

THE CRUCIBLE OF ADVERSARIAL TESTING

ACCESS TO COUNSEL IN
DELAWARE'S CRIMINAL COURTS



SIXTH
AMENDMENT
CENTER

Copyright © 2014 by the Sixth Amendment Center.
All rights reserved.
Publication Number: 2014.001

SIXTH AMENDMENT CENTER
PO Box 15556
Boston, MA 02215
www.sixthamendment.org

This study of the right to counsel in the state of Delaware was conducted by the Sixth Amendment Center on behalf of the Office of Conflicts Counsel, a division of the Office of the Public Defender, and made possible by a generous grant awarded by the U.S. Department of Justice, Bureau of Justice Assistance. DOJ Office of Justice Programs Grant Award #: 2012-DB-BX-0005.

EXECUTIVE SUMMARY

In the 1963 case, *Gideon v. Wainwright*, the U.S. Supreme Court declared it an “obvious truth” that anyone accused of a crime and who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.” In subsequent cases, the Court ruled that the right to counsel is the right to an effective attorney that works within an indigent defense system with systemic safeguards to allow for zealous representation.

In Delaware, able attorneys are working in a structure that prevents them from meeting constitutional adequacy despite their commitment, dedication and hard work. Systemic impediments clear out thousands of defendants each year who should be receiving representation under the Sixth Amendment, but that are not. These defendants either face subtle (or sometimes direct) pressure to forego the right to the assistance of counsel, or unwittingly waive that right without knowing the full consequences of doing so. Where defendants have not already relented to pressure to forego the right to counsel, their lawyers are provided too late and with too little time to be the zealous advocates that each defendant has as his privilege. And as a result, Delaware’s indigent defense function fails to subject the prosecution’s case to “the crucible of meaningful adversarial testing” rendering the entire adversarial process “presumptively unreliable.” (*United States v. Cronin*, 466 U.S. 648 (1984).)

FINDINGS

To help policymakers who may not be lawyers, or otherwise are not versed in constitutional law, the American Bar Association (ABA) promulgated the *Ten Principles of a Public Defense Delivery Systems* which, in the ABA’s own words, represent the “fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.” Our nation’s top law enforcement officer, Attorney General Eric Holder, called the ABA *Principles* the “basic building blocks of a well-functioning public defense system.”

This study of the right to counsel in the state of Delaware was conducted by the Sixth Amendment Center (6AC) on behalf of the Office of Conflicts Counsel, a division of the Office of the Public Defender, and made possible by a generous grant awarded by the U.S. Department of Justice, Bureau of Justice Assistance (DOJ Office of Justice Programs Grant Award #: 2012-DB-BX-0005). The goal of the BJA grant program is to “identify gaps” to be addressed by the ABA *Ten Principles*.

Both the primary and conflict indigent defense systems in Delaware fail the vast majority of the ABA *Ten Principles*. In fact, the indigent defense system in Delaware only meets one of the ABA *Ten Principles* in its entirety: *Principle 2* (requiring state funding and a mixed system of staff public defenders and private bar attorneys). Public defense lawyers in Delaware begin substantive work on a case far too late in the criminal justice process to be effective (in violation of *Principle 3*) and the same attorney does not provide continuous representation to each and every client once appointed through to disposition (in violation of *Principle 7*). The violations of *Principles 3* and *7* are a direct result of attorneys not having sufficient time to handle cases properly, including meeting with clients (in violation of *Principle 4*), because workload is not controlled to permit the rendering of adequate representation (in violation of *Principle 5*). Defense counsel, especially on the conflict side, are not supervised nor systematically reviewed for quality against performance standards (in violation of *Principle 10*), partly because there is no systematic training against such standards so that attorneys know what is expected of them (in violation of *Principles 6* and *9*).

And, though the indigent defense system, and in particular the OPD, is viewed by other criminal justice agencies as an equal partner in improving the criminal justice system (meeting *Principle 8*, in part), the conflict system enters into contracts that have financial disincentives for lawyers to render quality services for all appointed clients and fail to specify performance requirements and anticipated workload (in violation of *Principle 8*, in part).

More than any other reason, the failure to meet the majority of the ABA *Ten Principles* and the large number of people going unrepresented are both the direct result of the state of Delaware's failure to ensure the independence of the defense function (in violation of *Principle 1*). Most states have surpassed Delaware in its evolution of the right to counsel by insulating the chief executive of the indigent defense system under an independent commission made up of members selected by diverse appointing authorities such that no single branch of government has the ability to usurp power over the chief. In Delaware, the chief defender is a direct gubernatorial appointee.

REPORT GUIDE

Part One of the report (Chapters 1 through 4; pages 13-100), explores the constitutional requirement to provide defendants with early access to counsel (ABA *Principle 3*). The right to counsel attaches, according to the Supreme Court, at "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction." In Delaware, therefore, the right to counsel attaches in criminal proceedings where nearly all criminal matters begin: the Justice of the Peace Court.

Though defendants are advised of the right to the assistance of counsel at their initial appearance, no formal activation of that right occurs unless the defendant is unfortunate enough to remain incarcerated pretrial. As a result, many out-of-custody de-

defendants appear at subsequent critical stages in the Court of Common Pleas without representation – perhaps more without counsel than with. There they face subtle, and often overt, pressure to discuss potential plea arrangements with the prosecution or to waive due process rights, without the advice of a lawyer, and all for reasons that appear to have more to do with keeping the whole process moving than with a desire to ensure the fairness of the result.

This problem also occurs in Family Court for children in delinquency proceedings. Children failing to call the public defender's office for an interview in advance of their arraignment are considered by the prosecutors to be *pro se* – they have effectively defaulted on their right to the assistance of counsel. But allowing children and their parents to meet with prosecuting attorneys to discuss plea deals – or, worse, pressuring them to do so – is a clear violation of the right to counsel, and cannot be permitted.

Part Two (Chapters 5 & 6; pages 101-148) details how systemic deficiencies prevent those defendants who do manage to invoke their right to counsel from getting adequate representation.

Delaware practices “horizontal” representation – a system in which one attorney handles one part of a case and then passes the client on to another attorney in assembly-line fashion. Horizontal representation is in violation of ABA *Principle 7*, in part, because it fosters long periods of time where defendants have representation in name only. In New Castle County, for example, public defenders provided at preliminary hearings on felony matters in the Court of Common Pleas file no motions, launch no investigation, interview no witnesses, and only meet with the client in order to convince him to waive his right to the preliminary hearing. Either that, or they often advise him to take the plea being offered by the state, despite meeting the client for the first time that morning. So, for any case proceeding to trial in the Superior Court, the defendant may have had a lawyer assisting him at the preliminary hearing but he certainly did not have someone substantively advocating on his behalf.

Excessive caseloads further leave public defenders and conflict attorneys with insufficient time to properly work on all of their cases. For example, in Sussex and Kent counties' Family Courts, individual public defenders were found to be carrying the caseload three full time attorneys should handle per national caseload standards. Public defenders handling adult misdemeanors caseloads in the Court of Common Pleas are equally overwhelmed.

Part Three (Chapters 6 & 7; pages 149-184) details Delaware's lack of on-going training and supervision of the lawyers representing the indigent accused. Without a rigorous training structure, any organization will develop its own set of values from within. Over time, that which may have once been grudgingly accepted, like saving investigation for only the most serious cases, presuming that all clients have the same views toward their case outcomes and, based on that assumption alone, entering guilty pleas on behalf of those clients only moments after meeting them in court – all of which we found occurring throughout Delaware – now becomes the established standard.

This new “norm” has been allowed to take root in Delaware because the system lacks accountability. There are two parts to accountability: accountability of the attorneys within the system and accountability of the system itself. To start, there are no formal performance standards in Delaware telling attorneys what is expected of them. But even if there were performance standards, the Office of Conflicts Counsel has no mechanism to review the performance of the attorneys it hires against said standards. Some attorneys we spoke with expressed concern at this. “We need some systemic controls to ensure that, if there’s going to be a conflict appointment, the representation is going to be where it needs to be,” said one. Accountability of the primary public defender is a work in progress.

With this report the Sixth Amendment Center is, in essence, performing a systemic performance audit of Delaware’s indigent defense system because there is no institutionalized structure to perform this function from within. This report identified gaps in services, pointed out systemic deficiencies, and questions policies that prevent attorneys from being effective. But Delaware needs to be doing this on an on-going basis or these problems will mount over time to the point where the efficacy of the whole criminal justice system is called into question.

RECOMMENDATIONS

1. Insulate the provision of right to counsel services from undue political and judicial interference, and establish proper ethical screens between the indigent defense system’s chief executive and the primary defender system, and between the chief executive and the conflict defender system.
2. The Family Court should adopt a rule prohibiting children in delinquency matters from waiving the right to the assistance of counsel.
3. The indigent defense system should adopt and implement regulations requiring that counsel is appointed as soon as possible after “attachment,” as required by *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), for any defendant facing loss of liberty as a potential sentence under law, and the vertical representation of all clients.
4. The indigent defense system should promulgate standards for quality representation, create a comprehensive training program based on such standards, and measure compliance against those standards to demonstrate, on an ongoing basis, the effective use of taxpayer dollars. And the indigent defense system should establish workload limits to permit the rendering of effective attorney performance in all case types.



SIXTH
AMENDMENT
CENTER

www.sixthamendment.org