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## VA. CODE ANN. S 19.2-163.7\*

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## VA. CODE ANN. § 19.2-163.7\*

### I. Introduction

In 2003 the American Bar Association (“ABA”) adopted the revised ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“ABA Guidelines”).<sup>1</sup> The ABA Guidelines mandate the provision of adequate resources to ensure effective representation and thereby reduce the risk that states will impose the death penalty haphazardly.<sup>2</sup> To that end, Guideline 2.1 states that each jurisdiction should adopt a Legal Representation Plan “formalizing the means by which high quality legal representation in death penalty cases is to be provided.”<sup>3</sup> Each local Plan, according to Guideline 4.1, should provide for a defense team consisting of “no fewer than two attorneys qualified in accordance with Guideline 5.1.”<sup>4</sup> Guideline 5.1 in turn requires that counsel obtain certain skills and experience before they are appointed to represent a capital defendant.<sup>5</sup>

Implementation of similar reforms appears to have constrained prosecutors’ ability to secure marginal capital sentences.<sup>6</sup> For example, Indiana made state funds available to local jurisdictions that complied with the state commission’s guidelines for appointment of counsel in capital cases.<sup>7</sup> Those guidelines required the appointment of two lawyers with recent and extensive training in capital defense and a minimum number of years in criminal litigation.<sup>8</sup> Indiana University Law School Dean Norman Lefstein researched the Indiana system and concluded that the reforms have generally decreased requests for the death sentence and improved the quality of indigent defense.<sup>9</sup> In April 2004 the

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\* S. 177, 2004 Gen. Assem., Reg. Sess. (Va. 2004) (amending § 19.2-163.7).

1. The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases [hereinafter ABA Guidelines for Death Penalty Defense] (rev. ed. 2003), available at <http://www.abanet.org/deathpenalty/DPGuidelines42003.pdf>.

2. ABA Guidelines for Death Penalty Defense, *supra* note 1, Commentary to 1.1, at 17.

3. *Id.*, 2.1 at 18.

4. *Id.*, 4.1 at 28.

5. *Id.*, 5.1 at 35–36.

6. See James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2108 n.191, 2033 (2000) (examining reform efforts by courts and legislatures and contending that reforms alone “cannot accomplish the much needed task of forcing trial-level actors to bear the costs of their mistakes”).

7. *Id.*; see IND. R. CRIM. P. 24(B–C) (governing appointment and compensation of trial counsel in capital cases).

8. IND. R. CRIM. P. 24(B)(1–2).

9. See Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and its Implications for the Nation*, 29 IND. L. REV. 495, 496–504, 505–08, 505 tbl.1, 506 tbl.2, 508 tbl.3,

Virginia General Assembly took a limited step in the same direction by amending Virginia Code section 19.2-163.7 to require that circuit judges, on motion for appointment of counsel in capital cases, appoint at least two attorneys to represent the accused.<sup>10</sup>

## II. Discussion

Virginia Code section 19.2-163.7 generally provides for the appointment of counsel for indigent defendants charged with capital offenses.<sup>11</sup> The rule, as amended, states that:

[i]n any case in which an indigent defendant is charged with a capital offense, the judge . . . shall appoint at least two attorneys from the list or lists established by the Supreme Court and the Indigent Defense Commission or as provided in subsection C of § 19.2-163.8 to represent the defendant at trial.<sup>12</sup>

Prior law required the appointment of one or more attorneys.<sup>13</sup> In addition, in cases after July 1, 2004, lead counsel must come from a capital defender unit of the Public Defender Commission.<sup>14</sup> Finally, the capital defender unit attorney may, upon motion before the circuit court, withdraw as counsel if prior to indictment the Commonwealth attorney declares in writing that the Commonwealth will not seek the death penalty.<sup>15</sup>

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509–12, 521–26, 533 (1996) (discussing capital defense representation nationwide and explaining the content of Indiana’s Rule of Criminal Procedure 24 and its impact on the prosecution and defense of death penalty cases).

10. VA. CODE ANN. § 19.2-163.7 (Michie 2004).

11. *Id.*

12. *Id.*; see VA. CODE ANN. § 19.2-163.8(C) (Michie 2004) (“Notwithstanding the requirements of § 19.2-163.7, the judge of the circuit court may appoint counsel who is not included on the list, but who otherwise qualifies under the standards established and maintained by the Court and the Commission.”).

13. VA. CODE ANN. § 19.2-163.7 (Michie Supp. 2003).

14. VA. CODE ANN. § 19.2-163.7 (Michie 2004). Pursuant to VA. CODE ANN. § 19.2-163.8(E), the Virginia Public Defender Commission set requirements for lead and co-counsel. VA. CODE ANN. § 19.2-163.8(E) (Michie Supp. 2003). For example, lead counsel must be an active member in good standing with the Virginia State Bar, must have at least five years of criminal litigation experience in the preceding seven years, and meet a minimum number of hours of specialized training. VIRGINIA PUBLIC DEFENDER COMMISSION, STANDARDS FOR COUNSEL IN CAPITAL CASES (Jan. 1, 2002), available at <http://www.publicdefender.state.va.us/requirements.htm>; see VA. CODE ANN. § 19.2-163.8(E) (“The Supreme Court and the Indigent Defense Commission shall, in conjunction with the Virginia State Bar, promulgate and thereafter maintain standards for the qualifications of counsel who shall be considered eligible to be placed on the list of qualified attorneys.”).

15. VA. CODE ANN. § 19.2-163.7.

### III. Analysis

The adoption of the 2004 amendments brings Virginia closer to the ABA Guidelines and to the majority of other death penalty jurisdictions that require two attorneys for indigent capital defendants.<sup>16</sup> It should be kept in mind, however, that without adequate funding, lawyers charged with defending the indigent accused will not have the resources to compete with the relatively unlimited access of the prosecution to experts and investigative assistance.<sup>17</sup> Thus, in addition to a qualified defense team, adequate funding and resources are required to assure reliable capital trials.

### IV. Conclusion

Accordingly, the provision of qualified counsel is one of the most important safeguards against wrongful convictions or unwarranted death sentences.<sup>18</sup> The majority of death penalty jurisdictions have concluded that two counsel are necessary in capital cases, and Virginia now conforms, at least in part, with that majority. By mandating the appointment of two attorneys to capital cases, the General Assembly of Virginia has taken a step toward greater protection for indigent capital defendants.

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16. THE GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT 106 (April 2002) at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/complete\\_report.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf).

17. ABA Guidelines for Death Penalty Defense, *supra* note 1, Commentary to 4.1, at 34.

18. *Id.*, Commentary to 1.1, at 17.

