Establishing a Capital Defense Unit in Virginia: A Proposal to Increase the Quality of Representation for Indigent Capital Defendants

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I. Introduction

A capital defendant who seeks reversal of a conviction or sentence on appeal because of defense attorney's mistakes faces a formidable foe. The defendant must show that the attorney's deficient performance rendered the trial unfair and denied the defendant his Sixth Amendment right to effective assistance of counsel.1 The very claim of ineffective assistance of counsel elicits a mental image of the youthful shepherd, David, opposing the giant, Goliath.2 Absent his confidence in God, David might have engaged a more manageable opponent. Similarly, a capital defendant should avoid the giant of a post-trial ineffective assistance of counsel claim and fight a less sizeable adversary at trial.

In Strickland v. Washington,3 the United States Supreme Court established the high standard that a defendant must meet in order to overturn a sentence or conviction due to the deficient performance of his counsel.4

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1. See U.S. CONST. amend. VI (requiring that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"); McMann v. Richardson, 397 U.S. 759, 771 (1970) (stating "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel"); Powell v. Alabama, 287 U.S. 45, 58-59 (1932) (holding that Fourteenth Amendment Due Process is violated if appointed counsel does not have adequate time to prepare, investigate, and become acquainted with the facts of the case).

2. 1 Samuel 17:40-50.


The standard requires the defendant to show that his counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must also establish that counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." The reliability prong directs the appellate court to look at the record of the completed trial or sentencing proceeding and determine whether a proceeding, absent the attorney's error, would create a reasonable probability of a different outcome. Justice Marshall dissented from the use of the reliability prong and argued that "[t]he difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel."

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5. Id. at 687 (requiring the defendant to demonstrate that "counsel's representation fell below an objective standard of reasonableness"). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. at 688.

6. Id. at 687. The Court requires both showings before the court can determine "that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id.

7. Id. at 694. For examples of the types of conduct that have passed the Strickland test of ineffective assistance of counsel in capital cases see William S. Geimer, A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel, 4 WM. & MARY BILL OF RTS. J. 91, 155-161 (1995) (discussing the reduced impact of the guarantee that all individuals, regardless of economic status, enjoy an adequate defense because of the United States Supreme Court's decision in Strickland). An attorney representing a capital defendant had his license to practice law revoked for the second time prior to trial, but the United States Court of Appeals for the Fourth Circuit found that the attorney's performance was not ineffective under Strickland because the trial occurred prior to the effective date of the suspension. Id. at 155-56 (citing McDougall v. Dixon, 921 F.2d 518, 533-39 (4th Cir. 1990)). Another attorney who failed to call a key witness in a capital trial because the attorney misunderstood state law was not ineffective under the Strickland standard for ineffective assistance of counsel. Id. at 158 (citing Kyles v. Whitley, 5 F.3d 806, 818-20 (5th Cir. 1993)); see also Stephen B. Bright, Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake, 1997 ANN. SURV. AM. L. 783 (1997) (providing examples of atrocious behavior by attorneys that courts found did not offend the Sixth Amendment guarantee to effective assistance of counsel). An attorney who slept during nearly the entire trial was not ineffective under the Strickland standard. Id. at 829. The trial judge said, "the Constitution doesn't say the lawyer has to be awake." Id.

Indeed, the capital defendant's most effective means of avoiding the morass of after-the-fact determinations of counsel's performance lies in an adequately conducted defense at trial and sentencing.

Due to the significant burdens placed upon defendants who challenge the adequacy of trial counsel, the reluctance of appellate courts to grant relief based on unfairness in jury selection, and the limits placed on federal courts to review habeas corpus claims of constitutional error, the trial of capital defendants has become "virtually the whole ball game."9

Virginia's record corroborates the assertion that the capital trial constitutes "the whole ball game," because a 1995 study found that "of 128 death sentences imposed since 1977, the Virginia Supreme Court has reversed eleven, or about eight percent of the cases, compared with a national average of forty percent."10 Defendants in Virginia have only one-fifth of the chance of defendants nationally to have the state's highest court find error sufficient to warrant a reversal of the death penalty.11

In an effort to eliminate defendants' post-trial ineffective assistance of counsel claims and provide the best opportunity for capital defendants to enjoy a fair trial, this article explores the possibility of forming the statewide Virginia Capital Defense Unit ("the VCDU"). The VCDU would provide the primary source of trial representation for indigent capital defendants in the Commonwealth. The VCDU would enhance the quality of representation for indigent capital defendants, ensure the competence of appointed attorneys, and keep accurate, current records of capital cases in Virginia to facilitate the continuous assessment and improvement of capital representa-

9. AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guideline 1.1 commentary (1989) (quoting William S. Geimer, Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from its Death Penalty Standards, 12 FLA. ST. U. L. REV. 737, 779 (1985) (arguing that the United States Supreme Court's decisions have not held true to the requirement initially articulated that death penalty defendants must receive heightened due process).

10. Frank Green, Scathing ACLU Report Attacks Law, RICH. TIMES-DISPATCH, Apr. 8, 2000, at A1, available in 2000 WL 5034839 (citing a study by Professor James S. Liebman of Columbia Law School); see also State by State Comparison (visited Jan. 18, 2001) <http://www.truthinjustice.org/statebystate_chart.htm> (providing a comparison of individual states' and federal circuits' reversal rates of death sentences as found in the Liebman study).

From 1996 through February 2001, the Supreme Court of Virginia overturned two death sentences, thus raising the total number from 11 to 13. See Yarbrough v. Commonwealth, 519 S.E.2d 602, 617 (Va. 1999) (holding that the case be reversed and remanded for a new sentencing proceeding); Atkins v. Commonwealth, 510 S.E.2d 445, 447 (Va. 1999) (same).

This article compares capital trial divisions and capital defense counsel qualifications in several states. The article then extracts positive characteristics of the various capital trial divisions and proposes a structure for the VCDU to achieve autonomy, efficient administration, and a workable structure to prevent potential conflicts of interest between Virginia's public defender offices and the VCDU.

II. Alternative Structures and Responsibilities of State Capital Trial Divisions

Perhaps the most efficient method for exploring the VCDU begins with a synopsis and critique of several state systems that utilize a statewide organization or agency to provide representation for indigent capital defendants. This Part discusses the structure of Oklahoma's Capital Trial Division, Missouri's Capital Division, Nebraska's Capital Litigation Division, Maryland's Capital Defense Division, and Kansas's Death Penalty Defense Unit. In an effort to present information most relevant to Virginia's perspective, the following assessment of states begins with the state that has an execution rate closest to Virginia's and descends to the state furthest from Virginia's execution rate.12

A. Oklahoma's Capital Trial Division

Oklahoma has a population of 3.5 million and has executed thirty-nine individuals since 1976.13 Oklahoma established the Capital Trial Division ("the Division") in 1991 to represent indigent capital defendants as an arm of the Indigent Defense System ("the System").14 The Oklahoma Indigent

12. See State Execution Rates (visited Jan. 18, 2001) <http://www.deathpenaltyinfo.org/percapita.html> (comparing statistics of the individual state's population, the total number of executions as of December 31, 2000, and the rate of executions per 10,000 population).

For example, Virginia's population is listed at approximately 7.1 million, with 81 executions since 1976 for an execution rate of 0.114 per 10,000 individuals. Id. Oklahoma's statistics consist of a population of about 3.5 million, with 39 executions since 1976 for an execution rate of 0.087 per 10,000 individuals. Id.; see Number of Executions by State Since 1976 (visited Jan. 18, 2001) <http://www.deathpenaltyinfo.org/dpicreg.html> (listing individual states and the respective number of executions within that state since 1976). Missouri's execution rate was 0.082; Nebraska's execution rate was 0.018; Maryland's execution rate was 0.006; and Kansas's execution rate was 0. See State Execution Rates, supra.

13. State Execution Rates, supra note 12; see Number of Executions by State Since 1976, supra note 12.

14. Telephone Interview with David Autrey, Attorney, Oklahoma Capital Trial Division (Jan. 26, 2001); see OKLA. STAT. ANN. tit. 22, § 1355.6(A) (West Supp. 2001) (granting responsibility to the Indigent Defense System to defend all indigents in cases
Defense System Board ("the Board") governs the System. The governor appoints five members to the Board for five year terms with the advice and consent of the state senate. The Board appoints an Executive Director of the System, who possesses a large amount of discretion and power to operate and manage the System, "to serve at the pleasure of the Board."

The Division consists of two separate offices, one located in Tulsa and the other located in Norman. The offices operate as separate law firms for conflicts of interest purposes. Each office bears the responsibility for representing defendants prosecuted in counties within a demarcated geographic area. Tulsa and Oklahoma counties utilize their respective public defender offices for the purpose of accepting appointment from the court to represent indigent capital defendants. The Norman Division office represents capital defendants in forty-six counties including Oklahoma County when the public defender has a conflict of interest. The Tulsa Division office accepts appointments to represent capital defendants in thirty-one counties including Tulsa County in the event of the public defender’s conflict of interest. The Division has an internal policy that each attorney can have no more than four active cases at one time.

In the event of multiple defendant cases or the need for a local attorney to assist in representation, the Division contracts with attorneys from the private bar to represent defendants. Once an attorney from the Division begins primary representation of an indigent capital defendant, the attorney may enlist the assistance of private counsel as second chair in the trial.

punishable by incarceration).


16. Id.

17. OKLA. STAT. ANN. tit 22, § 1355.4(C)-(D) (West Supp. 2001) (providing the Executive Director’s duties to maintain a list of attorneys eligible for appointment to capital cases who meet the qualifications set by the board, set hourly rates for appointed attorneys, establish maximum caseloads for attorneys employed by the System, reduce caseloads through reassignment of cases, advise attorneys employed to represent indigent defendants, approve investigative services for appointed attorneys, and maintain a list of approved experts).


19. Telephone Interview with David Autrey, supra note 14.

20. Id.; see OKLA. STAT. ANN. §§ 1355.6(E), 1355.7(A) (West Supp. 2001) (delegating the power to the courts to appoint the attorneys to represent indigent defendants in both capital and non-capital cases).


22. Id.

23. Telephone Interview with David Autrey, supra note 14.
Appointed lead counsel may not receive compensation of more than $20,000 for a capital case unless the Board and the System's Executive Director determine that the capital case is an "exceptional one which requires an extraordinary amount of time to litigate." If Of the six capital cases that went to trial from the Norman office in the past fiscal year, the Division used private co-counsel in three cases. The Division maintains a list of the private attorneys who meet the qualifications for defending a capital case and contracts directly with those attorneys.

For the fiscal year 2001, the Norman office had twenty-six pending capital cases and received twenty-five new capital cases for a total of fifty-one open capital cases. Of the fifty-one cases, six have gone to trial. Three defendants received life without parole, two defendants received life with parole, and one received the death penalty. These statistics reflect the activity only for the Norman office. The Division offices do not accumulate records of capital cases for Oklahoma and Tulsa county public defender offices.

B. Missouri's Capital Division of the State Public Defender

Missouri has a population of about 5.6 million and has executed forty-seven individuals since 1976. The Public Defender Commission ("the Commission") administers the representation of indigent defendants throughout the state. The governor appoints seven members to the Commission for a term of six years each. The Commission manages the State Public Defender system ("the SPD"), selects and removes public defenders for good cause, makes administrative rules, and assists in assuring the independence of the state public defender system. The Commission appoints a director to the SPD, which is an independent department of the

25. Telephone Interview with David Autrey, supra note 14.
26. Id.
27. Id.
28. Id.
29. Id.
30. Id.
31. State Execution Rates, supra note 12; see Number of Executions by State Since 1976, supra note 12.
32. MO. ANN. STAT. § 600.015 (West 1995).
33. Id.
34. MO. ANN. STAT. § 600.017 (West 1995).
The capital division falls within the structure as an organ of the SPD. In 1989, the SPD separated into four separate divisions: the trial division, appellate division, training division, and capital division. The capital division of the SPD provides representation in capital cases unless a conflict of interest or a heavy caseload exists then the SPD selects an attorney from the private bar. The capital division consists of three offices located in St. Louis, Kansas City, and Columbia. The division offices in St. Louis and Kansas City primarily represent defendants from those urban areas, whereas the Columbia office represents defendants throughout the remainder of the state.

When a judge encounters a case in which the prosecutor seeks the death penalty, the judge must appoint the capital division to represent the indigent defendant. The SPD maintains a list of private attorneys from which the SPD may select and contract with an attorney to represent the defendant if the capital division has a multiple defendant case or conflicts of interest. The SPD has not promulgated official guidelines for private counsel who represent indigent capital defendants. However, if the SPD lacks familiarity with an attorney's ability, it will conduct a background inquiry to ensure a minimum level of experience in homicide defense. The SPD rarely calls upon private attorneys to represent defendants due to conflicts of interest because in a multi-defendant capital case the three offices can represent one defendant each and generally only need private counsel if the case involves more than three defendants.

The division offices also act as a resource for attorneys representing indigent capital defendants. The public defender offices and the capital division offices can access a computer network that contains training information and a motions databank. The shared databank presents a potential

35. MO. ANN. STAT. § 600.019 (West 1995).
36. Telephone Interview with Dan Gralicke, Deputy Director, Missouri State Public Defender (Jan. 30, 2001).
37. Id.
39. Telephone Interview with Dan Gralicke, supra note 36.
40. Id.
41. Id.
42. Id.
43. Id.
for conflicts of interest and requires each office to prevent the sharing of confidential information.

The capital division received an annual appropriation of approximately $1.3 million for litigation expenses and experts.\footnote{44} The state’s Homicide/Conflicts fund of $2,059,850 supplements the existing budget for appointment of private counsel and payment of some litigation expenses.\footnote{45} The salaries for the attorneys come from a separate appropriation and starting salaries range from $30,504 to $50,232.\footnote{46} The capital division’s funding may fall short due to the high cost of experts and the nature of capital cases.\footnote{47} As of January 2001, the capital division had between fifty and sixty active cases.\footnote{48}

C. Nebraska’s Capital Litigation Division of the Nebraska Commission on Public Advocacy

Nebraska has a population of 1.7 million and has executed three individuals since 1976.\footnote{49} Nebraska’s county public defenders provide the primary representation of capital defendants. The Capital Litigation Division (“the CLD”), as a branch of the Nebraska Commission on Public Advocacy (“the Commission”), handles the remaining capital cases.\footnote{50} County public defender offices may decline to accept a capital case because of a heavy caseload or a conflict of interest and choose a private attorney or allow the CLD to represent the case. The public defender office often selects counsel from the private bar to represent either a co-defendant or assist as co-counsel.\footnote{51} The hourly rate received by private counsel ranges from sixty-five to eighty-five dollars per hour and remains in the discretion of the trial court.\footnote{52}
The rate of pay involves negotiation between the attorney and the judge; an attorney may require a higher hourly rate for a highly publicized and complex case.\textsuperscript{53} A board of commissioners governs the CLD. The criminal defense organizations of the state bar nominate the list of individuals for the governor to consider. The governor approves the nominees for the unpaid positions as commissioners. The governor cannot remove the commissioners at will, but must have cause, such as malfeasance, prior to removal. The CLD enjoys independence from the governor’s office.\textsuperscript{54}

The CLD consists of four attorneys, three support staff, and one investigator and receives an annual budget of about $560,000.\textsuperscript{55} However, the state does not pay the CLD’s entire cost of litigating a capital trial. Rather, the prosecuting county must reimburse the CLD for one-third of the cost to defend the case.\textsuperscript{56} The CLD provides strategic advice and pertinent motions for public defenders and private attorneys, but the CLD attorneys do not simply hand boilerplate motions to outside attorneys; instead the CLD attorneys sit down with the private attorneys and discuss the proper purposes and the appropriate time to file the motions.\textsuperscript{57} Although the CLD has separate capital appellate and trial divisions, the divisions effectively function as one system. An appellate division attorney who has a relatively light capital appeals caseload may defend a capital case at the trial level and vice versa.\textsuperscript{58}

The debate rages in Nebraska between the public defenders and the private bar over whether to institute qualifications for attorneys to represent indigent criminal defendants.\textsuperscript{59} A proposed bill includes minimum requirements prior to representing defendants for a certain class of offenses.\textsuperscript{60} For

\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.; see NEB. REV. STAT. § 29-3931 (2000) (requiring the county in which the prosecution of the capital case arose to bear one-third of the Commission’s cost of defense including time of attorneys and staff, expenditures for litigation, and a reasonable amount for office overhead). This provision may function as a constraint upon an overly zealous prosecutor because the prosecutor must weigh the fact of the county’s limited financial resources against the desire to pursue the death penalty.
\textsuperscript{57} Telephone Interview with Jerry Soucie, supra note 50 (commenting that the value of handing a stack of capital motions to an attorney is relatively small unless accompanied by instruction as to when to file the motions and why those motions should be filed).
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.; see L.B. 335, 97th Leg., 1st Reg. Sess. (Neb. 2001) (granting the power to the
example, new law school graduates may only represent juvenile cases, an
attorney with two years of experience may represent only the lowest class
of crimes, and an attorney must have five years experience and experience
as co-counsel in a capital case prior representing an indigent capital defen-
dant. Opposition arose because the legislature tied the qualifications to a
funding bill which would reimburse counties for forty percent of their costs
of representing indigent criminal defendants if the county chooses to follow
the standards. The bill pending in the state legislature grants the Commis-
sion a significant amount of discretion to determine attorney eligibility and
qualifications, set compensation rates for salaried public defenders, distribute
overall funding of the indigent defense system, establish maximum case-
loads, award contracts to private counsel, provide support services, and
provide expert witnesses.

The CLD represents capital defendants at trial in about eight to ten
cases per year and about the same number of cases per year on direct
appeal. Nebraska has between fifty and sixty homicides per year, and the
state charges approximately forty with capital murder. As mentioned
above, county public defenders bear the responsibility for representing
capital defendants, so the CLD may handle about twenty of the capital
homicide cases per year. The CLD needs another investigator and a
mitigation expert. The CLD currently employs one investigator for the
entire state of Nebraska, which makes adequate performance of the job
difficult simply due to the large geographic area. The lack of a mitigation
expert adds to the list of responsibilities of the investigator. However, the
current number of attorneys sufficiently ensures quality representation for
defendants because each attorney has a caseload of only five or six cases at
any given time.

Commission on Public Advocacy to promulgate rules for its organization and adopt guide-
lines for county indigent defense systems which, if followed, will qualify the county for
reimbursement of the cost of indigent defense).

61. Telephone Interview with Jerry Soucie, supra note 50.
62. Id.
63. Neb. L.B. 355 (granting immense control to the Commission on Public Advocacy
over the functioning of the individual county public defender offices).
64. Telephone Interview with Jerry Soucie, supra note 50 (describing the automatic
appeal to the state supreme court upon the imposition of the death sentence).
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
D. Maryland's Capital Defense Division

Maryland has a population of 5.3 million and has executed three individuals since 1976.\(^70\) In 1971, Maryland formed the Office of Public Defender ("the OPD") to provide statewide representation for indigent criminal defendants.\(^71\) As an agency of Maryland's Executive Branch, the governor appoints a Board of Trustees ("the Board") that consists of three members who each serve three-year terms.\(^72\) The Board appoints a Public Defender who directs the OPD, the Deputy Public Defender, and one district public defender for each district of the Maryland District Court subject to the approval of the Board.\(^73\) In 1988, the OPD created the Maryland Capital Defense Division ("the Division") to provide statewide representation for indigent capital defendants.\(^74\) The Division retains independent decision-making power and discretion to choose the procedures for day-to-day operations.\(^75\)

The Division and local public defenders represent ninety percent of indigent capital defendants while panel attorneys—attorneys appointed from the private bar—represent the remaining ten percent.\(^76\) The public defender and panel attorneys represent indigent capital defendants only when the Division has a conflict of interest or an exceptionally heavy caseload.\(^77\) The

\(^{70}\) *State Execution Rates*, supra note 12; see *Number of Executions by State Since 1976*, supra note 12.


\(^{72}\) *Id.; see MD. ANN. CODE* art. 27A, § 3(a) (Supp. 2000) (establishing the OPD as a subsidiary of the Executive Branch); MD. ANN. CODE art. 27A, §§ 9(a), (c) (1997) (establishing a board of trustees appointed by the governor to "study and observe the operation" of the OPD and advise as to the operational matters of the OPD).

\(^{73}\) MD. ANN. CODE art. 27A, §§ 3(a)-(b) (Supp. 2000); *see also* MD. ANN. CODE art. 27A, §§ 10(b), (d) (1997) (establishing regional advisory boards made up of judges or attorneys for the purpose of studying, observing, and advising the district public defender on operations and appointment of panel attorneys).


\(^{75}\) Telephone Interview with Laura Murry, Deputy Attorney, Maryland Capital Defense Division (Jan. 19, 2001).

\(^{76}\) *Id.; see MD. ANN. CODE* art. 27A, § 2(e) (Supp. 2000) (providing the definition of panel attorney as any attorney licensed in Maryland who "qualifies and is eligible for appointment as counsel to an indigent person"); MD. ANN. CODE art. 27A, § 6(b) (1997) (requiring the district public defender to "appoint attorneys" to represent indigent defendants if the OPD does not provide an attorney).

\(^{77}\) Telephone Interview with Linda Murry, *supra* note 75; *see MD. ANN. CODE* art. 27A, §§ 6(a)-(b) (1997) (requiring each district public defender to maintain a list of private
Division also provides many services beyond representing indigent capital defendants. The Division maintains internal qualifications that panel attorneys must meet prior to representing indigent capital defendants and chooses which panel attorney will represent each defendant. Additionally, the Division actively monitors the performance of panel attorneys to ensure adequate performance.78

The Division trains the public defenders on defending a capital case in Maryland and acts as a resource for all attorneys trying capital cases.79 Maryland does not charge capital murder in an indictment, but upon a charge of first degree murder, the prosecutor has the discretion whether to seek the death penalty and must give the defendant notice of intent to seek the death penalty.80 The Division attorneys have the opportunity to discuss with the prosecutor alternatives to seeking the death penalty either before or after notice has been given.81 The Division employs three attorneys and has an appropriation for 2001 of $699,497.82 This appropriation provides adequate funding for the operation of the Division.83

E. Kansas's Death Penalty Defense Unit

Kansas has a population of 2.67 million and has not executed anyone since 1976.84 The Kansas Death Penalty Defense Unit ("the Unit") began operation in 1995 after the Kansas death penalty statute became effective on July 1, 1994.85 The Unit started as a coordinating office for private attorneys paid by the state to defend capital cases. However, the cost of hiring attorneys and support staff for each case became prohibitively high.86 The Unit evolved into an office with salaried attorneys and support staff to attorneys available to represent indigent persons, classify the attorneys into panels according to qualifications, and appoint attorneys from the appropriate panel).78 Telephone Interview with Linda Murry, supra note 75.

79. Id.

80. Id.; see MD. ANN. CODE art. 27, § 412(b) (Supp. 2000) (requiring the State to give the defendant 30 days notice prior to trial of the intent to seek the death penalty and the aggravating circumstances upon which it intends to rely).

81. Telephone Interview with Linda Murry, supra note 75.


83. Telephone Interview with Linda Murry, supra note 75.

84. State Execution Rates, supra note 12.

85. Telephone Interview with Linda Murry, supra note 75; see The Spangenberg Research Group, supra note 38.

86. Telephone Interview with Patricia A. Scalia, Executive Director, Kansas State Board of Indigents' Defense Services (Jan. 30, 2001).
defend capital cases. The Board of Indigents' Defense Services ("the Board") administers the Unit. A board of commissioners appointed by the governor manages the affairs of the Board and the Unit. The Supreme Court of Kansas formerly controlled the offices, but now the governor appoints the individuals to the Board and the Unit retains its autonomy. The individual commissioners have the requisite knowledge to manage the Board and the Unit, but do not micro-manage its operations. Judges confronted with an indigent defendant charged with a capital crime must call upon the Unit to either provide representation or select outside counsel.

The Board governs the representation of indigent capital defendants. Specifically, the Board has broad authority to assign attorneys to represent indigent capital defendants, establish standards of competency and qualifications for appointment of counsel in capital cases, and set reasonable compensation for appointed counsel. The legislature also mandated that the Board establish systems in each county and adopt rules and regulations necessary for the operation of the Board and guidance for appointed counsel.

The Unit, as developed by the Board, consists of five attorneys in the appellate division and five attorneys, one investigator, five paralegals and one secretary in the trial division. Salaries for attorneys in the unit begin at $49,000 per year for an entry-level attorney and the Chief Death Defender's salary begins at $70,000 per year. The Unit receives a designation of funds separate from the Board. The 2001 budget for the Unit is $1,357,517, but soon after the director requested the budget from the legislature, four new capital cases were filed in December of 2000. Each case costs at least six figures and with the addition of four new capital cases, the Unit's budget falls short of the amount needed for effective representation. The Unit also faces a problem of expert witnesses charging extremely high rates and "holding [the defense unit] up for ransom" because of the scarcity of qualified experts.

87. Id.
88. Id.
89. Id.
91. Id.
93. Telephone Interview with Patricia A. Scalia, supra note 86.
94. Id.
95. Id.
96. Id.
97. Id.
The Unit selects private attorneys to represent capital defendants if the Unit has a conflict of interest. The Unit had eight capital cases pending as of January 2001, and private attorneys are representing defendants in two of those cases. Sometimes the Unit employs private attorneys if the location of the case renders the presence of the Unit's attorneys impractical or if the Unit needs additional assistance due to a heavy caseload. The Unit sets the hourly rate paid to private attorneys, approximately one-hundred dollars per hour. The state has not capped the hourly rate or the total amount payable to private attorneys when representing an indigent capital defendant.

The Unit primarily represents indigent capital defendants, but the Unit also acts as a resource for private attorneys appointed to represent capital defendants. The Unit and private attorneys must carefully avoid conflicts of interest particularly in multi-defendant cases. Private attorneys generally call the Unit to seek assistance or request motions, but the Unit hopes to have all the motions available on its website in the near future.

F. Proposed Structure for the Virginia Capital Defense Unit

The death penalty activity among the aforementioned states differs significantly. Missouri has executed forty-seven individuals since 1976, while Maryland and Nebraska have each executed three individuals since 1976. Although the states assessed above may have less death penalty activity than Virginia, the VCDU can implement the positive characteristics and avoid the mistakes of the various capital trial systems.

As the various state capital trial divisions demonstrate, the responsibilities of the proposed VCDU should include more than just representation for indigent capital defendants. The VCDU, in conjunction with the Virginia Public Defender Commission (“the Commission”), must set and administer the eligibility qualifications of private attorneys seeking to defend indigent capital defendants. The VCDU should possess the authority to maintain the list of qualified private attorneys and select an attorney from that list to represent a defendant. The VCDU should act as a training center for capital defenders and offer resources to attorneys outside the unit who represent indigent capital defendants. Finally, the VCDU must maintain

98. Id.
99. Id.
100. Id.
101. Id.
102. Id.
103. Number of Executions By State Since 1976, supra note 12.
current and accurate records of all stages of the capital cases in Virginia because no central organization currently fills this need.

The Commission may provide the existing framework on which to construct the VCDU. The Commission consists of nine individuals appointed by the Speaker of the House of Delegates upon consultation with the House and Senate Courts of Justice Committees. The Speaker must appoint three judges, three attorneys, and three laypersons to make up the Commission. The Commission appoints a public defender to the individual offices, employs support staff of local public defender offices, and expends the budget appropriated by the General Assembly of Virginia. The Commission and the Virginia State Bar adopt standards for the appointment of counsel in capital cases, and the Commission maintains the list of attorneys qualified to represent indigent capital defendants. Virginia Code Section 19.2-163.7 requires the circuit court judge to appoint counsel for an indigent capital defendant from the list of attorneys prepared by the Commission. However, another statute permits the judge to appoint an attorney not on the list if the attorney possesses the qualifications set by the Commission for indigent capital defense. The Commission currently plays no role in the court’s appointment of capital counsel.


105. Id.

106. VA. CODE ANN. § 19.2-163.2 (Michie 2000) (listing the specific duties of oversight and appointment of public defenders by the Commission); see H.B. 2580 (Va. 2001) (proposing an amendment to §§ 19.2-163.7, 19.2-163.8 directing the Supreme Court of Virginia to participate in the adoption of standards for capital counsel); see also Ross E. Eisenberg, Statute Note, 13 CAP. DEF. J. 443 (2001) (discussing H.B. 2580 (Va. 2001)).

107. VA. CODE ANN. §§ 19.2-163.8(A)-(B) (Michie 2000) (providing that the Commission and the Virginia State Bar “shall adopt standards for the appointment of counsel in capital cases” and the Commission “shall maintain a list . . . of attorneys . . . who are qualified” to represent indigent capital defendants).

108. VA. CODE ANN. § 19.2-163.7 (Michie 2000) (charging circuit judges to appoint counsel for indigent capital defendants from the list established by the Commission).

109. See VA. CODE ANN. § 19.2-163.8(C) (Michie 2000) (granting the circuit judge discretion to appoint capital defense counsel not included on the Commission’s list of qualified counsel).

110. Telephone Interview with Overton P. Pollard, Executive Director, Virginia Public Defender Commission (Feb. 15, 2001).
The rates of compensation for counsel appointed to represent indigent capital defendants vary significantly.111 The total amount awarded to appointed capital counsel ranges from $10,000 to over $100,000.112 The explanation for the disparity in compensation rates lies in the statute that gives the trial judge "the sole discretion to fix the amount of compensation to be paid counsel appointed by the court to defend" a capital case.113 The statute also gives trial judges discretion to pay expenses incurred by the attorney if the judge "deems [payment] appropriate under the circumstances of the case."114

The effectiveness of the proposed VCDU is directly proportionate to the amount of freedom the unit would have from the direct control of state government. The General Assembly would commit a mistake by continuing to grant each circuit court judge the discretion as to whom to appoint to defend a capital case and the rate of compensation given to the appointed attorney. The Commonwealth should allow the VCDU to fill this role in order to eliminate inconsistency associated with each circuit appointing private counsel and individually determining compensation.115 Although many circuit judges in Virginia appoint only the most qualified attorneys, the pool from which to draw attorneys may be limited in certain jurisdictions. The proposed VCDU should also administer standards of performance, discussed below, for counsel representing indigent capital defendants.116

The attorneys and staff of the VCDU should possess the specialization required not only to represent capital defendants effectively but also to train and act as a resource for appointed counsel and public defenders. Efficiency will result because the attorneys and staff of the proposed VCDU will work primarily with capital defense law in Virginia and will establish familiarity

111. Id.
112. Id.
113. See VA. CODE ANN. § 19.2-163(2) (Michie 2000).
114. Id.
115. See Stephen B. Bright, Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake, 1997 ANN. SURV. AM. L. 783, 821 (1997) (discussing the problem of the lack of independence of indigent defense programs "when judges and executives control programs which continually provide deficient representation" it may be said that attorneys appointed only "create an appearance of legitimacy"). "Judges' participation in assigning the cases of indigent defendants to lawyers and in deciding whether to allow funds for experts and investigators improperly involves the judiciary in the management of the defense." Id. at 825. "Judges should be fair and impartial, and independent of both prosecution and defense ... independent boards should operate indigent defense programs." Id. at 828.
116. See infra Part III for a discussion of capital defense attorney eligibility standards.
with the common motions and strategies for capital cases. If conflicts of interest or a heavy caseload prevent the VCDU from representing a defendant, subject to proper screening procedures, the unit may still offer its expertise and advice to outside counsel. The relationship between outside attorneys, particularly public defenders and the VCDU, must be structured to avoid sharing confidential information and thus imputing conflicts of interest from the public defender or private counsel to the VCDU. The Commonwealth should employ the established framework of the Commission. The General Assembly of Virginia should establish the skeletal structure and duties of the VCDU and enable the Commission to approve a slate of nominees selected by the criminal section of the Virginia State Bar for the positions of chief attorneys and trustees. The chief attorneys and the board members of the VCDU would hire subordinate attorneys and support staff.

Virginia should copy the Missouri and Oklahoma models by establishing several offices of the VCDU. First, Virginia’s geography demands several locations in order to reduce the amount of travel required by attorneys in the unit. Secondly, multiple offices would eliminate most conflicts that would disqualify the entire VCDU because each office would maintain separate files of confidential records of defendants. The General Assembly should create four offices, as proposed in 1998 when the Virginia State Crime Commission (“the Crime Commission”) considered a central capital defense unit. The locations proposed to the Crime Commission were Northern Virginia, Tidewater, Central (Richmond), and Western (Roanoke). Missouri and Oklahoma demonstrate that multiple offices can function effectively and the state can feasibly support these offices. Virginia’s larger population and greater death penalty activity should act as an impetus to form four offices of the VCDU.

The VCDU must also perform the fundamental task of keeping records of the activity of capital indictments, trials, convictions, and sentences in Virginia. Most of the various states’ capital defense units compile data of capital cases pending and capital cases adjudicated. Conversely, Virginia

117. See infra Part IV for a discussion concerning potential conflict of interest situations for the VCDU.

118. See VA. CODE ANN. § 19.2-163.1 (Michie 2000) (providing that the Speaker of the House of Delegates appoints three judges, three attorneys, and three laymen to comprise the Commission). The creation of a separate structure for the VCDU may be duplicative.


120. Id.
lacks a consistent method of collecting records of capital case activity in the Commonwealth. Although the Commission had records of the number of public defenders who represented indigent capital defendants, nineteen in fiscal year 1999 and thirteen in fiscal year 2000, the Commission does not accumulate other records concerning capital cases in Virginia. The individual public defender offices do not customarily track the resolution and number of capital cases that the office has represented. The Commission estimated that the Commonwealth charges approximately one hundred capital murder cases annually.

The Virginia Code instructs the Supreme Court of Virginia to maintain records of all capital murder indictments in the Commonwealth. Upon inquiry, the Supreme Court of Virginia could not produce more than a rough estimate of the number of capital murder charges for 1999. The court assembled a document from records of Virginia's circuit courts. The Supreme Court of Virginia recorded each instance which the clerk of the circuit court entered "Section 18.2-31." However, the statistics indicate only one firm conclusion: that on the date listed, the Commonwealth filed a charge that included a capital count. Once "Section 18.2-31" was entered by the clerk, the clerk may not have updated the code section if the capital charge was dropped, if the charge was reduced, if the indictment was dismissed, or if the jury convicted the defendant of a lesser crime. Some of the entries listed within the report indicate an "M" for a misdemeanor charge in the "misdemeanor/felony" column of the report. Often the entry indicates several capital counts charged on the same day for the same

121. Telephone Interview with Overton P. Pollard, supra note 110.
122. Id.
123. Id.
125. Telephone Interview with Cyral W. Miller, Department of Judicial Planning, Supreme Court of Virginia (Jan. 30, 2001).
129. Telephone Interview with Cyral W. Miller, supra note 125.
130. Capital Cases Concluded in Virginia's Circuit Courts, 1999, supra note 126; see Telephone Interview with Cyral W. Miller, supra note 125 (explaining that when the court encountered an entry by the clerk of the circuit court that listed § 18.2-31 and listed that code section as a misdemeanor, those compiling the information reasoned that the probability of mistakenly entering the "M" for misdemeanor rather than the "F" for felony was greater than the probability of erroneously entering "18.2-31").
The statistical data does not distinguish whether the Commonwealth charged one defendant with multiple counts of capital murder or several defendants with a single count of capital murder. The VCDU would receive notice of each indictment because the circuit court would appoint the unit to defend the case or the unit would select outside counsel to defend the case. The capital murder information will flow to a central agency producing accurate and uniform records.

The Virginia Code also requires the Supreme Court of Virginia to conduct proportionality review of death sentences imposed. The statute provides that for conducting proportionality review of death sentences the court “may accumulate the records of all capital felony cases tried.” The court has undertaken to accumulate records for proportionality review, but contrary to statutory language, apparently only accumulates records of sentences reviewed by the Supreme Court of Virginia. The Commonwealth has failed to keep adequate records and the Supreme Court of Virginia has neglected its statutorily designated record-keeping. The VCDU could accumulate records and statistics of Virginia’s capital cases and promote accountability for the fulfillment of statutory record-keeping requirements.

The proposed VCDU cannot function on a nominal budget. The General Assembly needs either adequate funds to sufficiently support the VCDU or it should not establish the unit at all. If the VCDU begins as a properly funded entity, the cost to the state may decrease because the

132. Telephone Interview with Cyral W. Miller, supra note 125.
133. VA. CODE ANN. § 17.1-313(E) (Michie 2000).
134. Id.
135. See Akers v. Commonwealth, 535 S.E.2d 674, 677 (Va. 2000) (stating that for the purpose of proportionality review the Supreme Court of Virginia compares “all capital murder cases reviewed by this court”).

The precise cases the Supreme Court of Virginia has identified for use in proportionality review appears inconsistent. Compare Johnson v. Commonwealth, 529 S.E.2d 769, 786 (Va. 2000) (declaring that for conducting proportionality review the Supreme Court of Virginia compares “records of other capital murder cases, including cases in which a life sentence has been imposed . . . reviewed by this court”), with Bailey v. Commonwealth, 529 S.E.2d 570, 580, 586 (Va. 2000) (declaring that for conducting proportionality review the Supreme Court of Virginia examines “all capital murder cases reviewed by this Court, including those cases in which a life sentence was imposed” and “all appeals of [capital murder] convictions . . . first reviewed by the Court of Appeals of Virginia”) (emphasis added). The Bailey decision indicated that the court may consider capital cases reviewed by the Court of Appeals. In the same decision, the court said it relied on capital cases reviewed by the Supreme Court of Virginia. Does the court rely only on one set of cases or both? The Bailey and the Johnson decisions both came down on the same day, April 21, 2000.
VCDU could more efficiently defend capital cases than the existing system of appointment of individual attorneys. Salaried public defenders represented thirteen indigent capital defendants in 2000 and the remaining seventy or so indigent capital defendants obtained representation through appointed counsel paid at an hourly rate. The cost of compensation for court-appointed attorneys for capital murder defendants in fiscal years 1997 and 1998 hovered around $1.9 million for each year.

As an appointed attorney gains more experience, the repetition makes the steps easier and the research does not have to begin from square one with each case. A similar principle applies to the VCDU. The repetition of cases, research, and motions will streamline the process and lower the cost to the Commonwealth. For the desired result of efficiency and efficacy, the General Assembly should appropriate funds for salaries that will attract the best and brightest attorneys, investigators, paralegals, and staff for the offices.

With this proposed structure and its components, the quality of representation will increase for defendants, probably at less expense to the Commonwealth compared to paying each appointed attorney and public defender for often repetitive work. Establishing the VCDU within the existing framework of the Public Defender Commission will reduce administrative costs and burdens of forming the unit. The VCDU may improve the reputation of Virginia and its government and may have the opportunity to set the standard for capital trial defense units around the nation.

III. The Role of Qualifications in the Representation of Indigent Capital Defendants

Despite the primary role of VCDU as trial defenders, the unit should take the responsibility for development and administration of qualifications that guarantee an appointed attorney's adequate performance as an advocate for indigent capital defendants. Currently, the discussion of elevating the quality of representation for indigents through minimum attorney qualifications is popular rhetoric. The thrust of the discussions regarding qualifica-

tions focuses almost exclusively on an attorney’s criminal litigation experience such as the number of criminal jury trials. While the emphasis on qualifications encourages reform of representation for indigent capital defendants, the standards do not ensure consistent and adequate performance by the attorney. Under Virginia’s current qualifications for representing indigent capital defendants, the requirements may guarantee no more than experienced incompetence. Virginia’s qualifications might equally include experienced, unqualified attorneys and exclude inexperienced, qualified attorneys. An attorney must impanel a jury in a capital case before the case is considered “experience” for the purposes of qualification. Often the most effective attorney defending a capital case has managed to remove the attorney qualifications based upon knowledge and trial skills; Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations, Report of National Symposium on Indigent Defense, Feb. 1999 (visited Jan. 18, 2001) <http://www.ojp.usdoj.gov/indigentdefense/icjs.pdf> (identifying problems with current indigent defense systems and advocating a central structure for state indigent defense systems that includes experienced-based qualifications for attorneys).

139. See Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations, supra note 138; Standards for the Qualifications of Appointed Counsel in Capital Cases (June 17, 1999) (unpublished document, on file with the Virginia Public Defender Commission); NORTH CAROLINA RULES AND REGULATIONS RELATING TO THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CERTAIN CRIMINAL CASES § 4.9 (2001) (requiring that an attorney appointed to a capital case have five years experience in the general practice of law and a court find the attorney proficient in criminal practice).

140. See Standards for Qualifications of Appointed Counsel in Capital Cases, supra note 139. Virginia’s standards require that:

1. Lead counsel must:
   a. Be an active member in good standing of the Virginia State Bar or admitted to practice pro hac vice;
   b. Have at least five years of criminal litigation practice within the past seven years including acting as primary counsel (defense or prosecution) in at least five jury trials involving violent crimes with a maximum penalty of 20 years or more;
   c. Have had, within the past two years, six hours of specialized training in capital litigation;
   d. Have at least one of the following:
      i. Experience as “lead counsel” in the defense of at least one capital case within the past five years; or
      ii. Experience as co-counsel in the defense of at least two capital cases within the past seven years;
   e. Be familiar with the requisite court system, including specifically the procedural rules regarding timeliness of filings and procedural default; and
   f. Have demonstrated proficiency and commitment to quality representation.
2. Co-counsel must meet all of the requirements of “lead counsel” except 1(d).

Id.

141. Id.
capital murder charge from the case prior to impaneling the jury. In that respect, the qualifications may even reward ineffective pre-trial performance.

An analogy may be helpful in identifying the distinction between experience and performance. Imagine a state system in which state-appointed dentists provide dental care to indigent patients. The state has set a minimum number of procedures which the dentist must perform prior to performance of the difficult and complex artificial tooth implant on an indigent patient. Once the dentist has completed the required procedures, the state permits the dentist to now perform the artificial tooth implant. An indigent patient may leave with more pain after receiving treatment from the state-appointed dentist, but the state-appointed dentist has completed the required procedures, though incorrectly, and yet satisfied the state’s requirements. The state must also consider the fact that the dentist may have performed the procedures that fulfilled the state’s requirements on other indigent patients assigned to receive services from this dentist. The analogy roughly demonstrates the gaps in Virginia’s current attorney qualification system that focuses on the quantitative years of experience of the attorney but disregards whether the attorney adequately performed the work that qualifies as experience.

The following discussion briefly addresses and critiques two states’ qualification systems and the American Bar Association’s proposed standards for the representation of indigent capital defendants. The discussion assesses Virginia’s qualification system and offers a proposal to improve the effectiveness of qualifications for attorneys which includes the central role of the VCDU in administering improved standards for attorney performance.

A. Indiana’s Qualifications for Representation of Capital Defendants

In 1989, the General Assembly of Indiana created the Indiana Public Defender Commission (“the Commission”) to set qualifications for the appointment and compensation of attorneys who represent capital defendants. In 1992, Indiana codified the standards for appointment of trial and appellate counsel in capital cases. Rule 24 comprehensively regulates the qualifications of counsel, compensation rates, the number of counsel to be appointed, and the availability of investigative, expert, and other services necessary for an adequate defense. Additionally, the Commission offers

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143. Id.; see IND. R. CRIM. P. 24.
144. See Norman Liefstein, Reform of Defense Representation in Capital Cases: The
a reimbursement to each prosecuting county for fifty percent of the cost of defending a capital case, if the county's list of defense counsel given to the court for appointment complies with the state’s qualifications.\textsuperscript{145}

Rule 24 relies on the quantitative experience of the attorney and lacks a provision for monitoring the appointed attorney’s performance.\textsuperscript{146} Maximum workload requirements distinguish the Indiana Rule from Virginia’s qualifications, but the standards for assessing the workload of appointed attorneys fail to provide meaningful guidance to judges at the trial court level.\textsuperscript{147} Trial judges must extrapolate the meaning of terms such as the attorney’s ability to give “sufficient attention . . . quality representation . . . in accordance with constitutional and professional standards . . . breach of professional obligations.”\textsuperscript{148} Rule 24 gives concrete numbers to the trial

\textit{Indiana Experience and Its Implications for the Nation}, 29 IND. L. REV. 495, 500 (1996) (arguing that Indiana’s reform of its indigent defense system has drastically improved the quality of representation).

145. \textit{Id.}; see IND. CODE ANN. §§ 33-9-14-4(a) (Michie 1998) (requiring the public defender commission to certify compliance with guidelines prior to reimbursement for expenditures of indigent defense to defend a capital case).

146. \textit{See IND. R. CRIM. P. 24(B)(1)} (requiring that lead counsel have five years litigation experience, experience in at least five felony jury trials which were tried to completion, prior experience as lead or co-counsel in at least one case in which the death penalty was sought, and completion of at least 12 hours of training regarding capital defense within the past two years).

147. \textit{See IND. R. CRIM. P. 24(B)(3)}:

(3) Workload of appointed counsel. In the appointment of counsel, the nature and volume of the workload of appointed counsel must be considered to assure that counsel can direct sufficient attention to the defense of a capital case.

(a) Attorneys accepting appointments pursuant to this rule shall provide each client with quality representation in accordance with constitutional and professional standards. Appointed counsel shall not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

(b) A judge shall not make an appointment of counsel in a capital case without assessing the impact of the appointment on the attorney’s workload.

(c) Salaried or contractual public defenders may be appointed as trial counsel in a capital case if:

(i) the public defender’s caseload will not exceed twenty (20) open felony cases while the capital case is pending in the trial court;

(ii) no new cases will be assigned to the public defender within thirty (30) days of the trial setting in the capital case;

(iii) none of the public defender’s cases will be set for trial within fifteen (15) days of the trial setting in the capital case; and

(iv) compensation is provided as specified in paragraph (C).

IND. R. CRIM. P.24(B)(3); \textit{see also} Standards for Qualifications of Appointed Counsel in Capital Cases, \textit{supra} note 140.

148. Rule 24(B)(3)(a); \textit{see supra} note 147.
judge when assessing the workload of a public defender. However, even this tangible count the cases rule may not secure quality performance of the attorney because adequate time to prepare does not necessarily guarantee proper performance.

Rule 24(C)(1) provides a minimum $70 per hour fee for appointed defense counsel. Presently, the Supreme Court of Indiana appoints counsel and the trial judge has discretion over whether to award the $70 minimum hourly fee because the judge may consider rates "representative of the community." The discretion given to the judiciary may create a disincentive to talented attorneys considering appointment.

1. Lessons for the VCDU

The VCDU should consider the attorney's workload as a factor when selecting counsel, although a specific number may not necessarily produce effective counsel because the workload in each case varies substantially. Much of the present difficulty within state indigent representation systems stems from the formidable workload that produces the poor quality of representation given to indigents. The VCDU may set a minimum compensation rate for private attorneys selected to represent indigent capital defendants, but the courts should not have the ability to disregard the minimum rate. The VCDU should develop qualifications beyond quantitative numbers of jury trials and years of litigation experience to the attorney's performance.

B. North Carolina's Qualifications for Representation of Capital Defendants

North Carolina adopted rules to govern the appointment of counsel to represent indigent capital defendants. Contrary to Indiana's detailed Rule 24, North Carolina has promulgated only one short section of qualifications to govern appointment in capital cases. The first subsection requires five

149. Rule 24(B)(3)(c); see supra note 147.
150. IND. R. CRIM. P. 24(C)(1).
151. Id.; see also Lefstein, supra note 144, at 503 (discussing the major recommendation of the Commission that the Supreme Court of Indiana rejected: the proposition that the Commission maintain the roster of qualified attorneys and judges only appoint from the Commission's roster).
152. NORTH CAROLINA RULES AND REGULATIONS RELATING TO THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CERTAIN CRIMINAL CASES § 4.9 (2001).
153. Id. Section 4.9 provides that:

No attorney shall be appointed to represent an indigent capital defendant: (a) Who does not have a minimum five years' experience in the general practice of law, provided that the Court or, where authorized, the public defender, may in its discretion appoint as assistant counsel an attorney who has less experience,
years of experience in criminal law, but it recognizes that co-counsel may possess the proper ability despite the lack of the minimum years of experience. The second subsection requires either the court or the public defender to find that the appointed attorney has "demonstrated proficiency" in criminal law. The rules do not articulate the criteria needed to meet the proficiency standard of the qualifications.

The standard appropriately directs half of the inquiry to the attorney's proficiency, but the evaluation of the attorney's ability by the court or the public defender may vary significantly. North Carolina approaches quality representation more realistically than Indiana because the quantitative amount of experience constitutes only a partial requirement, recognizing that the attorney's "proficiency" demands assessment. However, North Carolina lacks uniformity in determining the proper application of the standards because the public defender or the court may assess "proficiency" according to individualized standards.

1. Lessons for the VCDU

The VCDU would do well to recognize the value of North Carolina's qualifications and create an instrument for assessing proficiency. The unit should start by either making the experience requirements not absolute, giving the VCDU the flexibility to choose an extremely qualified attorney without a large amount of experience, or make absolute experience requirements attainable by a large group of criminal attorneys. The chief attorneys and the board of trustees would assess the proficiency-type qualities of the attorney. The ability of an attorney to make effective pre-trial motions and closing arguments cannot be quantified, but are intangible characteristics that must form the basis for an attorney selected to represent indigent capital defendants.

C. American Bar Association Standards for Appointment of Counsel in Capital Cases

The American Bar Association adopted its "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" in February of

(b) Who has not been found by the court or, where authorized, the public defender, appointing him to have a demonstrated proficiency in the field of criminal trial practice.

Id. 154. Id.
155. Id.
156. Id.
157. Id.
The ABA guidelines provide detailed performance requirements including investigation minimums, required pre-trial motions, guidelines for plea negotiations, voir dire, capital sentencing, and steps to preserve claims of error. The National Legal Aid and Defender Association standards served as a model for the present ABA standards. The Guidelines begin by requiring minimum experience in criminal litigation and experience as lead counsel in three murder trials, six other jury trials, and either lead counsel or co-counsel in one death penalty case.

Much of the material in the guidelines looks like a handbook for attorneys representing indigent capital defendants covering the major aspects of a capital case. For example, Guideline 11.4.1 lists sources of information which the attorney should investigate. The guidelines encourage investigation into the indictment, potential witnesses, physical evidence, the crime scene, and expert witnesses. The guidelines describe the information that the attorney should glean from each source of investigation and how the source should be used at trial or sentencing. The guidelines offer instruction to the attorney concerning plea negotiations, content of the negotiations, and the obligations of the defense attorney.

The VCDU would require outside attorneys to possess knowledge of capital procedures and familiarity with criminal investigation. However, the most effective role of the unit may not include listing the copious duties which an attorney must complete. Logically, the assessment of the attorney's abilities should take place prior to appointment, thus giving the defendant and the unit confidence in the attorney's ability. The VCDU will employ the most experienced and knowledgeable capital defense attorneys


162. Guideline 11.4.1, Subsection (D)(4) provides: "Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so." Id.

163. Guideline 11.4.1.

164. Id.

who have the ability to administer performance standards without a formal procedure or extensive check list. Additionally, prior to appointment as lead counsel in a capital case, the attorney from the private bar or the public defender would have acted as co-counsel with a VCDU attorney in a capital case.

D. Virginia’s Current Qualifications and Suggestions for Reform

The Virginia General Assembly enacted a statute that requires the Public Defender Commission and the Virginia State Bar to promulgate minimum standards that an attorney must meet before appointment to represent an indigent capital defendant.\(^\text{166}\) The statute gives the Commission possible criteria for consideration including: 1) license to practice law in Virginia; 2) general background in criminal litigation; 3) experience in felony practice at trial and appeal; 4) experience in death penalty litigation; 5) familiarity with the requisite court system; 6) current training in death penalty litigation; and 7) proficiency and commitment to quality representation.\(^\text{167}\)

In accordance with the statutory directive, the Commission promulgated minimum standards for trial, appellate, and habeas corpus counsel.\(^\text{168}\) This article discusses only the qualifications for trial counsel. The qualifications to act as lead counsel in a capital case in Virginia include five years of criminal litigation experience, primary counsel in five jury trials involving a violent crime, capital litigation training and prior experience as either lead counsel in a death penalty case within the past five years or co-counsel in two capital cases within the past seven years.\(^\text{169}\) For a capital case to fulfill the Commission’s prerequisites of experience as lead counsel or co-counsel in a capital trial, the attorney must have at least impaneled the jury in the capital case.\(^\text{170}\) Subsection (f) of the qualifications provides that the attorney must have “demonstrated proficiency and commitment to quality representation.”\(^\text{171}\) Unfortunately, the Commission’s qualifications do not offer definitions of “proficiency” or “commitment” or a means of assessing these aspects of an appointed attorney.\(^\text{172}\) The Commission strongly encourages

\(^{166}\) See VA. CODE ANN. \(\S\) 19.2-163.8 (Michie 2000) (stating that the Commission and the Virginia State Bar “shall adopt standards for the appointment of counsel in capital cases”).

\(^{167}\) \(\S\) 19.2-163.8(A).

\(^{168}\) Standards for the Qualifications of Appointed Counsel in Capital Cases, \textit{supra} note 139.

\(^{169}\) Id.

\(^{170}\) Id. (providing that “whenever the term ‘capital case’ is used, it shall mean a case in which the death penalty was sought and which was concluded after the jury was impaneled”).

\(^{171}\) Id.

\(^{172}\) Id.
appointment of two attorneys for a capital case, and if a public defender is appointed the second attorney should come from the private bar.\footnote{173}

The Virginia General Assembly and the Commission have taken substantial steps toward providing quality representation for indigent capital defendants. The question of whether the qualifications promulgated by the Commission ensure the "proficiency" of the attorney appointed must also receive consideration. The standards directly address the minimum level of experience needed by an attorney to qualify to represent an indigent capital defendant, but no mechanism exists for the assessment of performance of the attorney at the jury trials, criminal litigation, or capital cases. Virginia’s standards leave open the danger of experienced incompetence.\footnote{174}

A bill passed by the Virginia General Assembly gives the Supreme Court of Virginia a role in the establishment of qualifications and compilation of the lists from which circuit judges appoint counsel.\footnote{175} The bill takes Virginia a step in the wrong direction because the aforementioned assessment of state capital trial systems reveal that proper functioning and the appearance of legitimacy depend upon the independence from the state judiciary.\footnote{176} The other portion of the bill includes a requirement that the attorney have training in forensic and DNA evidence.\footnote{177} The General

\footnote{173} Id.

\footnote{174} See Telephone Interview with Overton P. Pollard, supra note 110 (noting that a private attorney or a public defender who qualifies on paper may not have the necessary "trial savvy," yet the problem persists of attempting to measure this quality).

\footnote{175} H.B. 2580 (Va. 2001) (amending Code §§ 19.2-163.7, 19.2-163.8 directing that the Supreme Court of Virginia along with the Public Defender Commission "shall adopt standards for attorneys in Virginia... who are qualified to represent defendants charged with capital murder or sentenced to death" and establish lists of attorneys eligible for appointment). As of February 23, 2001, the bill passed the Virginia House of Delegates and the Virginia Senate, both by a unanimous vote, and awaits the signature of the governor. See HB 2580 Counsel in Capital Cases (visited Mar. 26, 2001) <http://leg1.state.va.us/cgi-bin/legp504.exe?ses-011&typ=bil&val=hb2580>; Ross E. Eisenberg, Statute Note, 13 CAP. DEF. J. 443 (2001) (discussing H.B. 2580 (Va. 2001)).

\footnote{176} See also supra note 115 and accompanying text. But see Telephone Interview with Overton P. Pollard, supra note 110 (stating that the Commission would welcome the assistance of the Supreme Court of Virginia in establishing the qualifications, but some question may arise as to whether the Supreme Court should be making these determinations).

\footnote{177} Va. H.B. 2580 (requiring capital representation qualifications to include "current training in the analysis and introduction of forensic evidence, including deoxyribonucleic acid (DNA) testing and the evidence of a DNA profile comparison to prove or disprove the identity of any persons").

It is worth noting that DNA rarely "proves" the identity of a person’s involvement in a crime, but only establishes probabilities of an individual’s DNA matching the DNA found at a crime scene. See Developments in the Law—Confronting the New Challenges of Scientific Evidence v. DNA, 108 HARV. L. REV. 1557, 1559 (1995) (discussing that DNA matches "are really only instances of high statistical probability, the reliability of which depends upon the
Assembly has incorrectly focused the inquiry upon the attorney's knowledge of scientific testing. The proper inquiry must ask the quality of the attorney's performance in capital cases. This bill has the potential to exclude considerable numbers of extremely capable attorneys due to their lack of knowledge about scientific evidence which appears in a small portion of all capital cases.

The creation of the VCDU will provide an informed administrative body to assess the competence of trial counsel and effectuate Virginia's requirement of "demonstrated proficiency and commitment to quality representation." The VCDU must incorporate a level of input from the Virginia State Bar criminal section to assess performance of the attorneys on the roster because opposing counsel naturally observes the attorney's performance in the courtroom. The VCDU may make use of very basic experience standards, but the intangible proficiency of performance inquiry should guide the decision of which attorneys qualify to represent indigent capital defendants. The role of the VCDU in establishing a consistent rate of compensation for attorneys, no longer within the discretion of individual judges, may attract greater interest from a greater number of skilled attorneys and alleviate some of the burden of the need to assess counsel's performance.

IV. Potential Conflicts of Interest Between Local Public Defender Offices and the Newly Created VCDU

The current organization of Virginia's indigent representation utilizes both local public defender offices and court-appointed private attorneys. The Public Defender Commission presently has twenty offices around the state. Under the Virginia Rules of Professional Conduct, if an attorney has a conflict of interest that disqualifies the attorney from representing the client, the firm also faces disqualification. Conflicts of interest commonly occur for the local public defender: a potential client is assigned to the local public defender's office and the attorney soon discovers that a witness for development of comprehensive, well-researched statistical pools.

178. See Standards for the Qualifications of Appointed Counsel in Capital Cases, supra note 139; cf. Louisiana Standards on Indigent Defense, Chapter 7, Part VI, Std. 7-6.1 (unpublished document, on file with The Louisiana Indigent Defense Assistance Board) (providing a procedure for the trial judge to seek certification from the Board for an attorney who does not meet all of the experience standards, requiring the judge to include particular facts familiar to the judge that demonstrate the applicant's "competency and commitment to handle a capital case").


180. Telephone Interview with Overton P. Pollard, supra note 110.
the Commonwealth was represented by the attorney or the attorney’s public defender office in another matter. The VCDU’s ability to maintain independence from public defender offices will prevent vicarious disqualification for conflicts of interest.

A. The State of the Law in Virginia

The Supreme Court of Virginia recently adopted the Virginia Rules of Professional Conduct (“the Rules”) that took effect January 1, 2000.\(^{181}\) The Rules replaced the Virginia Code of Professional Responsibility (“the Code”). Rule 1.7(a) precludes representation of a client whose interests are directly adverse to an existing client unless each client consents.\(^{182}\) Subsection (b) of Rule 1.7 precludes representation of a client if the attorney’s own interests or interests of a third party materially limit representation unless the client consents.\(^{183}\) Rule 1.9 expresses the common conflict of interest affecting public defender offices. It prevents an attorney from representing a new client in a matter which would adversely affect the interests of a former client in a “substantially related matter” unless the former and present clients consent.\(^{184}\) Rule 1.9 includes a conflict between the attor-

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181. Dennis W. Donhal, Overview, in THE NEW VIRGINIA RULES OF PROFESSIONAL CONDUCT—A COMPARISON WITH THE CODE, (1999); see VA. SUP. CT. R. Pt. 6 § II.

182. VA. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (2000). Rule 1.7 provides that:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless:
   (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
   (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:
   (1) the lawyer reasonably believes the representation will not be adversely affected; and
   (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultations shall include explanation of the implications of the common representation and the advantages and risks involved.

183. Id.

184. VA. RULES OF PROFESSIONAL CONDUCT Rule 1.9 (2000). Rule 1.9 states:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.

(b) A lawyer shall not knowingly represent a person in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
   (1) whose interests are materially adverse to that person; and
   (2) about whom the lawyer had acquired information protected by Rules 1.6
ney's former client and the attorney's former firm's former client. Rule 1.10 explains that under certain circumstances, the group of attorneys working in a "firm" with the disqualified attorney may, by virtue of their positions, also be disqualified from representation. Comment three to Rule 1.10 provides a definition of firm that includes "[l]awyers employed within the same unit of a legal service organization, but not necessarily those employed in separate units." The VCDU must remain a separate unit from public defender offices in order to avoid imputed disqualification.

The Rules, as adopted in Virginia, changed the definition of "firm" given in the Code. The Code defined "law firm" as a "professional legal corporation," which is "a corporation, or an association treated as a corporation, authorized by law to practice law for profit." The new definition expressed in the Rules is extremely broad. A firm is a "professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization." The comment following Rule 1.10 further explains the evidence of a firm to be any formal agreement between the lawyers and the presence of mutual access to information concerning the clients they serve. The determination of whether an entity constitutes a firm also depends on the particular rule involved and facts of the situation involved.

The VCDU and the public defender offices would have completely separate facilities and files for confidential client information. The access to files and exchange of confidential information would only take place during specific cases where the VCDU acted as lead counsel and the public defender

and 1.9(c) that is material to the matter; unless both the present and former client consent after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Id.

185. Id.
186. VA. RULES OF PROFESSIONAL CONDUCT Rule 1.10 (2000) (precluding attorneys associated in a firm from representing a client when one of them would be prohibited from representing the client if practicing alone).
187. Rule 1.10 cmt. 3.
188. See VA. RULES OF PROFESSIONAL CONDUCT Preamble, Rule 1.10 cmt.1 (2000).
190. VA. RULES OF PROFESSIONAL CONDUCT Preamble (2000).
191. Rule 1.10 cmt.1.
192. Rule 1.10 cmt.3.
acted as co-counsel in the same capital case. This would certainly not allow access to all client files of the other entity. The Court of Appeals of Virginia in *Lux v. Commonwealth* held that even within the same office, a screen sufficiently protects the interests of the client and the confidentiality of the information. Therefore, the proposed VCDU should erect proper screens to avoid general imputed disqualification due to contact with local public defender offices.

In *Lux*, the Court of Appeals of Virginia addressed whether an entire Commonwealth’s Attorney’s office was disqualified from prosecuting a defendant because the attorney was previously employed by the public defender office and had previously counseled the defendant on a related matter. This was a case of first impression in Virginia. The court followed the rule adhered to by the majority of states. “The majority of jurisdictions do not per se disqualify the entire prosecutor’s office solely because one member of the staff had represented the defendant in a related matter.” The court adopted the rule that in event of a conflict, the prosecutors not directly disqualified may prosecute the case if the disqualified attorney will not participate in the prosecution of his former client.

The disqualification of an entire Commonwealth’s Attorney’s office is within the discretion of the trial court, but the Court of Appeals of Virginia offered some guidance to trial courts. The court established a burden shifting procedure for determining the vicarious disqualification of the Commonwealth’s Attorney’s office. The initial burden of vicarious disqualification rests upon the defendant to prove that an attorney in the Commonwealth’s Attorney’s office offered counsel on a matter related to

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194. *Lux v. Commonwealth*, 484 S.E.2d 145, 150-51 (Va. Ct. App. 1997) (holding that the prosecutor’s office was not disqualified when a single attorney has a conflict of interest if the attorney is screened from giving or receiving information concerning the case causing the conflict).
195. *Id.* at 150.
196. *Id.*
197. *Id.*
198. *Id.*; see also *State v. Pennington*, 851 P.2d 494, 498 (N.M. Ct. App. 1993) (listing the jurisdictions that have not applied per se disqualification to prosecutor’s staff because one attorney was disqualified and rejecting the per se rule of disqualification).
199. *Lux*, 484 S.E.2d at 150-51. It is important to clarify the term “screened” that the court uses and this article will continue to reference. The court defines screening as preventing contact between the attorneys handling the matter and the disqualified attorney. *Id.* at 151.
200. *Id.* at 152.
201. *Id.*
the prosecution pending against him.\textsuperscript{202} If the defendant successfully carries that burden, a presumption arises that the disqualified attorney shared confidences with the other employees of the Commonwealth’s Attorney’s office.\textsuperscript{203} It is the Commonwealth’s burden to rebut the presumption by proving that the disqualified attorney “has been effectively screened from contact with the Commonwealth’s Attorneys working on the defendant’s case.”\textsuperscript{204} The court in \textit{Lux} held that the Commonwealth’s Attorney’s office failed to meet its burden of proving that the disqualified attorney erected a sufficient screen between himself and the attorney handling the case.\textsuperscript{205}

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\textsuperscript{202} \textit{Id.; see also} VA. RULES OF PROFESSIONAL CONDUCT Rule 1.9(a), (b) (2000) (precluding an attorney from representing a client if the attorney has previously represented a separate client on a “substantially related matter” unless the clients consent to representation).
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\textsuperscript{203} \textit{Lux}, 484 S.E.2d at 152.
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It is important to note that the term “screened” or “screening procedures” used in the court’s opinion in \textit{Lux v. Commonwealth}, and used in ethics opinions is synonymous with the term “chinese wall.” \textit{Lux}, 484 S.E.2d at 152 n.4. “A Chinese wall is essentially a screening mechanism set up within an institution to act as an ‘impermeable barrier to intrafirm exchange of confidential information.’” Sullivan, supra, at 392 (citing Note, \textit{The Chinese Wall Defense to Law-Firm Disqualification}, 128 U. PA. L. REV. 677, 678 (1980)). Imputed disqualification arose because it was presumed that the confidences of one attorney concerning a client were shared freely with the other members of the firm. Sullivan, supra at 393. Therefore, the screen “overcomes the presumption of shared confidences” and the court does not automatically disqualify the firm. \textit{Id.}
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The ABA Model Rules of Professional Conduct Rule 1.11 addresses the concern of an attorney entering private practice after practicing as a government attorney, and allows the disqualified attorney to use a screen to avoid vicarious disqualification. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (2000). Virginia accepted the screen defense when it adopted the ABA Rule 1.11. See VA. RULES OF PROFESSIONAL CONDUCT Rule 1.11(b)(1) (2000) (permitting a firm to represent a client whose interests are adverse to an attorney in the firm due to the attorney’s substantial and personal participation in the matter as a government employee, if screened from participation in the matter and receipt of fees therefrom).
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The key elements in a screen to prohibit the flow of client confidences and prevent vicarious disqualification are as follows: (1) the wall must be erected as soon as the conflict of interest is discovered; (2) the screened lawyer must not be allowed to discuss the sensitive matter with those in his new firm; (3) the screened lawyer must be strictly denied access to the documents and files related to representation; (4) if possible, the screened attorney should be physically separated from those working on the sensitive matter and should use different support personnel; (5) the former client or its counsel should be notified so that it can monitor the effectiveness of the wall. Sullivan, supra, at 407-09.
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\textsuperscript{205} \textit{Lux}, 484 S.E.2d at 152. The court also noted that if affidavits from the disqualified
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The *Lux* court disapproved of the standard under the Code for imputed disqualification based on "appearance of impropriety." Disciplinary Rule 9-101 of the Code admonished attorneys to "avoid even the appearance of impropriety." The court's disapproval of the appearance of impropriety standard foreshadowed Comment five to Rule 1.9. The Comment criticized and dismissed the use of "appearance of impropriety" as an unworkable standard and instead implemented a two-part functional analysis for disqualifications based on a conflict of interest between a former client and a present client: whether the firm can preserve confidentiality for the former and present client and avoid positions adverse to a client. The transition to a pragmatic standard for disqualification may make the establishment of VCDU more feasible than under the former rubric of appearance of impropriety.

The *Lux* court and the Court of Appeals of New Mexico decision cited in *Lux*, expressed a distinction between a prosecutor's office and a private law firm. The distinction rested on the fact of the duty of the prosecutor to seek justice rather than profits as one would in a private law firm. Similarly, the VCDU and the public defender lack financial incentives and have a duty to ensure the proper processes of the legal system, thus suggesting that the VCDU and the public defender may properly screen attorney and the attorney handling the case had been filed, it would have sufficiently rebutted the presumption of shared confidences. *Id.; see also* State *ex rel. Tyler v. MacQueen*, 447 S.E.2d 289, 292-93 (W. Va. 1994) (holding that the filing of affidavits by the prosecuting attorney and the disqualified attorney is sufficient evidence of proper screening procedures). The court found that "a criminal defendant is denied due process only when his former counsel joins a Commonwealth's Attorney's office and is not effectively screened from contact with the Commonwealth's attorneys who are handling the defendant's case on a related matter." *Id.*

The court's approach to conflicts of interest and imputed disqualification directly contradicted Legal Ethics Opinion No. 1020, and the court cited the opinion with disapproval. *Id.*

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206. *Lux*, 484 S.E.2d at 151 (finding that the appearance of impropriety standard is laudable but is not the constitutionally required standard of due process). The court found that "a criminal defendant is denied due process only when his former counsel joins a Commonwealth's Attorney's office and is not effectively screened from contact with the Commonwealth's attorneys who are handling the defendant's case on a related matter." *Id.*


209. *Id.*


211. See *Lux*, 484 S.E.2d at 151; see *Pennington*, 851 P.2d at 498 (permitting reliance upon a screen because "[a] prosecutor's sole duty is to do justice" and has "no financial incentive to obtain prohibited information").

212. See *Akers v. Commonwealth*, 535 S.E.2d 674, 677 (Va. 2000) (requiring defense counsel to serve a higher duty of proper process and file an appellate brief over the objections of the client).
confidential documents and information to prevent imputed conflicts of interest.

B. Effect of Imputed Disqualification on the Proposed Virginia Capital Defense Unit

Application of the court's decision in *Lux* to the context of the establishment of a VCDU and its contact with the local public defender office teaches that the progression toward flexibility in legal ethics may enable the VCDU to engage in a broad range of responsibilities. Courts have shown increased willingness to allow representation by attorneys in the same office as a disqualified attorney, especially by government employees serving the public. The effect of a harsh per se rule would certainly impede communication, particularly between the VCDU and public defender, necessary for competent representation for indigent capital defendants. A screening procedure will sufficiently protect the confidentiality of former clients and avoid positions adverse to these clients.

In the event that an attorney at the VCDU has a conflict of interest and a public defender takes a case, the court may permit the unit to erect a screen and continue to assist the public defender with the capital case. The more common case may arise of the VCDU acting as lead counsel and a public defender office acting as co-counsel. Even if these conflicts of interest disqualified the VCDU, the proposal includes establishing four offices, thereby creating co-equal offices that may assist a public defender in the event the other VCDU office is disqualified.

V. Conclusion

Virginia has the opportunity to take a significant step toward solving the crisis of the inconsistent quality of representation for indigent capital defendants by establishing the VCDU. The VCDU will ensure that a capital defendant's Sixth Amendment right to effective assistance of counsel has meaning promptly at the start of the pre-trial process. The Commonwealth should create uniformity in the quality of representation by giving the unit the power to select and compensate outside attorneys and administer qualifications for outside counsel in the representation of indigent capital defendants. The creation of the VCDU will accomplish a mechanism for the representation of capital defendants that is much more efficient than appointing separate counsel to each capital case.

The states that have created a separate capital trial unit have demonstrated that the success and efficiency of the capital trial units rests in the hands of the state legislature that decides whether to make the unit answerable to an entity with loyalties and interests other than providing top-quality death penalty representation. The VCDU may successfully operate as a subsidiary of the Public Defender Commission if the criminal section
of the Virginia State Bar nominates the individuals for the chief attorney positions within each office and the board of trustees positions of the VCDU. The nominees would require the approval of the Commission prior to taking their respective offices. The current trend in Virginia of oversight of indigent defense by the judiciary must give way to the independence necessary to guarantee quality representation of indigent capital defendants.

The VCDU must redirect the focus of the qualifications from the experience and knowledge of the attorney toward the abilities and performance of the attorney. The intangible factors of quality representation must be taken into account, and the VCDU will have the expertise and insight to make the judgments as to an attorney's probable performance in a capital trial. Prior to appointment as lead counsel in a case, the outside attorney, whether public defender or private attorney, should have the opportunity to try a capital case as co-counsel with an attorney from the VCDU. The VCDU attorneys will observe the other attorney in the capital trial and offer invaluable training and advice and will be uniquely situated to assess the ability of these attorneys prior to selection as lead counsel.

In a situation in which the VCDU acts as lead counsel and the public defender as co-counsel on a single case, the attorneys must carefully guard each office's confidential information. Conflicts of interest imputed from a public defender to the VCDU or vice versa could quickly destroy the benefits of a central capital trial unit. However, the Court of Appeals of Virginia appears willing to permit the functioning of public attorneys to proceed without hindrance from antiquated per se disqualification rules. The proper use of screening procedures will cure most potential vicarious disqualifications. The existence of four VCDU offices will also alleviate the concerns that conflicts of interest present to this proposal.

The General Assembly of Virginia must recognize the need to offer every capital defendant a fair trial regardless of the individual's ability to pay for an attorney. The VCDU can assure the reliability of the adversary process upon which a fair trial depends. The Commonwealth cannot allow the wealth of an individual to determine the quality of representation of capital defendants. The General Assembly of Virginia must rise to the challenge and take aggressive action to create the VCDU.