvenile cases. Many do not have administrative assistants or other support staff to assist with appointments, phone calls and research. Private counsel representing indigent children must pay for support staff, investigators and other experts from court compensation or general practice.

The matter of access to investigators, independent experts or sentencing advocates is not uniform around the state. Some public defenders reported that the courts would not pay for experts and others reported that current available resources are sometimes underutilized. Court appointed attorneys claimed that they do not receive enough money through fees to pay for experts or other resources. Some judges reported that they would be willing to pay for experts and investigators if lawyers would be more assertive and file motions requesting access to these resources.

Some public defender offices have recognized the need to increase available resources for defenders and have employed sentencing advocates as a way to enhance representation at preparation through sentencing. Sentencing advocates are experts who collect and develop mitigation for sentencing in criminal cases. They possess a great deal of knowledge on gathering information, for example: obtaining mental health records, school and educational records, work histories and family histories. The sentencing advocate compiles the material to make a cohesive package for presentation to the court for consideration in sentencing. Many advocates pursue a "holistic" approach to developing mitigation in that they want to pres-

*Defenders are the weakest link in the chain.*

*- Clerk of Court*

*[Public defenders] think it's the kiddy practice the practice ground.*

*- Juvenile Court Judge*

*Those attorneys who are on the court appointed list regularly take cases and treat juvenile court as a practice arena.*

*- Juvenile Court Judge*

ent a view of the whole person to the court. Even though several Public Defender Offices employ sentencing advocates as part of their staff, the primary focus of these advocates is in the adult court and rarely do they develop a mitigation package in juvenile court.

### C. Barriers to Just Outcomes

#### *The Culture of Juvenile Court*

Across disciplines, the notion that juvenile court is a second rate judicial forum was pervasive. In most jurisdictions investigators found that juvenile court is used as a training ground for new and inexperienced public defenders and court appointed lawyers.

Inside the courtroom, many noted a lack of professionalism. Nothing harkened back to the days of the “kangaroo court” more than observing probation officers prosecuting

cases instead of the Commonwealth’s Attorney. In several jurisdictions, the family, defense counsel, prosecutor and probation officer all spoke while standing at the judge’s bench. When asked if standing next to the prosecutor prevented

*The best lawyers in town will not take court appointed cases in juvenile court.*

*- Juvenile Court Judge*

*The mentality of juvenile court is to save the child from adult court. Getting a child off in juvenile court may not be the best thing for the youth. He or she needs services now.*

*- Court Appointed Counsel*

confidential communications between client and defense counsel one defender said, “I had not thought of that.” Role confusion contributes to a child’s inability to understand or adequately participate in his case. Often youth and parents are unsure with whom to speak or reveal confidences.

Inside and outside juvenile court, being a juvenile defender is not viewed as a respectable profession. Court appointed lawyers stop taking delinquency cases when they become more experienced and many public defender offices rotate experienced juvenile defenders to the felony division. Public defender offices also seemed to experience extreme turnover rates in both front-line and supervisory juvenile positions. An experienced juvenile prosecutor said, “[e]verybody thinks of [juvenile court] as the short end of the stick.”

Many professionals in juvenile court charged with working in the best interest of the child believe that defense counsel’s role is similar to their own. As a result defense counsel who seek to protect their clients rights are viewed as “getting kids off.” Many court appointed lawyers do not understand the difference between their roles as *guardian ad litem* and defense counsel. One new defense lawyer said, “ We don’t need to be too adversarial because we get along well and work in the best interest of the kids.”

Nothing appeared more “second rate” than watching the countless families endure the humiliating process of going through juvenile court. One investigator described the juvenile court as resembling a bus depot. Families sat on benches and the clerk called them into court over a loudspeaker system. Several investigators repeatedly noted the rude and often cutting manner in which juvenile court personnel, including judges,

spoke to children and their families.

The informality of juvenile court led many to believe that being adjudicated delinquent in the juvenile and domestic relations district court posed little risk to young offenders. Many lawyers believe that children and youth face minimal consequences compared to their adult counterparts. One probation officer, however, was very troubled by the failure of lawyers in his jurisdiction to explain collateral consequences of delinquency adjudications that can seriously impact kids later in life, such as use of juvenile record at an adult sentencing and its ramifications for licensing such as driving and hunting.

### ***Courts Not of Record***

In Virginia, juvenile courts are not courts of record. Unlike many other states, Virginia does not provide a mechanism to record delinquency hearings. There was little consensus among those interviewed about whether or not juvenile courts in Virginia should be courts of record. Some lawyers believe failure to create a transcript or record is a problem because it fosters an unprofessional “anything goes” mentality in juvenile court where there is no threat that what is said will be reviewed by a higher court. They believe that a mechanism to create a transcript or record would improve the overall quality of the proceedings and help to cure the second rate atmosphere that pervades juvenile court. One defender reported that she brings her own tape recorder to hearings and found that the tenor of the hearing becomes much more professional when she turns it on. One judge believed that no record was a disincentive for defenders to file motions. Another judge admitted that without a transcript or record he cannot be overruled no matter what he says.

*There is a general level of complacency in juvenile court that is attributed to the fact that juvenile courts in Virginia are not courts of record.*

*- Juvenile Public Defender*

Others are not concerned about transcripts or records because a child or youth adjudicated delinquent in juvenile court has the right to a new trial in circuit court through a *de novo* appeal. An overwhelming number of attorneys admitted that they do not appeal cases to circuit court and do not bring a recorder or hire a court reporter to document hearings because of the burdensome costs.

### ***Inappropriate Mental Health and School Referrals***

#### ***Mental Health***

Access to mental health services for children in Virginia is a complex issue and those interviewed for this assessment offered many reasons for the lack of services available for kids in need. However, there was unanimous agreement among those interviewed that that children with disabilities are overrepresented in the justice system and the juvenile court is the mental health service provider for poor children in the Commonwealth. Studies on Virginia’s access to mental health show that children denied access to mental health treatment services are being funneled into the juvenile justice system.<sup>71</sup>

A recent study reveals that the mental health system in Virginia cannot access needed residential treatment and the juvenile justice system cannot access needed community

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*"We are the mental health system."*

*- Juvenile Court Judge*

*"My number one concern is the mental health cases. The numbers of those cases are rising significantly, and mental health cases absolutely should be handled elsewhere."*

*- Department of Juvenile Justice Intake*

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treatment.<sup>72</sup> The report calls this crisis the "revolving door of mentally ill juveniles." There are only 64 public hospital beds available for youth committed to the Virginia Department of Juvenile Justice. They

must compete for bed space with other children and youth who are uninsured or whose disabilities are so profound that private facilities will not treat them.<sup>73</sup> One court appointed psychiatrist estimated that there are 32 beds available for kids in the entire justice system. Investigators found it was common for children and youth to be incarcerated for psychiatric treatment and for incarcerated youth to wait months for treatment services.

Detention center staff in every jurisdiction emphasized that there are too many youth in detention who need mental health treatment and detention centers are not equipped to service their needs. Superintendents guessed that anywhere from 50% to 85% of youth in their care needed to be medicated. According to a survey of incarcerated adolescents in Virginia, over one third of males and one half of females in detention have used psychotropic medications. A total of 17% of the youth in the system have been hospitalized in a psychiatric facility and one third of them have had multiple hospitalizations, while fifty two percent of males and nearly sixty percent of females received some sort of outpatient therapy.<sup>74</sup> Reports also indicate that 47% of incarcerated males and 57% of incarcerated females in Virginia's juvenile justice system need mental health treatment.<sup>75</sup>

Compounding the problem is an overwhelming sentiment by those interviewed that lawyers are not advocating appropriately for their clients at intake, where there is no right to counsel, detention reviews and disposition. One Virginia study found that "[a]ttorneys often lack knowledge of treatment options and the mental health needs of juvenile offenders and the legal representation and advocacy provided may often be inadequate."<sup>76</sup> Mental

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*Schools have flooded the judicial system with a lot of bogus cases that they try to send to court.*

*- Commonwealth Attorney*

*Numerous cases come in where we say, 'You know, they used to deal with that in school'.*

*- Juvenile Court Judge*

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health professionals who have worked with juvenile defenders confirmed that juvenile defenders and court appointed attorneys often do more harm than good. Defenders interviewed admitted that they do not know how to help clients with mental health needs because they are not trained and the courts will not pay for experts outside the court appointment pool.

### **School Referrals**

Virginia is among the many states to enact zero tolerance policies in schools that have dramatically impacted the number of children and youth referred to juvenile court.<sup>77</sup>

Juvenile court personnel, prosecutors, defenders, judges, detention center staff and school resource officers overwhelmingly reported that Virginia's zero tolerance policies have caused an increase in cases referred to juvenile court. One detention center administrator reported that the detained population increases *during* the school year.

Children are often referred back to juvenile court by their probation officer who files a petition alleging a violation of a condition of probation related to school attendance or behavior. Often the probation officer has sole discretion to refer the case to the court or to work within the school system to address the problem. If the probation officer decides to refer the case to court the child is in essence charged again and goes through the entire juvenile court process, which can include incarceration. Children additionally can be punished through the suspension and expulsion process at the school. Children do not have a right to counsel at a school suspension or expulsion hearing.

Another national phenomenon adopted in Virginia is the use of police officers in school. Police or "school resource officers" are routinely assigned to schools throughout the Commonwealth. School resource officers are sworn police officers employed by local law enforcement agencies and their primary job function is to provide security at the public school and to be a resource to the school administration. The resource officer assists with investigating criminal activity at the school and other criminal behavior occurring off campus where students at the school are suspected of being involved, increasing the likelihood that the matter will be sent to juvenile court rather than in the principal's office.

Interviewees, including probation officers, expressed strong sentiment that many cases referred to juvenile court are better handled at the school or in the community. Some interviewees believed that the zero tolerance policies allowed schools in their jurisdictions to practice "dumping" kids from one school to another. Some reported that the practice of dumping most affected children and youth who need special education services and older youth who are sent to adult education programs. One juvenile defender said, "If we could fix schools we'd fix delinquency by 75%."

There are a few successful community-based legal services and law school clinical programs in Virginia that represent kids in school related cases. Through their advocacy they are often able to prevent matters from being referred to juvenile court. However, field observations and interviews revealed that they are the exception to the norm. Juvenile defenders are not effectively advocating for diversion and dismissal because they are not trained in state and federal laws governing suspension, expulsion and special education services that protect youth from inappropriate school action. Most juvenile defenders reported that they do not request or review school records even when a case is school related. One court observer witnessed the judge, defender and Commonwealth's Attorney question a mother about the content of school records in a school related offense because no one had requested the school records.

### ***Disproportionate Minority Representation***

Despite demographic differences, there was agreement in every jurisdiction that children and youth of color are overrepresented in Virginia's juvenile justice system. Studies by national advocacy groups and the Virginia Department of Criminal Justice Services show that minorities are overrepresented at every stage of the process.<sup>78</sup>

Across disciplines, there was an overarching sentiment and perception that children and youth of color are disparately treated: that race matters. No one could say for sure why minorities in their jurisdiction were treated differently. Interviewees proffered many reasons for the disparate treatment including biased police patrol, lack of parental empowerment and access to resources.

*Black kids are treated entirely differently from their white counterparts.*

*-Juvenile Court Judge*

Even though many detention centers are regional, housing youth from several different counties with varying demographics, staff reported predominantly African-American detention populations. In one jurisdiction, a detention administrator received a call from a judge who requested the release

*Rank and race have its privilege. Black kids aren't the only ones stealing cars.*

*-Juvenile Court Clerk*

*If there are 80 kids in detention, then 80 will be black.*

*-Juvenile Detention Officer*

of a group of white youth from detention despite the intake officer's assessment that the youth presented a risk to public safety. In a recent detention report the Virginia Department of Juvenile Justice projected that the number of African-American youth at risk for being detained will increase by 11% between 2000 and 2010.<sup>79</sup>

One judge believes that poor quality of representation has a greater impact on African-American youth. A detention center administrator verified that Caucasian youth are released after adjudication more frequently than African-Americans and Hispanics.

### ***Over Reliance on Court Service Units***

Prior to the Supreme Court ruling in *In re Gault*, juvenile courts around the country were established with the idea that proceedings were informal, with no right to counsel. Probation officers often played the largest role in the juvenile court. Since the Supreme Court guaranteed the right to counsel in *Gault*, the struggle to identify the role of juvenile defense counsel and separate the responsibilities of probation from the defense and prosecutorial functions has been a challenge in many states.<sup>80</sup>

In Virginia the Department of Juvenile Justice is a powerful executive branch agency that manages community programs and services, community supervision and case management, and custody and care of committed juveniles.<sup>81</sup> The Department's case management division, or court service, unit has responsibility for presenting information to the court at every stage of the process. Court service unit personnel make decisions that affect youth at intake, conduct investigations, prepare reports to the court and provide probation supervision.

Following arrest, probation intake officers have the first contact with youth. Intake officers are not lawyers, yet they are responsible for reviewing and processing complaints, including determining whether or not probable cause exists.<sup>82</sup> The intake officer has several options available: the officer can divert a case from juvenile court, issue a petition but release the youth from custody or issue a petition and detain a youth until a judge can review the facts of the case.

The intake officer is charged with the responsibility of using objective criteria in making all decisions. However, a recent report by the Virginia Department of Juvenile Justice



revealed that intake officers in the sites studied were more likely to detain a child who came to intake for a technical violation of probation, regardless of whether the child committed a new offense than a child who came to intake with a current or pending felony. While intake officers self-reported that they did not use detention as a means for “teaching a lesson” they were more likely to detain a youth who displayed a “negative attitude.”<sup>83</sup>

For detained youth, intake staff presents the misdemeanor case to the court at the initial detention hearing. The Commonwealth’s Attorney is not required to present the petition or even be present at the hearing and there is no right to counsel at the hearing, leaving the child virtually defenseless. For youth who are not detained, investigators observed court service unit staff presenting petitions to the court at the advise/arrestment hearings again without the Commonwealth’s Attorney’s presence.

Court service unit staff also play a vital role at the disposition hearing. A probation officer from the court service unit prepares the investigation and report for the court. The reports are court ordered and describe the child, his family and his social history. Based on the information gathered, the Department of Juvenile Justice makes a recommendation to the court through the probation officer about services for the youth. The Department of Juvenile Justice also provides the services it recommends, including: probation supervision, programs for youth on supervised probation, operation of correctional centers throughout the state and parole supervision.

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*Lowering the age to put children in prison is stupid.*  
- Juvenile Court Judge

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Many juvenile defense counsel expressed concern about the judge’s total reliance on the court service unit to make recommendations and their almost absolute deference to those recommendations. Youth interviewed in detention expressed confusion between the role of their lawyers and probation officers who often took on the responsibility of counseling youth about their legal rights and options.

### ***Structure of Prosecutorial Discretion***

Consistent with every other state, Virginia law provides a mechanism for juveniles to be tried and sentenced as adults through transfer.<sup>84</sup> In 1994, Virginia had one of the lowest rates of violent juvenile crime in the United States.<sup>85</sup> Despite crime statistics and public sentiment that juveniles should be tried in juvenile court,<sup>86</sup> the Virginia General Assembly followed the national wave of “get tough” policies and significantly changed its juvenile code and transfer laws in 1995 and again in 1996. Presently, there are three ways to transfer a juvenile case from the Juvenile and Domestic Relations District Court to the circuit court: discretionary file, mandatory file and direct file.<sup>87</sup>

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*There is a tendency to send the kid upstairs and throw away the key.*  
- Court Appointed Counsel

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Historically, in Virginia, the Juvenile and Domestic Relations District Court judge made the decision to transfer a child for prosecution as an adult in the

Circuit Court. The Commonwealth’s Attorney would file a motion to transfer the case and the judge would hear evidence regarding the charge and determine if probable cause existed. If the judge found probable cause, he would then hear evidence about

the child and make a determination about jurisdiction. In assessing the evidence, the court would consider several factors before making the transfer determination, including possible services available to the child through the juvenile justice system, impact on the community if the youth were to remain in juvenile court and potential future dangerousness to society. If the case was transferred to the Circuit Court, the juvenile judge would then consider bail for the child. Future charges against the child would begin in juvenile court and follow the same process.

The Virginia legislature dramatically altered the transfer process during its 1995 and 1996 sessions. Instead of vesting all power and discretion in the juvenile court, the process was expanded to a three-tiered system. This change significantly enhanced the role of Commonwealth's Attorney. Additionally, the General Assembly lowered the age that a child could be transferred from 15 years old to 14 years old. The child must be charged with an offense that would be a felony if he was an adult.

The transfer statute is comprised of three sections that govern process. The first section retains the traditional mechanism for transfer. Permitting the Commonwealth's Attorney to begin the process by filing a motion to transfer that requests a transfer hearing by the judge. This proceeding mirrors the traditional way transfers were commenced prior to the legislative changes in 1995 and 1996.

The remaining two methods of juvenile transfer give the prosecutor more discretion and severely restrict the authority of the judge. The second section provides that a child charged with murder would be transferred automatically to the circuit court upon a finding of probable cause by the juvenile court judge. All ancillary charges would be transferred as well. The Commonwealth's Attorney makes the charging decisions and therefore controls how the petition is written. The Commonwealth is not required to file any notice of transfer since the transfer proceeding is automatic.

The third method of transfer is commonly referred to as "prosecutorial discretion." There are twelve enumerated violent felony offenses listed in this subsection. If a child is charged with one of these offenses, the Commonwealth need only file a notice of intent to transfer and the juvenile court must hold a preliminary hearing and determine probable cause. If the court finds probable cause, the case and all other ancillary charges are then transferred to the Circuit Court.

The Virginia Code provides for an appeal to the Circuit Court of a juvenile court judge's decision to transfer or retain jurisdiction.<sup>88</sup> Unlike adjudicatory appeals, an appeal of the transfer decision is not *de novo*. Any party may appeal. When a discretionary waiver case is appealed to the Circuit Court all action in the juvenile case is stopped until the Circuit Court considers the appeal. The child remains in juvenile detention until the Circuit Court ruling and an appeal from a mandatory waiver case does not halt the adjudicatory process. However, the Commonwealth's Attorney may seek an indictment in Circuit Court despite the fact that the child has appealed the decision to transfer jurisdiction. In reviewing an appeal, the Circuit Court considers only whether the decision was made in compliance with the law.

Virginia law also allows for "blended sentencing." There are many different forms of blended sentencing around the country that provide children and youth with a "last chance" at juvenile rehabilitation and an incentive to comply with the conditions.<sup>89</sup> In Virginia, blended sentencing allows a Circuit Court judge to sentence a juvenile as a

juvenile and suspend an adult sentence to ensure that the youth complies with the conditions of the juvenile sentence. If the child fails to comply with the conditions of the juvenile sentence, an adult sentence can be imposed.

There is scant information available about the number of children and youth transferred from the juvenile court to the Circuit Courts in Virginia and even less information about what happens to them once they enter the adult system. In 1996, the Virginia Department of Criminal Justice Services issued a report about juveniles convicted of murder in Circuit Court in Virginia. The report indicated that juveniles convicted of murder as adults received sentences "which exceeded Virginia adult sentencing guidelines" and that "juveniles released from prison for homicide...served more years on average than adults released during the same time period."<sup>90</sup>

Investigators found no statistics regarding youth transferred to adult court, and most interviewees were unaware of any data regarding juveniles in the adult system. Judges guessed that 3-5% of the court's cases are sent to Circuit Court. One Commonwealth's Attorney kept no records or statistics but claimed to have filed five or six motions to transfer within the last six months. The investigator was unable to confirm that number with any court personnel. Another Commonwealth's Attorney claimed to file only one motion to transfer per month, yet defenders in that jurisdiction reported that the Commonwealth's Attorneys regularly filed motions as negotiation leverage. Defenders around the state reported that it is routine for the Commonwealth's Attorney to file motions to transfer and offer to move to dismiss the motion if the juvenile pleads guilty to a juvenile charge.

There was no information available to show how many Circuit Court judges sentence youth through blended sentencing. One defender whose client was transferred to Circuit Court stated that he finds Circuit Court judges amenable to sentencing juveniles as juveniles. One investigator was repeatedly informed that juveniles tried as adults in Circuit Court who are sentenced as juveniles routinely wait in detention for up to three months for Circuit Court orders to reach the facilities. During this time, youth fail to receive treatment or services and receive no credit for the time served waiting.

In the 1995, 1996 and subsequent juvenile code amendments, issues related to transfer provisions and establishing a child's competence to stand trial in adult court have blurred the distinction and methods of handling children in juvenile and adult court. Court personnel, mental health professionals, probation officers, defenders and judges believe that Virginia's transfer laws favoring prosecutorial discretion are a gross deviation from the tradition of rehabilitation in the juvenile court.

Studies around the country are inconclusive as to sentencing outcomes for juveniles in criminal court<sup>91</sup> and the deterrent effect of trying children as adults. The absence of information in Virginia related to transfer is disturbing considering that the potential loss of rights and privileges for Virginia's youth is so severe.<sup>92</sup> The most severe consequence for youth transferred to Circuit Court, as young as 16 at the time of the offense, is that Virginia law allows the Commonwealth's Attorney to seek the death penalty.

### ***Delivery of Indigent Defense Services***

*[We] really need a public defender system.*

*— Commonwealth's Attorney*

The delivery of indigent defense services in Virginia is varied and unequal. Public defenders represent less than half the population. The lack of a statewide public defender system is by far one of the largest barriers to access to counsel and quality of representation for children.

Despite criticism that public defenders need more training and stability in juvenile court, juvenile court professionals in public defender jurisdictions overwhelmingly believed that representation dramatically improved since the establishment the office. Judges and Commonwealth's Attorneys in court-appointed-only jurisdictions expressed the strong need to create public defender offices to improve the quality of representation.

There is increasing momentum in the Commonwealth towards the establishment of a statewide public defender system.<sup>93</sup> A recent study by the Virginia Crime Commission to the Governor and the Virginia General Assembly found that the outcomes of cases were better for defendants represented by public defenders.<sup>94</sup> Similarly, investigators for this report found that public defenders in juvenile court were more likely to file detention review and other pre-trial motions, more likely to interview witnesses and prepare for adjudication, more likely to go to trial and less likely to accept a plea without some form of investigation.



### **CHAPTER THREE PROMISING APPROACHES/INNOVATIVE PRACTICES**

Despite structural and systemic barriers that limit or impede the quality of juvenile defense in Virginia, the assessment team observed attorneys in different parts of the state that vigorously and enthusiastically represented their young clients. They were not only articulate and well prepared, but the children they represented appeared to be engaged and demonstrated an understanding of the court process in different and more meaningful ways. They were creative and imaginative and developed strategies to link and collaborate with others. Those lawyers not only challenged the prosecution to prove its case, but also displayed a comprehensive and holistic approach to their representation relying on innovative approaches to bolster and support their legal arguments. They worked well with families, possessed significant knowledge regarding the neighborhoods and communities from which their clients came, and presented compelling alternatives to the court. Their out-of-court contacts significantly enhanced their in-court advocacy. They reported having affiliations with law schools, bar associations and non-profit law centers that inspired and supported their work.

Consistent with national data, defender programs and individual defense attorneys that offer high quality legal services have some or all of the following characteristics in common:

- The ability to limit or control caseloads;
- Support for entering the case early and the flexibility to represent the child in related collateral matters, such as special education;
- Access to ongoing training and resource materials;
- Adequate non-lawyer support and resources;
- Hands-on supervision and mentoring of attorneys; and,
- A work environment that values the importance of a robust juvenile court practice.

Investigators encountered a range of promising approaches that contributed to more forceful and effective legal representation on behalf of the children and families in Virginia. Such practices included the ability to conduct comprehensive mental health and special education advocacy; to engage in aggressive detention advocacy; to provide the court with compelling sentencing alternatives by using trained sentencing advocates; and, the ability to effectively draw in families and tap into community and neighborhood resources

Bar associations were identified that recruited, trained and used volunteer lawyers to assist overburdened court systems in a variety of capacities, from taking individual cases to teaching street law. Law school legal clinics exist that serve as a valuable asset to juvenile defenders in their communities in addition to providing training and resources to lawyers statewide. Non-profit law centers dot the state and, due, in part, to their ability to control their caseloads, sometimes put substantial time and resources into an individual case thus creating a standard of high-quality, comprehensive practice to which others can aspire. These innovative practices serve as models for enhanced legal advocacy for children.

In addition, across the state, observers identified juvenile defenders who have become more visible leaders in practice and policy matters. The importance of leadership development cannot be overstated. It is in this role that juvenile defenders can exercise their voice, identify barriers that limit representation, and articulate ideas and strategies that can improve outcomes for children, families and communities. Building leadership among the juvenile defense bar is an essential ingredient to any successful reform effort.

## **CHAPTER FOUR CONCLUSION AND RECOMMENDATIONS**

While the investigative team observed many enthusiastic and caring lawyers, judges and other juvenile court personnel at work, Virginia's indigent children and youth do not have uniformed statewide access to justice in juvenile court and the quality of representation is uneven at best. This uneven representation has had a disproportionate impact on poor and minority children. Countless numbers of children are waiving the right to counsel and proceeding unguided through a sometimes harsh and uncaring system that offers little opportunity for meaningful guidance and rehabilitation. The consequences are serious and everlasting. The second-class status of the juvenile court and the frustration of many professionals working within the system create an environment in which youth and families are too often treated in an undignified and uncaring manner.

Lawyers who make the effort to protect their client's rights are struggling within a system that does not provide sufficient compensation or support. Lawyers in juvenile court are directly and indirectly discouraged from being zealous advocates and are asked to handle many complex cases without sufficient access to legal resources, support staff, investigators, defense experts and social workers making it virtually impossible to adequately protect the rights of their clients.

The second-class status of the juvenile court in Virginia results in a courthouse culture that implicitly disfavors strong legal advocacy and is sometimes even viewed as unprofessional. The system as a whole must acknowledge the deep-rooted problems in the juvenile indigent defense system and work together toward just solutions. Judges must take greater responsibility to ensure quality representation, to appoint competent counsel, to insist that juvenile defenders have the necessary resources to protect children, and to avoid whenever possible the appearance of children in court without a lawyer. The Commonwealth's Attorneys must not use the threat of transfer as a vehicle to obtain hurried pleas from children. Probation officers should not be permitted to engage in the provision of legal services, such as the preparing and filing of petitions or negotiating plea bargains without the benefit of counsel. The juvenile indigent defense system must not use juvenile court as a training ground for young or inexperienced attorneys and must strive for a higher level of practice. No child or family should be treated with disdain or contempt.

Virginia has an obligation to treat children and youth in the juvenile justice system with dignity, respect and fairness. The people of the Commonwealth have an abiding interest in supporting systemic reform of the juvenile justice system in ways that will ensure the success and safety of all its children. To this end, the following recommendations are made with respect to the provision of juvenile indigent defense services:

1. The Commonwealth and its counties must ensure that a fair and equitable share of resources is allocated to support the meaningful representation of juveniles in delinquency proceedings.
2. Legislative changes should be made that ensure the early appointment of counsel so that children are not detained in secure or other facilities without the benefit of counsel.



3. The legislature should establish an unwaivable right to counsel in delinquency cases consistent with national standards.
4. The legislature should create a statewide juvenile public defender system staffed by full-time public defenders with specialized training and expertise to provide comprehensive representation to children. Each office should provide access to support staff, investigators, social workers and other necessary resources.
5. The Commonwealth should provide meaningful and affordable opportunities for comprehensive and ongoing training, professional development and supervision of juvenile defenders.
6. The Commonwealth should develop statewide guidelines and minimum practice standards to ensure competent representation in juvenile delinquency proceedings, including arrest, detention, pre-adjudication, adjudication, post-adjudication and appeals.
7. The Commonwealth should establish independent oversight and monitoring mechanisms of the juvenile indigent defense system to ensure greater accountability. Oversight and monitoring should include, at a minimum, data collection, workload assessments, caseload management and overrepresentation of minority youth.
8. A statewide review of the Juvenile and Domestic Relations District Courts' status as courts not-of-record should be conducted to determine the specific impact on outcomes for children in the delinquency system, levels of advocacy on behalf of these children and advancement of professionalism in the juvenile bar.
9. The Commonwealth should address the increase in mental health and school-related referrals to juvenile court and evaluate their appropriateness, especially as this impacts minority youth.
10. The Commonwealth should involve law school clinical programs, state and local bar associations, and other legal and community-based entities in designing strategies to improve the image and overcome the second-class status the juvenile court holds.

## APPENDIX

### Virginia Juvenile Justice Law

#### I. Custody

Virginia Code §16.1-246, governs when and how a child may be taken into immediate custody:

- When a judge has issued a detention order.
- When a child is alleged to be in need of services or supervision and there is a clear and substantial danger to the child's life or health.
- When, in the presence of the officer who makes the arrest, a child has committed a criminal act and the officer believes that detention is necessary for the protection for the public interest.
- When a child has committed a misdemeanor offense involving shoplifting, assault and battery, or carrying a weapon on school property, and, although the offense was not committed in the presence of the officer who makes the arrest, the arrest is based on probable cause.
- When there is probable cause to believe that a child has committed a felony.
- When a law-enforcement officer has probable cause to believe a child has run away from a residential, child-caring facility or home in which he had been placed by the court, the local department of public welfare or social services or a licensed child welfare agency.
- When a law-enforcement officer has probable cause to believe that a child has run away from home or is without adult supervision at such hours of the night and under such circumstances that the law-enforcement officer reasonably concludes that there is a clear and substantial danger to the child's welfare.
- When a child is believed to be in need of inpatient treatment for mental illness.

The Virginia Code distinguishes between detention, which is placement in a secure facility resulting in a loss of physical freedom, and shelter care, which is referral to a group home or placement in foster care. The decision to detain is predicated on securing the presence of the juvenile at trial, reducing the likelihood of infliction of serious bodily harm on others, or the protection of the juvenile from imminent bodily harm upon his or her request. Virginia requires that the parents be notified "in the most expeditious manner practicable" and that the child be taken "with all practicable speed" to the intake officer or the judge, if not released to the parents.

#### II. Detention or Shelter Care

After initial custody, the Code §16.1-248, sets specific criteria for Detention or Shelter Care. A juvenile may be detained in a secure facility, pursuant to a detention order or warrant, only upon a finding by the judge, intake officer, or magistrate, that there is probable cause to believe that the juvenile committed the act alleged, and that at least one of the following conditions is met.

- The juvenile is alleged to have committed an act which would be a felony or Class 1 misdemeanor if committed by an adult, and there is clear and convincing evidence that:
- The release of the juvenile constitutes a clear and substantial threat to the person or property of others; or

- Release would present a clear and substantial threat of serious harm to such juvenile's life or health; or
- The juvenile has threatened to abscond from the court's jurisdiction during the pendency of the instant proceedings or has a record of willful failure to appear during the pendency of the instant proceedings or at a court hearing within the immediately preceding twelve months.
- The juvenile has absconded from a detention home or facility where he has been directed to remain by the lawful order of a judge or intake officer.
- The juvenile is a fugitive.
- The juvenile has previously failed to appear.

Any juvenile not meeting the criteria for placement in a secure facility shall be released to a parent, guardian or other person willing and able to provide supervision and care under such conditions as the judge, intake officer or magistrate may impose. However, a juvenile may be placed in shelter care if:

- The juvenile is eligible for placement in a secure facility;
- The juvenile has failed to adhere to the directions of the court, intake officer or magistrate while on conditional release;
- The juvenile's parent, guardian or other person able to provide supervision cannot be reached within a reasonable time;
- The juvenile does not consent to return home;
- Neither the juvenile's parent or guardian nor any other person able to provide proper supervision can arrive to assume custody within a reasonable time; or
- Juvenile's parent or guardian refuse to permit the juvenile to return home and no relative or other person willing and able to provide proper supervision and care can be located within a reasonable time.

### **III. The Detention Hearing**

If the decision is made to detain a child then §16.1-25, describes the procedure for detention hearing

- When a child is taken into custody and not released, he should appear before a judge on the next day on which the court sits. In the event the court does not sit on the following day, the child will have the opportunity to appear before a judge within a reasonable time, not to exceed 72 hours, after he has been taken into custody. Notice of the detention hearing (oral or written) should be given to the parent or guardian. If notice is not given to a parent and the parent does not appear or does not waive appearance, the parents may request that the court rehear the matter on the next day it sits.
- During the detention hearing, the judge must advise the parties of the right to counsel and of the child's right to remain silent with respect to any allegation of delinquency.
- If the judge finds that there is not probable cause to believe that the child committed the delinquent act alleged, the court shall order his release. If the judge finds that there is probable cause to believe that the child committed the delinquent act alleged but that the full-time detention of a child who is alleged to be delinquent is not required, the court must order his release, and may impose certain conditions of release.
- If the court deems it necessary to summon witnesses to assist in the probable cause determination then the hearing may be continued and the child remain in

detention, but in no event longer than 3 consecutive days, exclusive of Saturdays, Sundays, and legal holidays.

#### **IV. Transfer to Criminal Court**

Section 16.1-269.1 of the Virginia Code lists the transfer provisions.

If a juvenile 14 years of age or older at the time of an alleged offense is charged with an offense which would be a felony if committed by an adult, the court shall, on motion of the Commonwealth's attorney and prior to a hearing on the merits, hold a transfer hearing. The court may retain jurisdiction or transfer such juvenile for proper criminal proceedings to the appropriate circuit court having criminal jurisdiction of such offenses committed by an adult.

Any transfer is subject to the following conditions:

- Notice given to the juvenile and his parent.
- Probable cause exists to believe that the juvenile committed the delinquent act as alleged or a lesser included delinquent act which would be a felony if committed by an adult.
- The juvenile is found competent to stand trial. The juvenile is presumed to be competent and the burden is on the party alleging the juvenile is not competent to rebut the presumption by a preponderance of the evidence; and
- The court finds by a preponderance of the evidence that the juvenile is not a proper person to remain within the jurisdiction of the juvenile court. The court may consider (but is not limited to) the following factors:
  - Juvenile's age;
  - Seriousness and number of alleged offenses:
    - Aggressive, violent, willful?
    - Crime against a person or a crime against property?
    - Firearm or dangerous weapon involved?
    - Nature of juvenile's participation;
  - Whether the juvenile can be retained in the juvenile justice system long enough for effective treatment and rehabilitation;
  - Record and previous history of juvenile;
  - Appropriateness of services in the juvenile system;
  - Mental retardation/mental illness;
  - Whether the juvenile has previously absconded;
  - School record and education;
  - Mental and emotional maturity; and
  - Physical condition and physical maturity.
- No transfer decision shall be precluded or reversed on the grounds that the court failed to consider any of the factors listed.

#### **V. Disposition: §16.1-278 - §16.1-290**

§ 16.1-278.8. *Delinquent juveniles* - If a juvenile is found to be delinquent, the juvenile court or the circuit court may make any of the following orders of disposition:

- The court is authorized to cooperate with and make use of the services of all public or private societies or organizations which seek to protect or aid children or families.

- Permit the juvenile to remain with his parent, subject to conditions and limitations.
- Defer disposition for a period of time not to exceed 12 months, after which time the charge may be dismissed by the judge if the juvenile exhibits good behavior during the period.
- Defer disposition until after completion of the boot camp program.
- Defer disposition for 12 months during which time the juvenile will be placed on probation.
- Order the parent with whom the juvenile does not reside to participate in programs and cooperate with treatment.
- Place the juvenile on probation.
- Impose a fine not to exceed \$500.
- Suspend the juvenile's driver's license or impose a curfew.
- Order restitution or reparation.
- Order the juvenile to complete public service.
- Transfer legal custody of the juvenile to a relative, social services agency, or child welfare agency.
- If the juvenile is older than 11 and the current offense is an offense which would be a felony if committed by an adult or an offense which would be a Class 1 misdemeanor if committed by an adult and the juvenile has previously been found to be delinquent, he may be committed to the Department of Juvenile Justice.
- Require participation in a gang-activity prevention program.

*§ 16.1-285. Duration of commitments* — Except in the cases of serious offenders, all juvenile commitments shall be for an indeterminate period having regard to the welfare of the juvenile and interests of the public, but no juvenile is to be held or detained longer than thirty-six continuous months or after such juvenile has attained the age of twenty-one years. This thirty-six month limitation does not apply in cases of commitment for an act of murder or manslaughter.

#### **VI. Appeal: §16.1-296 - §16.1-298**

*§16.1-296. Jurisdiction of appeals* - From any final order or judgment of the juvenile court affecting the rights or interests of any person coming within its jurisdiction, an appeal may be taken within ten days from the entry of a final judgment, order or conviction. Where an appeal is taken by a child on a finding that he or she is delinquent, trial by jury on the issue of guilt or innocence of the alleged delinquent act may be had on motion of the child, the attorney for the Commonwealth or the circuit court judge. If the alleged delinquent act is one, which, if committed by an adult, would constitute a felony, the child shall be entitled to a jury of twelve persons. In all other cases, the jury shall consist of seven persons.

## ENDNOTES

<sup>1</sup> "Children and Youth in Trouble in Virginia: Phase II." A Report by the Virginia State Crime Commission; Richmond, VA (May 1979), p. ix.

<sup>2</sup> "Children and Youth in Trouble in Virginia: Phase II." A Report by the Virginia State Crime Commission; Richmond, VA (May 1979), p. 39.

<sup>3</sup> "Children and Youth in Trouble in Virginia: Phase II." A Report by the Virginia State Crime Commission; Richmond, VA (May 1979), pp. 41-45.

<sup>4</sup> "Children and Youth in Trouble in Virginia: Phase II." A Report by the Virginia State Crime Commission; Richmond, VA (May 1979), pp. 41-45.

<sup>5</sup> "Children and Youth in Trouble in Virginia: Phase II." A Report by the Virginia State Crime Commission; Richmond, VA (May 1979), pp. 41-42.

<sup>6</sup> *See, Kent v. United States*, 383 U.S. 541 (1966) (due process attaches to hearings on transfer from juvenile to adult jurisdiction); *In re Gault*, 387 U.S. 1 (1967) (due process attaches to delinquency hearings); *In re Winship*, 397 U.S. 358 (1970) (standard of proof in delinquency proceedings is beyond a reasonable doubt); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (right to a jury trial is not a fundamental due process right in delinquency proceedings); *Breed v. Jones*, 421 U.S. 519 (1975) (double jeopardy protections are part of delinquency proceedings); and *Schall v. Martin*, 467 U.S. 253 (1984) (preventive detention of children charged with delinquent acts is constitutional).

<sup>7</sup> National Advisory Committee for Juvenile Justice and Delinquency Prevention, July 1980, "3.312 Representation by Counsel – For the Juvenile," *Standards for the Administration of Juvenile Justice* (Washington, DC: Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice).

<sup>8</sup> *IJA/ABA Juvenile Justice Standards Annotated, Standards Relating to Counsel for Private Parties* (1996).

<sup>9</sup> Puritz, Burrell, Schwartz, Soler, Warboys. *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*. American Bar Association Juvenile Justice Center (December 1995).

<sup>10</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>11</sup> *Gideon v. Wainwright*, 372 U.S. 335, 334 (1963).

<sup>12</sup> *Kent v. United States*, 383 U.S. 541 (1966).

<sup>13</sup> *In re Gault*, 387 U.S. 1, 20 (1967).

<sup>14</sup> *In re Gault*, 387 U.S. 1, 36 (1967).

<sup>15</sup> *In re Gault*, 387 U.S. 1, 18 (1967).

<sup>16</sup> *In re Winship*, 397 U.S. 358, 365-366 (1970).

<sup>17</sup> For a thorough review of the legislative history of the development of the juvenile courts and the law pertaining to children, see Shepherd, Jr., Robert, ed. *Juvenile Law and Practice in Virginia*: Virginia Law Foundation (1999), §§ 1.1-1.2.

<sup>18</sup> *Virginia Code* § 16.1-228(D).

<sup>19</sup> *Virginia Code* § 16.1-241(A)(1). It is not considered an act of delinquency to commit a "traffic infraction as defined in *Virginia Code* § 46.2-100.

<sup>20</sup> *Virginia Code* § 16.1-228.

<sup>21</sup> *Virginia Code* § 16.1-269.6(C).

<sup>22</sup> *Virginia Code* §§ 16.1-269.1(B)-(C).

<sup>23</sup> *Virginia Code* § 16.1-228.

<sup>24</sup> *Virginia Code* § 16.1-241(A).

<sup>25</sup> *Virginia Code* §§ 16.1-242 and 16.1-244.

<sup>26</sup> *Virginia Code* § 19.2-159.

<sup>27</sup> *Virginia Code* § 16.1-267(A).

<sup>28</sup> Recently the Virginia General Assembly passed legislation to create an additional public defender office in Norfolk increasing the number of counties and offices that provide indigent defense services.

<sup>29</sup> *Virginia Code* § 19.2-163.1.

<sup>30</sup> *Virginia Code* § 19.2-163.2(6).

<sup>31</sup> This discrepancy in payment appears to have been the result of legislative oversight. For a thorough discussion of the fee caps and the legislative history behind them, see, Virginia State Crime Commission "Report on Indigent Defense in the Commonwealth," February 22, 2002.

<sup>32</sup> *Virginia 2000 State of the Judiciary Report*, "Indigent Defense Services," p. A-144.

<sup>33</sup> *Virginia Code* § 16.1-249.

<sup>34</sup> *Virginia Code* § 16.1-248.1(A).

<sup>35</sup> *Virginia Code* § 16.1-248.

<sup>36</sup> Shepherd, Jr., Robert, ed. *Juvenile Law and Practice in Virginia*: Virginia Law Foundation (1999) § 3.201, p. 96.

- <sup>37</sup> *Virginia Code* § 16.1-250(B).
- <sup>38</sup> Virginia Supreme Court Rule 8:17; *Virginia Code* § 16.1-250(C).
- <sup>39</sup> *Virginia Code* § 16.1-250(C).
- <sup>40</sup> *Virginia Code* § 16.1-250.1.
- <sup>41</sup> Shepherd, Jr., Robert, ed. *Juvenile Law and Practice in Virginia*: Virginia Law Foundation (1999), § 3.206, p. 101.
- <sup>42</sup> *IJA/ABA Juvenile Justice Standards Annotated, Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition*, Basic Principle 3.2 (1996).
- <sup>43</sup> *IJA/ABA Juvenile Justice Standards Annotated, Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition*, Basic Principle 3.2 (1996).
- <sup>44</sup> *Virginia Code* § 16.1-248.1.
- <sup>45</sup> *IJA/ABA Juvenile Justice Standards Annotated, Standards Relating to Counsel for Private Parties*, Standard 4.2(a) (1996).
- <sup>46</sup> Individuals with Disabilities Education Act, 20 U.S.C. § 1415.
- <sup>47</sup> Section 504 of the Vocational Rehabilitation Act, 29 U.S.C. 794.
- <sup>48</sup> Americans with Disabilities Act, 42 U.S.C. § 12132.
- <sup>49</sup> *IJA/ABA Juvenile Justice Standards, Annotated, Standards Relating to Counsel for Private Parties*, Standard 10.1(a)i (1996).
- <sup>50</sup> *IJA/ABA Juvenile Justice Standards, Annotated, Standards Relating to Counsel for Private Parties*, Standard 10.5 (1996).
- <sup>51</sup> "Cheap Lawyering in Virginia," *The Washington Post*, March 2, 2001 at A24.
- <sup>52</sup> "State Ranks 3<sup>rd</sup> On Cash For Safety; But It's Last On Parks, Environment," Michael Hardy, *Richmond Times Dispatch*, June 11, 2002.
- <sup>53</sup> *Virginia Code* §16.1-267 referring to *Virginia Code* § 19.2-163 setting the maximum amount allowed for work done in District Court.
- <sup>54</sup> Virginia Crime Commission Report (February 22, 2002).
- <sup>55</sup> Virginia Crime Commission Report (February 22, 2002)
- <sup>56</sup> Virginia Crime Commission Report (February 22, 2002)
- <sup>57</sup> Virginia Crime Commission Report (February 22, 2002)



<sup>58</sup> Virginia Crime Commission Report (February 22, 2002)

<sup>59</sup> *Virginia Code* § 19.2-159

<sup>60</sup> *IJA/ABA Juvenile Justice Standards, Standards Relating to Counsel for Private Parties Standard*, 2.4 (1996).

<sup>61</sup> *Virginia Code* § 16.1-266(b); *IJA/ABA Juvenile Justice Standards, Standards Relating to Counsel for Pretrial Court Proceedings* § 5.1 (1981).

<sup>62</sup> *Virginia Code* § 16.1-266.

<sup>63</sup> Juvenile Detention: What's Going On in Virginia, Utilization of pre-dispositional juvenile detention in Virginia, Fiscal Year 2000, The Virginia Department of Juvenile Justice, May 2001. In 1997, the national detention rate was 96 juveniles per 100,000, while the rate for Virginia was 169 juveniles per 100,000. In 1999, the Virginia detention rate rose to 176 per 100,000.

<sup>64</sup> *Virginia Supreme Court Rule 7C:5* governs discovery procedures and entitle the defense to "hear, inspect and copy or photograph the following information or material known to the prosecuting attorney and that is to be offered into evidence against the juvenile: (i) any relevant written or recoded statements or confessions made by the child or copies thereof and the substance of oral statements and confessions made by the youth to any law enforcement officer; and (ii) any criminal record of the juvenile.

<sup>65</sup> *Virginia Code* § 16.1-246.

<sup>66</sup> *Virginia Code* § 16.1-260.

<sup>67</sup> *Virginia Code* § 16.1-232, only requires that the Commonwealth's Attorney prosecute certain cases and represent Commonwealth on appeal. The attorney for the Commonwealth prosecutes felony charges before the juvenile court, unless relieved of such responsibility by order of the court. It is left to the discretion of the Commonwealth's Attorney whether to prosecute misdemeanor charges before the court.

<sup>68</sup> *Virginia Code* § 16.1-250 B.

<sup>69</sup> Notes from Wise County Board of Supervisors meeting, May 17, 2000, Wise County Courthouse ([http://www.wisecounty.org/BOS/minutes/recessed\\_meeting\\_5-17-00.htm](http://www.wisecounty.org/BOS/minutes/recessed_meeting_5-17-00.htm)).

<sup>70</sup> *Virginia Code* § 19.2-163.8.

<sup>71</sup> Redding, R.E. (2000). Barriers to meeting mental health needs of offenders in the juvenile justice system. Juvenile Justice Fact Sheet. Charlottesville, VA: Institute of Law, Psychiatry, & Public Policy, University of Virginia; Margret Nimmo Crowe, Action Alliance For Children: Fact sheet about children's mental health (October 2000).

<sup>72</sup> Redding, R.E. (2000). Barriers to meeting mental health needs of offenders in the

juvenile justice system. Juvenile Justice Fact Sheet. Charlottesville, VA: Institute of Law, Psychiatry, & Public Policy, University of Virginia.

<sup>73</sup> Margret Nimmo Crowe, Action Alliance For Children: Fact sheet about children's mental health (October 2000).

<sup>74</sup> Redding, R.E. (2000). Barriers to meeting mental health needs of offenders in the juvenile justice system. Juvenile Justice Fact Sheet. Charlottesville, VA: Institute of Law, Psychiatry, & Public Policy, University of Virginia.

<sup>75</sup> Margret Nimmo Crowe, Action Alliance For Children: Fact sheet about children's mental health (October 2000).

<sup>76</sup> Redding, R.E. (2000). Barriers to meeting mental health needs of offenders in the juvenile justice system. Juvenile Justice Fact Sheet. Charlottesville, VA: Institute of Law, Psychiatry, & Public Policy, University of Virginia.

<sup>77</sup> Donahue, E. , Schilradli V. and Zeidenberg J. (1998) "School House Hype: The School Shootings, and the Real Risks Kids Face in America." Washington, DC: The Justice Policy Institute.

<sup>78</sup> In Virginia, minorities constituted 27% percent of the youth population statewide but they accounted for nearly 60% of the juveniles arrested and 57% of the juveniles placed in secure corrections. Building Blocks For Youth: The Problem of Minority Youth in The Justice System (<http://www.buildingblocksforyouth.org/overrepresentaion.htm>); Juvenile Services Juvenile Justice System Demographics. Virginia Department of Criminal Justice Services. (<http://info.dcjs.state.va.us/sections/juvenileservices/demographics/index.cfm?code=3>).

<sup>79</sup> "Juvenile Detention: What's Going On in Virginia, Utilization of pre-dispositional juvenile detention in Virginia, Fiscal Year 2000," The Virginia Department of Juvenile Justice, May 2001.

<sup>80</sup> *A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (ABA Juvenile Justice Center); *Georgia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (ABA Juvenile Justice Center and the Southern Center for Human Rights); *The Children Left Behind: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Louisiana* (ABA Juvenile Justice Center and the Juvenile Justice Project of Louisiana).

<sup>81</sup> "The Virginia Department of Juvenile Justice: An Overview of the Agency," January 2000.

<sup>82</sup> "Juvenile Detention: What's Going On in Virginia, Utilization of pre-dispositional juvenile detention in Virginia, Fiscal Year 2000," The Virginia Department of Juvenile Justice, May 2001, p.3.

<sup>83</sup> Juvenile Detention: What's Going On in Virginia, Utilization of pre-dispositional juvenile detention in Virginia, Fiscal Year 2000, The Virginia Department of Juvenile Justice, May 2001, p24, 25, 31.

<sup>84</sup> Redding, R.E. "Transfer of Juveniles to Criminal court and Legal Consequences of Criminal Court Adjudication." *Juvenile Justice Fact Sheet*. Charlottesville, VA: Institute of Law, Psychiatry & Public Policy, University of Virginia (2000).

<sup>85</sup> Schiraldi, V.E. "Youthful Arms Race: Lawmakers Don't Get It." The Justice Policy Institute (September 1997).

<sup>86</sup> Redding, R.E. "Transfer of Juveniles to Criminal Court and Legal Consequences of Criminal Court Adjudication." *Juvenile Justice Fact Sheet*. Charlottesville, VA: Institute of Law, Psychiatry & Public Policy, University of Virginia (2000).

<sup>87</sup> National Center for Juvenile Justice. State Profiles (2000), (<http://www.ncjj.org/stateprofiles>).

<sup>88</sup> *Trying Juveniles As Adults in Criminal Court: An Analysis of State Transfer Provisions*. Office of Juvenile Justice and Delinquency Prevention (December 1998) (<http://ojjdp.ncjrs.org/pubs/tryingjuvasadult>).

<sup>89</sup> Redding, R.E. "State's New Blended Sentencing Schemes in Juvenile Court." *Juvenile Justice Fact Sheet*. Charlottesville, VA: Institute of Law, Psychiatry & Public Policy, University of Virginia (2000).

<sup>90</sup> Faggiano, D., Dover, T.J., Sturgis, J. *Juvenile Murder in Virginia: A Study of Arrests and Convictions*. Virginia Department of Criminal Justice Services (1996).

<sup>91</sup> Redding, R.E. "Conviction and Sentencing in Juvenile Versus Criminal Court." *Juvenile Justice Fact Sheet*. Charlottesville, VA: Institute of Law, Psychiatry & Public Policy, University of Virginia (2000).

<sup>92</sup> Redding, R.E. "Conviction and Sentencing in Juvenile Versus Criminal Court." *Juvenile Justice Fact Sheet*. Charlottesville, VA: Institute of Law, Psychiatry & Public Policy, University of Virginia (2000).

<sup>93</sup> In the Virginia 2001 state of the Judiciary Report the Chief Justice of the Virginia Supreme Court recently wrote: "I am now convinced more than ever that it will never be possible to provide the level of compensation necessary to the private bar for [indigent defense] services and that, as a result, the level of quality court-appointed representation will decline. For this reason, I believe that indigent representation should be provided by appropriately staffed and funded public defender offices throughout the state." (<http://www.courts.state.va.us/reports/home.html>).

<sup>94</sup> Virginia Crime Commission Report (February 22, 2002).