

# THE CRUCIBLE OF ADVERSARIAL TESTING

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ACCESS TO COUNSEL IN  
DELAWARE'S CRIMINAL COURTS



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AMENDMENT  
CENTER

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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.

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## ABOUT THE SIXTH AMENDMENT CENTER

The Sixth Amendment Center (6AC) is a Massachusetts-based nonprofit 501(c)3 organization that seeks to ensure that no person faces potential time in jail without first having the aid of a lawyer with the time, ability and resources to present an effective defense, as required under the United States Constitution. We do so by measuring public defense systems against established standards of justice. When shortcomings are identified, we help states and counties make their courts fair again in ways that promote public safety and fiscal responsibility.

### JON MOSHER

**Deputy Director, Sixth Amendment Center.** Now in his tenth year working on right to counsel issues, Jon Mosher is an expert on the standards for the delivery of indigent defense services, and the methods utilized by state and local government in providing for those services. He is the primary author of the report and project manager of the study.

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# PREFACE

“Liberty and Independence,” the motto on the Great Seal of the State of Delaware, is a fitting maxim for the first state to ratify the United States Constitution. The Constitution, after all, distinguished a new form of government that would no longer follow the dictates of foreign governments of the 18th century that placed power in the hands of a few at the expense of the many. The fledgling country, and its new Constitution, instead insisted upon protection of personal liberty and independence from the potential tyranny of big government. All people, the Constitution argues, should be free to express unpopular opinions or choose one’s own religion or to take up arms to protect one’s home and family without fear of retaliation from the state.

Central to the core idea of “liberty and independence” is the notion that no one’s freedom can ever be taken away in a criminal procedure without the process being fair. A jury made up of everyday citizens, protections against self-incrimination, and the right to have a lawyer advocating on one’s behalf are all American ideas of justice enshrined in the Bill of Rights.

In 1963, the fear of state tyranny over the liberty and independence of the individual led the United States Supreme Court to unanimously declare it to be an “obvious truth”<sup>i</sup> that the indigent accused cannot receive a fair trial unless a lawyer is provided at no cost. “The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries,” the Court announced in *Gideon v. Wainwright*, “but it is in ours.”<sup>ii</sup> Accordingly, *Gideon* made it incumbent upon states through the Fourteenth Amendment to provide Sixth Amendment right to counsel services to any person of limited means facing a possible loss of liberty and independence in the criminal justice system.

Delaware created a statewide, state-funded public defender system in the immediate wake of the *Gideon* ruling. (It was the second state to do so.) The Supreme Court’s watershed decision was handed down on March 18, 1963. Delaware’s House Bill 177, “An Act to Create a Public Defender and Making a Supplemental Appropriation,” was introduced a mere 15 days later. The bill was signed into law in January 1964, with the Office of the Public Defender opening its doors that summer.

And, if the story ended there, Delaware would be rightly celebrated as a model protector of “liberty and independence” nationwide. But even while creating the new public

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<sup>i</sup> *Gideon v. Wainwright*, 372 U.S. 355 (1963).

<sup>ii</sup> *Ibid.*

defender system, the rest of the state's method for providing right to counsel services was not given the same level of care and attention.

Delaware was one of 35 states that appointed counsel in felony matters even before the Supreme Court required such appointments with the *Gideon* decision. By creating the Office of the Public Defender in 1964, the state replaced the then-primary method for providing public counsel to accused persons – private attorneys, paid hourly or under contract, and managed by the judiciary – with a new method, and one better suited to meeting the state's needs going forward.

But of course not all people who stood accused before Delaware's courts in 1964 received the benefit of the state's Office of the Public Defender. For example, a public defender system cannot ethically represent people charged as co-defendants in the same crime because the interests of one of the accused directly conflict with the interests of the other. Just think of one co-defendant pointing a finger at the other as being more culpable of the crime they are both accused of having committed. And so, from 1964 onward, Delaware has maintained two distinct indigent defense systems. One being the primary public defender system and the other being the judge-administered system, now preserved to provide for conflict representation.

As readers will learn, national standards of justice bar judges from the oversight and administration of indigent defense services because of the bias – either real or perceived – that they are controlling defense attorneys' actions and otherwise not remaining neutral between the battle of two adversaries. Nationally, attorneys working in such non-independent systems often take into account what they must do to please a judge in order to get their next assignment rather than advocating solely on behalf of their clients, as required under the Sixth Amendment. So, from the outset, without a comparable level of concern for their needs as for clients of the primary system, conflict defendants were, in effect, second-class citizens of the criminal justice system in Delaware.

In January 2011, Chief Justice Myron Steele sought to end Delaware's undue judicial interference in the state's conflict indigent defense system by transferring responsibility for the administration of the conflict panel to the Office of the Public Defender (OPD).

Unfortunately, OPD was in no position to take on the new responsibilities. Back in 1964, a single public defender office could handle the bulk of Delaware's indigent defense cases with little difficulty. However, the onslaught of cases that began with the extension of *Gideon* to misdemeanor cases and beyond, and exploded with the "tough on crime" movement of the 1980s and 1990s, required indigent defense systems to adapt accordingly. Delaware's public defender system, for the most part, did not. As this report makes clear, OPD started triaging justice incrementally, over time focusing on the *Gideon* mandate by putting most of its resources into felony representation while neglecting less serious cases. In short, in 2011 an unorganized conflict system was grafted onto an overloaded primary system, without enough care given to needed ethical screens between the two parts of the indigent defense system.

These systemic deficiencies (among others) prevent both the primary and contract systems from providing an effective, independent, and zealous advocate to each and every person to whom the Sixth Amendment right to counsel attaches. As such, it is our opinion that Delaware triages justice to the detriment of a large number of defendants that come before its criminal and family courts.

The report that follows contains the basis for this finding. It also provides a number of recommendations based upon foundational standards of justice and lessons learned from other states that merit serious debate. Although the number of systemic deficiencies identified are many, we believe the candor and seriousness with which criminal justice stakeholders and state policymakers approached this study bodes well that the state can overcome the problems we have documented.

# ACKNOWLEDGEMENTS

The Sixth Amendment Center (6AC) acknowledges the support and assistance provided to us by criminal justice system stakeholders across the state. The access to information and data provided throughout the study was exceeded only by the level of candor demonstrated by all during our discussions of the provision of right to counsel services in Delaware. But certain individuals merit additional thanks.

Stephanie Volturo, Chief Counsel of the Office of Conflicts Counsel, made herself and her office available to us throughout the course of this project. The timely access to information, whether provided through statistical reports or lengthy conversations by phone or in-person, was essential to the project's success.

The Office of the Public Defender's supervising attorneys in Kent County and Sussex County, Bill Deely and Dean Johnson respectively, provided us with unfettered access to their staff members while also making themselves available for impromptu meetings as needed during each of our site visits. Without their assistance and input, we would not have been able to appreciate the subtle variations and uniquenesses of Delaware's smaller counties.

And, of course, none of this happens without the leadership of State Public Defender Brendan O'Neill, through whom much of the assistance and support received from stakeholders outside of the indigent defense function was garnered.

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## ACCESS TO COUNSEL IN DELAWARE'S CRIMINAL COURTS

FEBRUARY 2014



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"Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor, as well as in felony, cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.

In addition, the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result. . . .

Wherever the visitor looks at the system, he finds great numbers of defendants being processed by harassed and overworked officials. Police have more cases than they can investigate. Prosecutors walk into courtrooms to try simple cases as they take their initial looks at the files. Defense lawyers appear having had no more than time for hasty conversations with their clients. Judges face long calendars with the certain knowledge that their calendars tomorrow and the next day will be, if anything, longer, and so there is no choice but to dispose of the cases.

Suddenly it becomes clear that, for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous."

*Argersinger v. Hamlin*, 407 U.S. 25 (1972).

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# INTRODUCTION

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.”<sup>1</sup> Under our Constitution, therefore, government has a “fundamental and essential” obligation — a promise — to provide meaningful access to zealous and effective representation in felony criminal matters to anyone who cannot afford the cost on his own. In the intervening 50 years, the Supreme Court extended that promise to any criminal case in which a defendant may potentially lose their liberty, including: direct appeals,<sup>2</sup> juvenile delinquency proceedings,<sup>3</sup> misdemeanors,<sup>4</sup> misdemeanors with suspended sentences,<sup>5</sup> and appeals challenging a sentence as a result of a guilty plea.<sup>6</sup>

But what may be “obvious” to jurists within the hallowed halls of the Supreme Court may not be so clear to state policymakers. Faced with competing financial priorities, state government officials often assume that, so long as every defendant is provided with someone with a bar card, then the Sixth Amendment right to counsel is satisfied. That is not true. Just as you would not go to a dermatologist for heart surgery – despite both doctors being licensed practitioners – a real estate or divorce lawyer cannot handle a complex felony case competently.

Through a long series of cases, the Court has said that the right to counsel is the right to an “effective” attorney.<sup>7</sup> This right to effective representation is a right held by all defendants. The Constitution does not differentiate between the first person accused of wrongdoing and his co-defendant. The state has an obligation therefore to ensure that every adult or child accused of a crime or delinquent act that carries potential time in jail, and who cannot afford counsel on his own accord, has access to the same minimum level of effective representation to which they are all constitutionally entitled.

But how is “effective” representation defined? The U.S. Supreme Court made clear what it means by effective assistance of counsel with a pair of cases that were both heard on

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<sup>1</sup> *Gideon v. Wainwright*, 372 U.S. 355 (1963).

<sup>2</sup> *Douglas v. California*, 372 U.S. 353 (1963).

<sup>3</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>4</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>5</sup> *Alabama v. Shelton*, 505 U.S. 654 (2002).

<sup>6</sup> *Halbert v. Michigan*, 545 U.S. 605 (2005).

<sup>7</sup> See, specifically, *McMann v. Richardson*, 397 U.S. 759 (1970), in which the U.S. Supreme Court held that “the right to counsel is the right to the *effective* assistance of counsel.” (Emphasis added.)

the same day and later announced on the same day: *United States v. Cronin*<sup>8</sup> and *Strickland v. Washington*.<sup>9</sup>

In *Cronin*, the Court determined that “if counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” The Court said there are two ways to determine whether a system could fail to meaningfully test the prosecutor’s case. First, if counsel is not present at all, it is impossible to have effective representation. Secondly, they pointed to the systemic factors that led to the wrongful conviction of the so-called “Scottsboro Boys.”<sup>10</sup> The Scottsboro Boys’ attorney was hand-selected by the judge presiding over their case, was unfamiliar with criminal law, conducted no independent investigation, and had no time to properly prepare the case. When such systemic deficiencies occur in the present day, the attorneys in that indigent defense system should be presumptively determined to be ineffective.

What *Cronin* determines is that our adversarial system is based upon the simple premise that lawyers appointed to represent the accused cannot be effective unless they work within indigent defense systems that have systemic safeguards. And the Court demonstrates that those safeguards must ensure, among other things, that an appointed lawyer is independent from undue political or judicial interference, is provided with training and is supervised. Only when such systemic issues do not come into play can a two-pronged test be applied to determine whether an individual lawyer is “ineffective,” as set out in *Strickland v. Washington*.<sup>11</sup>

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<sup>8</sup> *United States v. Cronin*, 466 U.S. 648 (1984).

<sup>9</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>10</sup> *Powell v. Alabama*, 287 U.S. 45 (1932). The so-called “Scottsboro Boys” were a group of nine African-American young men arrested for the rape of two white women in 1930’s Alabama. They were tried and sentenced to death within a week of the alleged offense. *Powell* established the right to counsel in death eligible cases in which the defendant is poor, undereducated, developmentally delayed, or otherwise incompetent to direct his own defense.

<sup>11</sup> Under *Strickland*, a defendant must show on appeal that his attorney’s representation fell outside of what object standards of reasonableness require, and that the outcome of the case would have been different had the attorney performed up to standards. Several recent U.S. Supreme Court decisions have clarified the *Strickland* standard. For example, there are a number of potential collateral consequences of a criminal conviction, including loss of student loans, public housing or even deportation. In 2010, the Court determined that “[i]t is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the ‘mercies of incompetent counsel.’ To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation.” (*Padilla v. Kentucky*, 30 U.S. 1473 (2010).) And in 2012, the Court made clear with two more cases – *Missouri v. Frye*, 566 U.S. \_\_\_\_ (2012) and *Lafler v. Cooper*, 566 U.S. \_\_\_\_ (2012) – that the right to effective assistance of counsel applies to the plea-bargaining process and not just to trials.

## NATIONAL RIGHT TO COUNSEL SYSTEMIC STANDARDS

To help policymakers who may not be lawyers, or otherwise who are not versed in constitutional law, the American Bar Association (ABA) promulgated the *Ten Principles of a Public Defense Delivery System (Ten Principles)*, which represents 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.”<sup>12</sup>

The use of standards in criminal justice is not a new concept for government officials. After all, for many decades policymakers have ordered minimum safety standards in all proposals to build a brand new courthouse, a new state highway overpass, or even to redo the electrical wiring in one’s home. Our Constitution demands that the taking of an individual’s liberty is given the same level of concern and care. Our nation’s top law enforcement officer, Attorney General Eric Holder, called the ABA *Ten Principles* the “basic building blocks of a well-functioning public defense system.”<sup>13</sup>

These ten simple tenets are a shorthand method by which to gauge whether or not the right to counsel delivery model is set up to allow attorneys to meet the constitutional threshold for adequacy. The *Ten Principles* seek to answer simple questions like: “Are attorneys appointed early enough in the process to have sufficient time to conduct necessary investigations?” or “Is the defense service provider free to zealously defend the client without concern for retaliation (i.e. termination of employment, reduction in pay, reduction in personnel, or reduction in defense resources)?” As such, the *Principles* are not a set of best practices to be aspired to, but rather, the minimum floor of effective representation. Indeed, as this report explains, in many instances the ABA *Ten Principles* are the parameters to allow for the “adversarial process” demanded by the U.S. Supreme Court in *Cronic*.

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<sup>12</sup> American Bar Association. *Ten Principles of a Public Defense Delivery System*. February 2002. Available at: [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf).

<sup>13</sup> United States Attorney General Eric Holder. *Address to the Department of Justice’s National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000–2010*. Washington, D.C., February 18, 2010. Available at: <http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html>.

## THE CURRENT STUDY

The “First State,” as Delaware is commonly known, was the first state after the 1963 *Gideon* decision to create a statewide, state-funded public defender system.<sup>14</sup> Delaware’s status in this regard should be celebrated, as a number of recent studies<sup>15</sup> conclude that public defenders – or government employees providing right to counsel services as staff attorneys of a standing agency – are “more efficient,” “provide more services,” “meet with their clients more promptly,” “engage in more assertive use of pretrial motions” and are more “cost-effective” than a system that appoints and pays private attorneys to assist the indigent accused on an hourly or contractual basis.

But Delaware’s public defender system cannot represent all defendants. There are certain circumstances that create conflicts of interest between one defendant seeking representation and another defendant the agency already has as its client, for example, that ethically prevent the Office of the Public Defender from accepting that next client’s case. The state, therefore, must provide a secondary system – a “conflict” system – to represent any such client the primary public defender system cannot.

Attorneys from the private bar provide conflict representation in Delaware. Historically, the private attorney conflict program was administered by the court and managed by a variety of court personnel, including judges. But judges are supposed to be neutral arbiters between the prosecution and defense, not hand-selecting the attorney representing one side, directing one side’s substantive decisions, or determining if and how much one side can spend on experts or investigation. For this reason, all national standards prohibit judges from exerting control over indigent defense representation – including the ABA *Ten Principles*.

In November 2011, Chief Justice Myron Steele sought to meet the dictates of the ABA *Ten Principles* and, following the lead of other states that have created a single government agency to oversee primary and conflict representation,<sup>16</sup> transferred the adminis-

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<sup>14</sup> Prior to March 18, 1963, only one state – Rhode Island – had created an Office of the Public Defender to represent all defendants in all courts throughout the state. The state of Connecticut was an early proponent of the public defender model and, by 1921, had established public defender offices in every county in the state. (See, Connecticut General Statutes 1917, Sec. 6476, as amended 1930.) But Rhode Island was first to create a single, centralized state public defender agency in 1941. (See, Laws of R.I. (1941) Ch. 1007; amended 1942, Ch. 1133.) Delaware joined Rhode Island immediately following the *Gideon* ruling.

<sup>15</sup> See for example: (1) Public Policy Research Institute at Texas A&M University. *Wichita County Public Defender Office: An Evaluation of Case Processing, Client Outcomes and Costs*. October 2012. Available at: <http://www.txcourts.gov/tidc/pdf/WichitaPDOStudy101212.pdf>; (2) Council of State Government’s Justice Center. *Harris County Public Defender Preliminary Report on Operations and Outcomes*. October 2012. Available at: <http://www.courts.state.tx.us/tidc/pdf/HCPDOPrelimReport101912.pdf>; and (3) United States Department of Justice, Bureau of Justice Statistics. *Who’s Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Favorable Case Outcomes*. 2011. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1876474](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876474).

<sup>16</sup> The states that have a single government agency overseeing both primary and conflict representation

## OUR METHODOLOGY

Staff of the Sixth Amendment Center (6AC) visited each of Delaware's three counties multiple times, from February through July 2013. The 6AC's site visit methodology can be divided into three component parts:

**Data collection.** Basic information about how a jurisdiction provides right to counsel services is often available in a variety of documents, from statistical information to policies and procedures. The 6AC collects and studies all relevant hard copy or electronic information available. We then place this information in its proper context through interviews and court observations, described below.

**Interviews.** The 6AC believes that no aspect of the criminal justice system operates in a vacuum. Rather, the policy decisions of one component necessarily impact another. For example, a local decision to add more police positions will likely lead to more arrests and prosecutions thereby increasing the number of cases entering the criminal courts each year. Because of this, the 6AC sought interviews with a broad cross-section of stakeholder groups during each site visit. In addition to speaking with members of the conflict defender panel, we spoke with private criminal defense lawyers, public defenders, and prosecutors. We interviewed members of the judiciary across the spectrum of the state courts, from the Supreme Court to the Justice of the Peace Court. In addition, we spoke to members of the General Assembly and the Executive Branch.

**Court observations.** Understanding how the right to counsel works in any jurisdiction requires an understanding of three critical processes: the process the individual defendant experiences as his or her case flows from arrest through to disposition; the process the attorney(s) experiences as he or she goes about representing that individual at the various stages of the defendant's case; and the process the case file(s) follows as information about the defendant passes back and forth, from the primary defender system to the conflict system. Much of this understanding can be garnered only by sitting and observing trial court proceedings in all levels of court, and in all types of cases.

Each of our site visits focused on gathering a better understanding of how the right to counsel is currently provided, and how public defense services operate in the context of the larger criminal justice system of each county – as well as statewide.

tration of conflict representation in Delaware from the state courts to the Office of the Public Defender (OPD).

The OPD then created the Office of Conflicts Counsel (OCC) with a separate physical location in an attempt to prevent breaches in confidential attorney-client information between the primary and conflict systems. However, OCC essentially kept the same model for providing conflict services with private bar attorneys working under contract for an annual flat rate (though certain conditions trigger counsel to earn an hourly rate above and beyond the annual flat fee).

Recognizing that the transfer of conflict representation from the court to OPD presented a number of challenges and opportunities, OCC sought resources that would help them identify how the system could become more efficient and effective. In April of 2012, the United States Department of Justice, Bureau of Justice Assistance (BJA) released a grant application entitled *Answering Gideon's Call*. The goal of the BJA grant program is to “enhance a state or local jurisdiction’s ability to provide quality representation to indigent defendants; promote innovation; and promote strategies that incorporate the ABA *Ten Principles*.”<sup>17</sup> OCC sought the BJA grant to “identify gaps to be addressed by the ABA *Ten Principles*,” and to develop “a program design that outlines strategies ... to overcome the problem(s).” BJA named OCC one of four grant recipients in September 2012.

In November 2012, OCC contracted with the Sixth Amendment Center (6AC) to measure the OCC against the *Ten Principles*. The 6AC is a Massachusetts non-profit, tax-exempt organization seeking to ensure that no person faces the prospect of time in jail without first having the aid of a lawyer with the time, ability and resources to present an effective defense, as required under the United States Constitution.

However, as the OCC is now a subsidiary of the Office of the Public Defender, there is significant overlap between one function and the other. If, for example, the Office of the Public Defender experiences undue political influence, then so too does the OCC as its subsidiary. Therefore, the 6AC necessarily had to study the entire right to counsel system in Delaware to understand how the responsibilities and authorities for ensuring access to counsel are now divided between the primary and conflict systems.<sup>18</sup>

Despite the dedication of the attorneys and staff throughout the indigent defense system, both the primary and conflict systems fail the vast majority of the ABA *Ten Principles*. In fact, the indigent defense system in Delaware only meets one of the ABA *Ten*

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are: Connecticut, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, New Mexico, North Carolina, Oregon, Vermont, Virginia, and Wisconsin.

<sup>17</sup> United States Department of Justice, Office of Justice Programs, Bureau of Justice Assistance. OMB No. 1121-0329. *Answering Gideon's Call: Improving Indigent Defense Delivery Systems FY2012 Competitive Grant Announcement*. BJA-2012-3286. April 4, 2012. Available at: <https://www.bja.gov/Funding/12ImpIndigentDefenseSol.pdf>.

<sup>18</sup> Because of the necessity of studying the conflict system in the context of the overall public defender system, we were not able to study in depth OPD's capital and appellate units.

# ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

## 1 **The public defense function, including the selection, funding, and payment of defense counsel, is independent.**

The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.

## 2 **Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.**

The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services. The appointment process should never be *ad hoc*, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction. Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.

## 3 **Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.**

Counsel should be furnished upon arrest, detention, or request, and usually within 24 hours thereafter.

## 4 **Defense counsel is provided sufficient time and a confidential space within which to meet with the client.**

Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.

## 5 **Defense counsel's workload is controlled to permit the rendering of quality representation.**

Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.

**6 Defense counsel's ability, training, and experience match the complexity of the case.** Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.

**7 The same attorney continuously represents the client until completion of the case.** Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing. The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

**8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.** There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense. Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services. No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should

participate as an equal partner in improving the justice system. This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

**9 Defense counsel is provided with and required to attend continuing legal education.** Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.

**10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.** The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.

\* American Bar Association. *Ten Principles of a Public Defense Delivery System*. Approved by the ABA House of Delegates, February 2002. Reprinted with authorization from the American Bar Association, Standing Committee on Legal Aid and Indigent Defendants.

*Principles* in its entirety: *Principle 2*.<sup>19</sup> In the pages that follow, the 6AC explains exactly how and why either the primary or conflict system, or most likely both, fail the rest of the ABA *Principles* (either in whole or in part).

In general, able attorneys are working in a structure that prevents them from meeting constitutional adequacy. That is, 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*). We discuss further how 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).

To be clear, lawyers within the indigent defense system are oftentimes adversarial, as required. However, the level of advocacy exhibited is premised on systemic impediments that 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 consequences of doing so. The system is defective; the lawyers within the system are not.

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<sup>19</sup> The black letter of *Principle 2* states: “Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.” As noted above, this describes Delaware’s public defense delivery system perfectly. Moreover, the commentary for *Principle 2* goes on to state that the “private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services.” The OCC uses both assigned counsel attorneys paid hourly and contract defenders. The commentary goes on to note that the “appointment process should never be ad hoc but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.” The OCC assigned counsel system is not *ad hoc* and the OCC is overseen by an attorney who clearly is very familiar with the requirements of practice in Delaware. Finally, *Principle 2* demands that “[s]ince the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.” Delaware’s indigent defense system is 100% state funded.

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 failing 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 public defender – or more likely the chief executive of the larger “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.

For reasons that will be explained in the report, it is the 6AC’s experience nationally that executives of non-independent indigent defense systems have more difficulty securing appropriate resources. This results in the system taking on more cases than the system can ethically handle, delaying work on cases, entering into flat fee contracts, and triaging the hours attorneys have available in favor of some clients, but to the detriment of others, thereby failing to meet the parameters of ethical representation owed to *all* clients. All of this occurs in Delaware.

We do not intend this general overview to be a critique of the current Chief Public Defender, Brendan O’Neill, who could not have been more helpful throughout the course of this study. Indeed, it is clear that he cares about his staff and clients, and by all accounts is a great courtroom mentor and advocate. However, there are systemic impediments built into the current system. These impediments are rooted in how indigent defense in Delaware evolved over the decades, resulting in undue political interference over the administration of the right to counsel throughout the state. The lack of independence is a systemic critique, not a personal one.

And though the relationship between the current chief defender and the current governor may not show any outward appearances of undue political interference, there are no systemic safeguards to ensure that either the next governor or the next chief defender will exhibit the same professionalism. Moreover, it is a simple fact that the system has not been able to advance over time or secure the resources necessary to provide adequate representation in all cases. A chief defender insulated by an independent commission most assuredly would have been able to harness the power of that commission either to help secure appropriate resources or to help obtain a means of refusing cases without fear of losing his or her job. In short, the 6AC believes that any chief public defender – the current chief included – will have an inherent conflict between what he needs to do to ensure effective representation for all clients of the indigent defense system and what he needs to do to secure his next appointment from the governor.

# PART ONE

## EARLY APPOINTMENT OF COUNSEL

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In New Castle County, a Family Court commissioner called on a 12-year-old boy to stand. The boy was there for his arraignment. "Who's here with you today?" the commissioner asked.

"My mom," said the boy.

"Do you understand your rights?"

"Yes."

"Do you understand the charges against you?"

"Yes."

"How do you want to plead?"

The boy paused, and looked to his mother for direction. "Not guilty."

"Are you going to get representation?"

Again the boy looked to his mother, who shook her head. "No," said the child.

"And why don't you want to get an attorney?"

The boy once more looked to his mother, but his mother was silent. "I don't know," he said after a brief pause.

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# CHAPTER 1

## EARLY APPOINTMENT OF COUNSEL AND THE CRITICAL STAGES OF A CASE

In 1931, nine young men of color stood accused in Alabama of the capital crime of rape. Their trial made national headlines, and quickly they became known as the Scottsboro Boys.<sup>20</sup>

Their trial judge appointed a real estate lawyer from Chattanooga, who was not licensed in Alabama and was admittedly unfamiliar with the state's rules of criminal procedure. A retired local attorney who had not practiced in years was also appointed to assist in the representation of all nine co-defendants. Having thus been assigned counsel, the trials proceeded immediately that same day. Over the course of the next three days, four separate all-white juries, trying the defendants in groups of two or three at a time, found all nine of the Scottsboro Boys guilty as charged, and all but one was sentenced to death. The youngest – only 13 years old – was instead sentenced to life in prison.

In *Powell v. Alabama*,<sup>21</sup> the U.S. Supreme Court found that the Scottsboro Boys had been denied their right to a fair day in court, because “during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.”<sup>22</sup>

So what does this really mean? Was the Supreme Court saying that “the most critical period” of a criminal case is the period from arraignment until the beginning of trial? Could they really mean that the events leading up to the trial are in many ways more important than conducting the actual trial itself? To a large extent, yes, and we will explain why.

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<sup>20</sup> Our account of the Scottsboro Boys' saga is based on and condensed from accounts provided in: the U.S. Supreme Court's opinion in *Powell v. Alabama*, 287 U.S. 45 (1932); William Beaney, *The Right to Counsel in American Courts* (U of Mich, 1955), at 151-157; and Douglas O. Linder, *The Trials of "The Scottsboro Boys"* (1999), available at: [http://law2.umkc.edu/faculty/projects/FTrials/scottsboro/SB\\_acct.html](http://law2.umkc.edu/faculty/projects/FTrials/scottsboro/SB_acct.html).

<sup>21</sup> 287 U.S. 45 (1932).

<sup>22</sup> As discussed in the Introduction to this report, the U.S. Supreme Court specifically points to the *Powell* case to define systemic deficiencies that make “the adversary process itself presumptively unreliable.” (*United States v. Cronin*, 466 U.S. 648 (1984).)

## "DUE PROCESS" AND THE "CRITICAL STAGES" OF A CASE

No government can take away an individual's liberty if the process leading up to that individual's conviction was not fair. This is called "due process." Our adversarial system of justice is founded upon that right to due process of law, because the system is also premised on the notion that the government's law enforcement officers are human and that they sometimes make mistakes.

Without a doubt, the men and women responsible for keeping our communities safe do so with remarkable effectiveness day in and day out. But if they were entirely infallible in their duties, then what would be the point of empanelling a jury of our peers to review the evidence in order to determine guilt and innocence? If errorless law enforcement existed, then every crime would be solved with no clue left uncovered, and of all potential suspects only the right person would be arrested and charged with committing the crime. And we could skip the trial phase entirely and jump straight to sentencing, knowing that the bad guy was caught and justice was served. But of course, detectives might miss an important clue, an eyewitness might mistakenly identify the wrong person as the perpetrator, or an analyst at the forensics lab might return faulty data. Simply put, it is impossible for law enforcement to get it 100 percent right, 100 percent of the time.

This is why our adversarial system of justice exists in the first place. The government presents the evidence it has collected and then the accused person is granted the opportunity both to challenge the validity of that evidence and also to present his own side of the story. (See side bar on our adversarial system of criminal justice, next page.)

During the course of a criminal prosecution, however, a defendant is confronted with a number of court proceedings in which he has to make certain choices. Those choices might result in the individual forfeiting one or even several of his constitutional rights. By pleading guilty to the charges against him, for example, the defendant automatically gives up his Sixth Amendment right to a jury trial and the right to cross-examine his accusers. The moments in which the defendant has to make these choices are called the "critical stages" in a case, and by their "critical" nature the Supreme Court has determined through dozens of cases heard over the decades since *Powell v. Alabama* that, during those stages, access to legal advice is essential.

Although the Court has never purported to have capped the list of events that might potentially fall into this category, events that are definitely critical stages are:

- custodial interrogations both before and after institution of prosecution;<sup>23</sup>

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<sup>23</sup> *Massiah v. United States*, 377 U.S. 201 (1964); *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966); *Brewer v. Williams*, 430 U.S. 387, 399 (1977).

## OUR ADVERSARIAL MODEL OF CRIMINAL JUSTICE

The U.S. Supreme Court held in *Gideon v. Wainwright* that “reason and reflection, require us to recognize that, in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” But what is this adversary system of justice?

Our system of justice is rooted in the fabric of our nation. The laws of the American Colonial governments were largely based on English common law.<sup>i</sup> But the procedures of our criminal courts were uniquely American, even then.<sup>ii</sup> Even in the early-18th Century, within a generation of that group of troublemakers who decided to dump a bunch of tea into the Boston harbor, the judge was the central figure in English criminal procedure. Defendants were barred from having lawyers to assist them in their defense. But the prosecution did not fare much better. In England, there was not a person we would recognize today as “the prosecutor.” Instead, the victim of a crime or his relatives and family would be permitted to hire a lawyer to act as prosecutor, but few could afford the cost. As a result, the judge dominated the proceedings.

These were the last vestiges in England of what we would call the inquisitorial model

of criminal justice. Still in use in France and elsewhere in Europe today, the inquisitorial model sets about finding the “truth” in what happened, and does so with a judge in charge of all proceedings. The judge calls the witnesses for both the victim and the defendant, and questions them directly. Lawyers – if they are involved at all – generally plays a limited role. The judge acts as the chief investigator, and oversees the collecting of evidence, determining what is reliable and what is unreliable. And the presumption of innocence – this idea that we take for granted in this country, that everyone is innocent until proven guilty – does not exist in the inquisitorial system. Instead, because the judge makes a final verdict based on the evidence that he himself has collected, there is a presumption of guilt inherent in the trial proceedings. In the inquisitorial system of justice, therefore, the burden of proof rests with the defendant accused of a crime to establish his own innocence.<sup>iii</sup>

In England, however, criminal procedure had begun to shift away from the inquisitorial model by the 1730s. It all started with the introduction of the defense attorney into the courtroom. “Before defense counsel participated, guilt was rarely challenged, and trials were largely *de facto* sentencing proceed-

<sup>i</sup> See William Beaney, *The Right to Counsel in America* (Univ. of Mich., 1955), at page 8.

<sup>ii</sup> For this section, we rely heavily on an excellent paper by Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England* (July 2009), as published in *Widener Law Review*. Available at: <http://widenerlawreview.org/files/2009/06/01-jonakait-final-323-356.pdf>.

<sup>iii</sup> In addition to Jonakait’s paper, see also the following resources: [http://broomerslaw12.weebly.com/uploads/6/2/8/1/6281119/the\\_adversarial\\_and\\_inquisitorial\\_trial\\_system1.pdf](http://broomerslaw12.weebly.com/uploads/6/2/8/1/6281119/the_adversarial_and_inquisitorial_trial_system1.pdf); and <http://mercantilelaws.blogspot.com/2012/07/difference-between-adversarial-and.html>; and [http://www.lawcom.govt.nz/sites/default/files/adversarial\\_and\\_inquisitorial\\_systems\\_2.pdf](http://www.lawcom.govt.nz/sites/default/files/adversarial_and_inquisitorial_systems_2.pdf).

ings.<sup>iv</sup> With defense lawyers increasingly involved, criminal trials started to become actual *trials*. Procedural rules started to be written down and codified. Evidence, including hearsay, could no longer be introduced without restraint. And the presumption of guilt became increasingly contested. This was the birth of the adversarial system that we would recognize in our own country today.

But in England, without *full* access to legal assistance, the shift in criminal procedure from the inquisitive to adversarial model was a lengthy evolution. (Lawyers remained prohibited in English felony trials until 1836.) The colonies, on the other hand, were at the cutting edge of the law. With the guarantee of counsel rooted in the charters of most colonial governments, American justice had begun shifting to the adversarial system long before.<sup>v</sup>

Because the European people that arrived on the shores of America were, in many instances, those who had been subject to religious persecution in European courts, the presumption of guilt was never going to work here. The Enlightenment was in bloom and people had begun questioning the tyranny of the crown, so the colonial settlers were perhaps predisposed to take a more adversarial approach to criminal justice. The people of the new American colonies were suspicious of concentrated power in the hands of a few. An individual's right to liberty was self-evident, and there needed to be a high threshold to allow a court to take away the liberty that the Creator had endowed to each and every individual. The new colonies were not going to set up justice systems that would railroad defendants simply because the accused was ignorant of the law.

As an example of the degree to which the New World Americans were committed to the right to counsel, the following preamble accompanied the right to counsel law passed on March 11, 1660 in the colony of Rhode Island and Providence Plantations:

"Whereas it doth appeare that any person . . . may on good grounds, or through mallice or envie be indicted and accused for matters criminal, wherein the person is so [accused] may be innocent, and yett, may not be accomplished with soe much wisdom and knowledge of the law to plead his own innocencie, &c. Be it therefore inacted . . . that it shall be accounted and owned from hence-forth the lawful privilege of any man that is indicted, to procure an attorney to plead any point of law that make for clearing of his innocencie."<sup>vi</sup>

The adversarial justice system is based on the simple notion that the truth is best made clear through the back and forth debate of opposing perspectives. In fact, this idea of competition soon became the basis of American capitalism as well. When the North American colonies revolted from the crown, the right to counsel was quickly enshrined in all but one of the original 13 state constitutions.<sup>vii</sup> And so, our adversarial system of justice was not something we borrowed from elsewhere – it is part of the fabric of our republic, part of what makes us different.

This is what the U.S. Supreme Court was referring to when it famously wrote, in 1963's *Gideon v. Wainwright*: "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." Defense attorneys did not exist in most countries when America was founded, and our forefathers saw this as fundamentally unfair. A criminal justice system without effective defense attorneys yields no justice at all.

<sup>iv</sup> Jonakait, note ii above, at 325.

<sup>v</sup> Beaney, at 8-26.

<sup>vi</sup> II *Rhode Island Colonial Records* 1664-77 (Bartlett, 1857), p. 239. [As noted in Beaney, at 17-18.]

<sup>vii</sup> Virginia was the lone state without the right to counsel in its constitution. See Beaney, pp. 14-26.

- preliminary hearings prior to institution of prosecution where “potential substantial prejudice to defendant[s]’ rights inheres in the . . . confrontation;”<sup>24</sup>
- lineups and show-ups at or after initiation of prosecution;<sup>25</sup>
- during plea negotiations and at the entry of a guilty plea;<sup>26</sup>
- arraignments;<sup>27</sup>
- during the pre-trial period between arraignment until the beginning of trial;<sup>28</sup>
- trials;<sup>29</sup>
- during sentencing;<sup>30</sup>
- direct appeals as of right;<sup>31</sup>
- probation revocation proceedings to some extent;<sup>32</sup> and
- parole revocation proceedings to some extent.<sup>33</sup>

And by virtue of being “critical stages,” none of these proceedings can occur unless counsel is present. Why? Because as the Supreme Court has noted, “the right to be represented by counsel is by far the most pervasive for it affects [an accused person’s] ability to assert any other rights he may have.”<sup>34</sup>

## WHEN MUST THIS RIGHT BE MADE AVAILABLE?

When the ABA *Ten Principles* were promulgated in 2002, *Principle 3* insisted upon attorneys being appointed “as soon as feasible” after arrest, and usually within 24 hours. U.S. Supreme Court case law, however, has defined a more rigid standard for the timely appointment of counsel than even that called for by *Principle 3*.

In *Rothgery v. Gillespie County*, the Supreme Court set out the parameters of when counsel must be appointed, noting that the right to counsel attaches when “formal judicial proceedings have begun.”<sup>35</sup> The Court carefully explained, however, that the question of whether the right to counsel has attached is distinct from the question of

<sup>24</sup> *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970).

<sup>25</sup> *United States v. Wade*, 388 U.S. 218, 236-38 (1967); *Moore v. Illinois*, 434 U.S. 220, 231 (1977); and *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972).

<sup>26</sup> *Lafler v. Cooper*, 566 U.S. \_\_\_, No. 10-209 at 3-4 (March 21, 2012); *Padilla v. Kentucky*, 559 U.S. \_\_\_, No. 08-651 at 16 (March 31, 2010); and *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).

<sup>27</sup> *Hamilton v. Alabama*, 368 U.S. 52 (1961).

<sup>28</sup> *Brewer v. Williams*, 430 U.S. 387, 398-399 (1977); and *Powell v. Alabama*, 387 U.S. 45, 57 (1932).

<sup>29</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 37, 40 (1972); *Alabama v. Shelton*, 535 U.S. 654, 662 (2002); and *In re Gault*, 387 U.S. 1, 36-37 (1967).

<sup>30</sup> *Lafler v. Cooper*, 566 U.S. \_\_\_, No. 10-209 at 6 (March 21, 2012); *Glover v. United States*, 531 U.S. 198, 203-204 (2001); *Mempa v. Rhay*, 389 U.S. 128 (1967); and *Wiggins v. Smith*, 539 U.S. 510, 538 (2003).

<sup>31</sup> *Douglas v. California*, 372 U.S. 353, 357 (1963); and *Halbert v. Michigan*, 545 U.S. 605, 621 (2005).

<sup>32</sup> *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

<sup>33</sup> *Ibid.*; cf. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (leaving open the question “whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent”).

<sup>34</sup> *United States v. Cronin*, 466 U.S. 648 (1984).

<sup>35</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, No. 07-440 at 19 (June 23, 2008).

**ABA Principle 3: Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.** Counsel should be furnished upon arrest, detention, or request, and usually within 24 hours thereafter.

whether a particular proceeding is a “critical stage” at which counsel must be present as a participant.<sup>36</sup>

“Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any ‘critical stage’ of the postattachment proceedings . . . .”<sup>37</sup> In other words, according to the Court, the Constitution does not necessarily require that defense counsel be present at the moment that the right to counsel attaches, but from that moment forward, no critical stage in a criminal case can occur unless the defendant is represented by counsel or has made an informed and intelligent waiver of counsel.

If the event that triggers attachment of counsel is not itself a critical stage, then that event can theoretically occur without counsel being appointed or being present; attachment of the right to counsel triggers the need to appoint counsel to represent the defendant at *future* critical stages. On the other hand, if the event that triggers attachment of counsel is itself a critical stage, then that event cannot occur unless the defendant is represented by counsel *during* the critical stage or has waived the right to counsel.<sup>38</sup>

The Supreme Court has never set out a specific formula for how or how quickly counsel should be appointed once the right to counsel has attached.<sup>39</sup> What *Rothgery* makes clear is that there is a moment when the right to counsel attaches, and “counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.”<sup>40</sup>

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> In theory at least, there can be an event that is a critical stage, during which counsel must be present, but that does not trigger the attachment of the right to counsel beyond the event itself.

<sup>39</sup> “We do not here purport to set out the scope of an individual’s post-attachment right to the presence of counsel. It is enough for present purposes to highlight that the enquiry into that right is a different one from the attachment analysis.” *Rothgery v. Gillespie County*, 554 U.S. 191, No. 07-440 at 19 n.15 (June 23, 2008).

<sup>40</sup> *Id.* at 19.

So, what does this mean for Delaware?

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.”<sup>41</sup> The event triggering the attachment of the right to counsel may be the custodial appearance of the defendant before a magistrate who informs him of the charges upon which he has been arrested and determines the conditions of his liberty, without regard to whether a prosecutor is aware of the arrest;<sup>42</sup> or it may be the institution of prosecution “whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,” without regard to whether the defendant is in jail or at liberty.<sup>43</sup>

In Delaware, therefore, the right to counsel attaches in criminal proceedings where nearly all criminal matters begin: the Justice of the Peace Court.

## JUSTICE OF THE PEACE COURT

In most cases involving potential jail time, the Justice of the Peace Court (“JP Court”) serves as committing magistrate on behalf of another court with statutory jurisdiction over the particular offense, meaning the JP Court initiates criminal proceedings against the defendant.

Any defendant who is taken into custody by law enforcement is brought immediately before a magistrate of the Justice of the Peace Court for the purpose of setting bail.<sup>44</sup> This usually occurs by videoconference (with the defendant appearing from the local police station or state corrections facility, and the magistrate in the courtroom), and almost always without the presence of either a prosecuting attorney or defender. Instead, the arresting officer, the warrant officer, or a corrections officer at the prison presents the state’s interest in determining bail.<sup>45</sup>

During the hearing, the Justice of the Peace Court magistrate is required to: “inform the defendant of the defendant’s right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances

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<sup>41</sup> *Rothgery v. Gillespie County*, 554 U.S. 191 (June 23, 2008). See also: *Brewer v. Williams*, 430 U.S. 387 (1977); and *Michigan v. Jackson*, 475 U.S. 625 (1986).

<sup>42</sup> *Ibid.*

<sup>43</sup> *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)); see also *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986).

<sup>44</sup> *Rules Governing Criminal Procedure for the Justice of the Peace Court of the State of Delaware*, Rule 5(a). See also, Hon. Patricia Griffin, Chief Magistrate, *Legal Memorandum No. 282* (January 21, 2005). Available at: <http://courts.delaware.gov/legal%20memoranda/download.aspx?ID=18258>. A Justice of the Peace Court magistrate estimated that incarcerated defendants are brought before a JP Court magistrate within two hours, on average.

<sup>45</sup> Interview with Chief Magistrate Alan Davis.

The bail hearing in Justice of the Peace Court is precisely the court proceeding the U.S. Supreme Court describes as triggering the right to counsel. No critical stage from that moment onward can occur without the presence of counsel and “counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.”

under which the defendant may secure pretrial release. . . . The Justice of the Peace shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules.”<sup>46</sup>

But, importantly, whenever the Justice of the Peace Court is serving as committing magistrate for another trial court, “the defendant shall not be called upon to plead”<sup>47</sup> during that hearing as he would if it were an arraignment.<sup>48</sup> Instead, with bail conditions now set, the case is then transferred to whichever court has jurisdiction, and the defendant’s next court appearance is set. The defendant either posts bond and is released, or he remains in the custody of the state pending trial. Either way, it makes little difference: the Justice of the Peace Court proceeding that had just occurred for that defendant is precisely the court proceeding described in *Rothgery* as the event triggering the right to counsel.

Not all defendants, however, are brought before the Justice of the Peace Court while already in the custody of the state. (See chart, next page.) Statutory offenses involving potential jail time are generally spread across two major sections of the Delaware Code: Title 11, criminal offenses; and Title 21, traffic offenses. Chief Magistrate Alan Davis estimated that, of those accused of felonies and misdemeanors under Title 11, more than 90% are arrested and brought immediately before a JP Court magistrate. Because arrests can occur at any time, day or night, the initial hearings before a JP Court magistrate following from these arrests can likewise pop up at any time, day or night, on any day of the week.

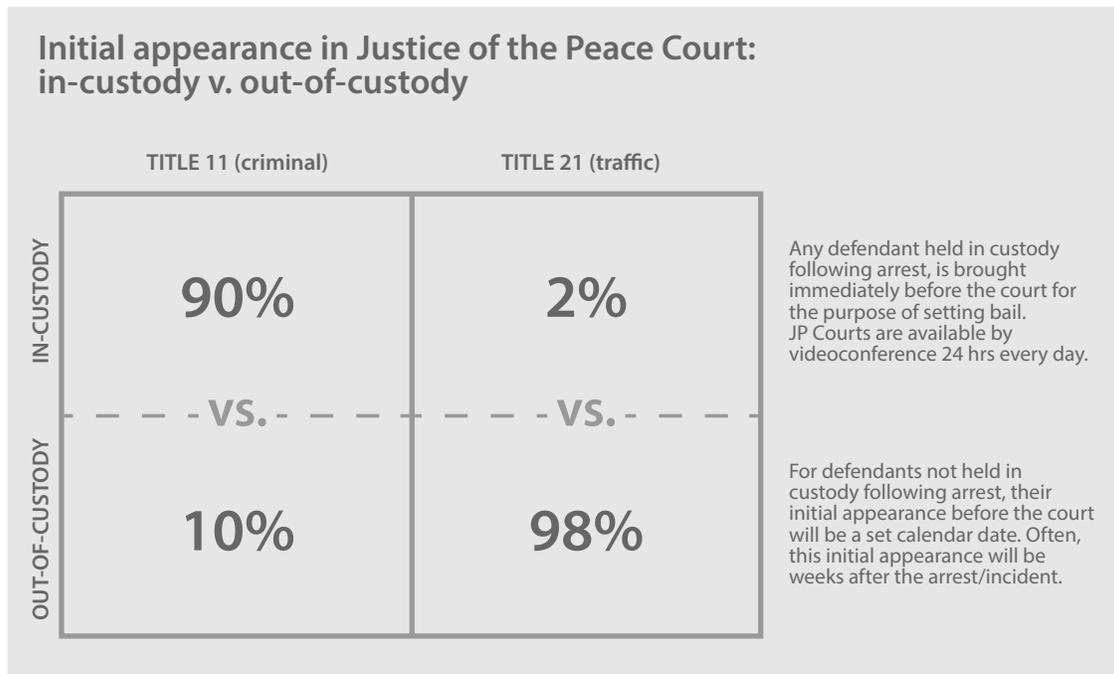
Individuals facing traffic-related charges under Title 21, however, are rarely held in state custody pending trial.<sup>49</sup> Instead, they are given a ticket or a citation with a notice to appear before the court at a later date. Be-

<sup>46</sup> *Rules Governing Criminal Procedure for the Justice of the Peace Court of the State of Delaware*, Rule 5(c).

<sup>47</sup> *Ibid.*

<sup>48</sup> *Rules Governing Criminal Procedure for the Justice of the Peace Court of the State of Delaware*, Rule 10(a).

<sup>49</sup> Interview with Chief Magistrate Alan Davis.



cause the overwhelming majority of people appearing out-of-custody are being charged under Title 21 rather than Title 11, all regularly scheduled calendars in JP Courts across the state are informally referred to as traffic calendars.

The Delaware General Assembly has given the Justice of the Peace Court broad authority to act as trial court for certain lesser misdemeanors and nearly all motor vehicle cases (excluding felonies).<sup>50</sup> In such cases, the defendant is given the opportunity to have his case transferred to the Court of Common Pleas, in which circumstance the Justice of the Peace Court reverts back to serving as committing magistrate. Recall once more that whenever the Justice of the Peace Court is serving as committing magistrate for another trial court, “the defendant shall not be called upon to plead.”<sup>51</sup> But if the defendant “waives” that right to have the case transferred to CCP for trial, then the initial appearance before the Justice of the Peace Court *becomes* his arraignment<sup>52</sup> – it becomes a “critical stage” of his case.<sup>53</sup> And, if the sentence available under statute involves potential incarceration for the accused, the proceeding cannot occur unless counsel is present.<sup>54</sup>

<sup>50</sup> This authority is established in Title 21, Sec. 703 of the Delaware Code. See also: <http://courts.delaware.gov/jpcourt/jurisdiction.stm>.

<sup>51</sup> *Rules Governing Criminal Procedure for the Justice of the Peace Court of the State of Delaware*, Rule 5(c).

<sup>52</sup> *Rules Governing Criminal Procedure for the Justice of the Peace Court of the State of Delaware*, Rule 10(a).

<sup>53</sup> *Hamilton v. Alabama*, 368 U.S. 52 (1961).

<sup>54</sup> *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).

Under Delaware law, a large portion of offenses listed in Title 21 carry potential jail sentences. The most serious traffic offenses carry the harshest punishments, as is the case in most states. A first offense of driving under the influence of either drugs or alcohol can result in up to 12 months in prison, along with \$500-\$1,500 in fines.<sup>55</sup> In addition to increased fines, a second offense carries a minimum sentence of two months behind bars, and so on for each repeat offense.<sup>56</sup>

But the General Assembly has attached potential jail sentences to a host of lesser traffic violations as well. Reckless driving<sup>57</sup> and aggressive driving<sup>58</sup> both carry ten days incarceration (or more) for the first offense. So does a second offense of operating a motor vehicle during an emergency<sup>59</sup> and parking in a spot reserved for handicapped persons.<sup>60</sup> Passing a stopped school bus is 30 days.<sup>61</sup> Bicycling on a highway under the influence<sup>62</sup> and making an illegal right-hand turn while at a red light<sup>63</sup> both carry ten days for a second offense.

The Sixth Amendment Center is mindful not to suggest that punishment by way of incarceration is not warranted in the offenses noted here – it is not our place to do so. It is the responsibility of each state's elected officials to determine for their own citizens the appropriate sanctions for violations of the state's laws. But in doing so, those same elected officials must be cognizant that the constitutional right to counsel attaches wherever the *potential* for incarceration exists. (See side bar on the right to counsel in cases with suspended sentences, page 27.)

During our trip to Kent County, we visited JP Court 7 in downtown Dover. Its dockets are scheduled by arresting agency. All traffic matters involving the state police are held on Wednesday afternoons. The Camden Police Department's slate of arrests is held weekly on Monday afternoons. We observed the Wyoming Police Department's calendar (the "Wyoming Call") one Thursday morning.

The calendar began at 8:30am, with defendants clearing security and entering a small waiting area inside the courthouse. Then, opposite the front entrance and beyond a row of a dozen or so chairs, they checked in at the clerk's window before taking a seat and waiting to be called upon. The chief of the Wyoming Police Department, meanwhile, was seated at a desk in a small room just off of the waiting area, next to the door to the

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<sup>55</sup> Title 21, Del. Code § 4177.

<sup>56</sup> *Ibid.*, at (d)(2), which states: "For a second offense occurring at any time within 10 years of a prior offense, be fined not less than \$750 nor more than \$2,500 and imprisoned not less than 60 days nor more than 18 months. The minimum sentence for a person sentenced under this paragraph may not be suspended."

<sup>57</sup> Title 21, Del. Code § 4175.

<sup>58</sup> Title 21, Del. Code § 4175A.

<sup>59</sup> Title 21, Del. Code § 4176D.

<sup>60</sup> Title 21, Del. Code § 4183.

<sup>61</sup> Title 21, Del. Code § 4166.

<sup>62</sup> Title 21, Del. Code § 4198J.

<sup>63</sup> Title 21, Del. Code § 4108(d).

courtroom. Outside his small office, a line of about five or ten defendants extended along the wall back toward the waiting area. No attorney was present to represent any of the defendants. There was no public defender available, as the public defender's office does not staff JP Court proceedings.

One-by-one the police chief called the defendants into his office to discuss each case and to offer a resolution to the charges by way of a plea. Periodically, as he worked through the cases, the chief brought a batch of plea agreements to the magistrate presiding over the JP Court calendar that day, before returning to his desk to continue meeting with defendants.

Having a set of plea agreements ready to go, the magistrate took the bench in the courtroom and the first group of five or six defendants was called in. The chief of police remained outside the courtroom, continuing to discuss plea deals with defendants.

"I've asked you here in a group," the magistrate began, "because you all have similar charges but the same rights. [The police chief] may have offered you a plea. You do not have to take that plea." The magistrate then called the cases one at a time. After reading the charges against the first defendant, the magistrate asked: "What do you want to do?"

"Plead guilty," the defendant responded.

"Okay. You understand you have the right to a trial?" The magistrate then explained to the defendant his options: he could exercise the right to trial in JP Court, in which case it would be held later that day before that same magistrate, or he could waive the right to have the case heard in JP Court in favor of transferring it to the Court of Common Pleas. "You also have a right to consult with a lawyer. If you'd like to be represented by the public defender's office, then we'll go ahead and enter a plea of not guilty, and transfer the case over to CCP. You still want to plead guilty?"

"Yes."

And so the magistrate proceeded to sentence the defendant pursuant to the plea agreement as set out by the Wyoming chief of police.

A similar process continued for each defendant's case called that morning. While some chose to have their cases transferred to the Court of Common Pleas, most pleaded guilty. No one was sentenced directly to prison. (That really does not matter, however, as discussed in a side bar on suspended sentences on page 27.) The magistrate presiding that day explained to us that, by and large, the plea deals being offered were cutting the defendants' fines dramatically. Most sentences involved modest periods of probation (perhaps six months at Level 2),<sup>64</sup> with conditions of probation including treatment

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<sup>64</sup> Delaware's sentencing guidelines call for five levels of state supervision. Levels 1 through 4 are probationary sentences with varying degrees of supervision and confinement. Level 5 is a sentence of incarceration at a state detention facility. See, Delaware Sentencing Accountability Commission, *Benchmark 2013*,

courses, fines and court costs. During a break in the proceedings, the magistrate explained that the course of events – with the chief of police discussing potential plea deals with unrepresented defendants, before bringing those defendants into the courtroom to enter the plea on the record – was relatively standard for his courtroom.

Importantly, however, the plea-bargaining process itself is a critical stage requiring access to counsel.<sup>65</sup> Beginning in 2007 as a pilot project before being expanded statewide, the state Department of Justice has formally authorized senior officers of state and local police agencies “to act as prosecutors in the Justice of the Peace Court” for the purpose of discussing the charges with defendants towards the goal of reaching a plea agreement at this appearance. Hailed as a cost-saving measure for defendants, this “police prosecution process” has spread to Justice of the Peace Courts across the state:

“Prior to the initiation of this process, traffic defendants hoping to obtain a plea bargain in their case typically had to appear in court twice: first at arraignment in the Justice of the Peace Court and then at trial in either the Justice of the Peace Court or Court of Common Pleas (if the defendant elected to transfer the case to that Court). Under the new procedure established by Chief Magistrate Alan G. Davis, in conjunction with police agencies, these cases can usually be resolved in one court appearance.”<sup>66</sup>

The pursuit of cost-savings for defendants, and likely for local police agencies as well, is laudable. But, the Constitution makes no due process exemption on the basis of cost.

We are reminded of the cautionary words of the U.S. Supreme Court in *Argersinger v. Hamlin*, which we used to open the Introduction to this report: “Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor, as well as in felony, cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.”<sup>67</sup> By presenting the lawyerless defendant with the opportunity to reach a plea agreement with the state, the criminal and traffic proceedings in Delaware’s JP Courts place concerns of costs and efficiency above the minimum requirements of the Constitution.

Defendants who choose not to enter a guilty plea in JP Court, and instead have their cases transferred to the Court of Common Pleas, will each face similarly subtle and not-so-subtle pressures there to enter into a plea agreement and forego the right to be advised by counsel.

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page 24, available at: [http://cjc.delaware.gov/SENTAC/Benchbook/sentac\\_2013%20\(6\)31413.pdf](http://cjc.delaware.gov/SENTAC/Benchbook/sentac_2013%20(6)31413.pdf).

<sup>65</sup> *Lafler v. Cooper*, 566 U.S. \_\_\_, No. 10-209 at 3-4 (March 21, 2012): “Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process.”

<sup>66</sup> *Delaware Docket, The Newsletter of the Delaware Judiciary* (Summer 2010). Available at: <http://courts.delaware.gov/aoc/Docket/Summer2010/process.stm>.

<sup>67</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

## THE RIGHT TO COUNSEL IN CASES INVOLVING SUSPENDED SENTENCES

Following the U.S. Supreme Court's *Argersinger* decision, extending the right to the assistance of public counsel to any case involving potential time in jail, many state and local governments presumed that they were under no obligation to appoint counsel until the point where the judge actually intended to affix a jail sentence. Instead, for the average misdemeanor defendant, there is no right to appointed counsel at the time of the original trial as the person would not actually be placed in jail. If the government intends to revoke the individual's probation, which would thereby activate the original jail sentence, then the government would appoint counsel to represent the defendant in the probation revocation hearing – the point when he risked actual jail time.

The Court returned to the matter in the 2002 case, *Alabama v. Shelton*, wherein it made clear that the right to counsel attaches to any case involving the potential for jail time. Sure, the statute might still allow for a maximum punishment of jail time, but unless counsel is afforded to the defendant at trial, then the judge is prohibited from ever imposing any amount of jail time – even as a “hollow threat.”

LaReed Shelton was accused in 1998 in Etoway County, Alabama of third degree assault. Under state statute, he faced a maximum of one year in jail plus a \$2,000 fine if he was convicted. The trial judge warned Mr. Shelton of the risk of appearing without an attorney, but did not offer him the assistance of a lawyer at state expense. Having no resources to hire one, Mr. Shelton was left

to proceed at trial without a lawyer and was found guilty. The judge sentenced him to 30 days in jail but immediately suspended the sentence, and instead placed Mr. Shelton on two-years probation under the condition that he pay a \$500 fine, \$25 in reparations, and \$516.69 in restitution. Mr. Shelton appealed his conviction and sentence on the grounds that he had not been afforded the right to counsel, arguing that a “suspended jail sentence” is – despite being “suspended” – still in fact a “jail sentence.”

Eventually, the question was brought before the U.S. Supreme Court in *Alabama v. Shelton*: if a defendant is not afforded the right to counsel during the trial, can the trial judge still apply a suspended jail sentence as a condition of probation, even if he knows he will never be able to activate it? Or is he prohibited from applying the suspended sentence at all?

The Supreme Court was not satisfied that these were the only options, and asked that both sides consider a third option. In fact, many states actually interpreted *Argersinger* to mean there was no prohibition against activating the jail sentence, even if counsel had not been afforded during the trial on the original charges, because the right to counsel actually attached in the hearing in which jail time was actually imposed. So, as long as we, the government, are giving you, the accused, the opportunity to be represented by an attorney during the probation revocation hearing, we are in compliance with the Constitution. With so many jurisdictions applying the right to counsel in exactly

this fashion, including municipal courts operating well off of the radar of state-level policymakers, it was critical that the Supreme Court address this scenario as well.

But, to the Court, this third option was a complete misreading of its earlier decisions: "A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense." So it is completely insufficient to wait until the probation revocation hearing to appoint a lawyer to defend the accused. There is no opportunity in a probation revocation hearing for that lawyer to go back to the trial phase to challenge the government's case on the original accusations – the same accusations

the defendant had already faced without the assistance of counsel. The Supreme Court made clear in *Shelton* that "[t]his is precisely what the Sixth Amendment . . . does not allow."

In conclusion, the Court held that "a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged."

# CHAPTER 2

## EARLY APPOINTMENT OF COUNSEL AND MISDEMEANOR ARRAIGNMENTS

Criminal proceedings in the Court of Common Pleas vary to some extent by county. But as the Court of Common Pleas' criminal rules apply uniformly across the state, it is generally true that any defendant charged with a misdemeanor appears for an arraignment in CCP having already had his initial appearance in JP Court.<sup>68</sup> If he does not resolve his case at the arraignment in CCP then his case is set for trial – either by jury or by non-jury (i.e., a trial where a judge determines guilt or innocence, also known as a bench trial) – at some later date. Those are likely the only two court appearances he will have on his matter in CCP. (See timeline, next page. There are exceptions to this generalization, including an intermediate “case review” calendar in certain cases and in certain counties, which we discuss more in later chapters.)

Because the arraignment is itself a critical stage, the proceeding cannot occur without the defendant first being afforded the right to have counsel appointed to assist him in his defense. This core Sixth Amendment requirement is consistently violated throughout Delaware, although the violation manifests itself in different ways among the three counties.

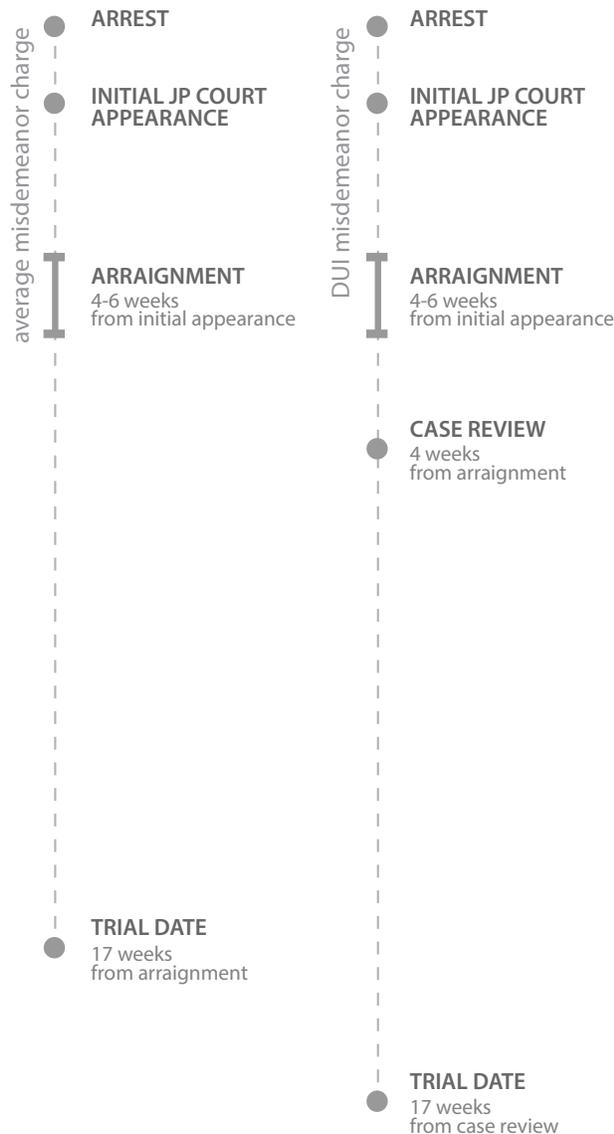
### SUSSEX COUNTY

The arraignment calendar in the Court of Common Pleas for Sussex County starts with all out-of-custody defendants told to sit and wait in the jury waiting room while the bailiffs finish preparing the two CCP courtrooms, which involves some rearranging of furniture. Two or three members of the Clerk of Court's staff set up in Courtroom A, while two prosecutors set up in Courtroom B. Once they are ready, the bailiffs bring everyone into Courtroom A, where they form a single line snaking around the room's back walls. One by one, the defendants are called up.

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<sup>68</sup> According to Chief Magistrate Alan Davis, the only case-types the Justice of the Peace Court transfer automatically to the Court of Pleas, without first having an initial hearing in JP Court, are misdemeanors involving drugs where the defendant is not incarcerated pending trial. (The General Assembly has not granted JP Court jurisdiction to try to resolve those case-types.) All other adult criminal proceedings commence in JP Court.

## Misdemeanor timeline: from arrest to trial



The clerk's staff finds the individual's name on the calendar. If they have already been interviewed by the public defender's office, they are told to wait in the jury box in Courtroom A to talk to one of the public defenders who will be in shortly. Otherwise, if they do not have counsel of their own, they are considered *pro se*, and are told to go over to Courtroom B, which is just across the hallway.

In Courtroom A, the two public defenders that staff CCP have use of the jury deliberation room, which is positioned just behind the jury box. The supervising public defender for Sussex County could not recall there being a misdemeanor jury trial in the past five or six years, so the jury deliberation room has been unofficially transformed into the public defender's conference room. Each attorney calls back to the conference room whichever client happens to be next in line. All the while the door to the conference room remains open, and with the jury box positioned just beyond, it is likely that the conversations being held within can be heard by those outside the room. But, as both defenders meet with clients at the same time, and at the same table, it seems unlikely those lawyers are greatly concerned about the confidentiality of attorney-client communications.

Meanwhile in Courtroom B, two deputy attorneys general (DAGs) have moved their chairs around the two counselor's tables so that they are sitting with their backs to the bench, enabling them to face the gallery where more and more unrepresented defendants file in and find places to sit among the benches in the back of the courtroom. Periodical-

ly, one of the clerk's staff members walks across the hallway from Courtroom A with a stack of case files (or, sometimes a prosecutor retrieves a batch of files himself), which the prosecutors split between them. With case files in hand, each DAG begins calling names one at a time.<sup>69</sup>

"Hi there. So, you're charged with driving without a valid license,"<sup>70</sup> the prosecutor might say as he flips through the file (which includes the police report and the defendant's criminal history) before making a plea offer to the defendant standing before him. "You've got a valid license with you today? Okay, good. I'll knock it down to a fine." Whether or not the charge carries potential time in jail, the plea form used is the same. The prosecutor fills out all of the relevant information on the form (case number, defendant's name, etc.) and then asks the defendant to review all of the trial rights they will be waiving by pleading guilty. "Answer questions 1 through 7 here, these questions at the bottom here, and then sign at the bottom here."

At the top of the plea form, the defendant must answer a series of questions by checking *yes* or *no*:

"Have you ever been a patient in a mental hospital?"

"Are you under the influence of alcohol or drugs?"

"Have you freely and voluntarily decided to plead guilty to the charges listed?"

"Have you consulted a lawyer about your decision to plead guilty?"

"If not, do you desire to do so?"

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<sup>69</sup> OPD informs us that the arraignment process in Sussex County's Court of Common Pleas is changing since we first documented our observations. According to OPD, a judge or commissioner now appears in Courtroom B to make a general announcement regarding the defendants' rights to appointed counsel, and other constitutional rights, prior to the prosecutor meeting with unrepresented defendants as otherwise described herein.

The 6AC notes, however, that no blanket statement delineating the rights of each and every defendant can ever satisfy the constitutional standard that valid waivers of those right must be *individually* knowing, voluntary, and intelligent. (See discussion on page 41.) By addressing defendants *en masse* a judge can never know if a particular defendant has, for example, sufficient proficiency in the English language to have understood the judge's announcement. The same can be said for any defendants that have mental health issues, are developmentally delayed, or struggling with addiction. And, although defendants being late to court should never be condoned, tardy defendants who may have missed some or all of the judge's announcement also should not forfeit the chance to be told their constitutional rights. The right to an attorney is an *individual* right; any attempt to get a group waiver of that right in the interest of speed will fail the constitutional standard.

<sup>70</sup> We used this hypothetical because of its commonness, and because a two-time offender of this statute faces potential time in jail. Driving without a valid license is governed by Title 21 § 2701 of the Delaware Code, which states in part: "(a) No person shall drive a motor vehicle on a public street or highway of this State without first having been licensed under this chapter . . . (b) No person shall drive a motor vehicle on a public street or highway of this State after serving a period of suspension, revocation or license denial, without first having obtained a valid license through proper reinstatement procedures as prescribed by this title. . . . (e) Whoever violates subsection (a) or (b) of this section shall for the first offense be fined not less than \$50 nor more than \$200. For each subsequent like offense, the person shall be fined not less than \$100 nor more than \$500 or imprisoned for a term not to exceed 6 months, or both."

“If you have a lawyer, are you satisfied with your lawyer’s representation of you and that your lawyer has fully advised you of your rights and of the result of your guilty plea?”

Questions 1-7, likewise, are a series of *yes/no* questions:

“Do you UNDERSTAND that because you are pleading guilty you will not have a trial and you therefore waive (give up) your constitutional right:

- (1) to be presumed innocent until the State can prove each and every part of the charge(s) against you beyond a reasonable doubt;
- (2) to a speedy and public trial;
- (3) to trial by jury;
- (4) to hear and question the witnesses against you;
- (5) to present evidence in your defense;
- (6) to testify or not testify yourself; and,
- (7) to appeal to a higher court?”

And at the bottom, the defendant is asked:

“Do you UNDERSTAND that all jail sentences must, by law, be consecutive (one after the other) and cannot be concurrent?

Are you on probation or parole?

Do you understand that a guilty plea may constitute a violation of probation?

Has anyone promised you what your sentence will be?

Has anyone threatened you or forced you to plead guilty?

Is your plea the result of a plea agreement with the State?

Do you agree to be sentenced by the Commissioner if necessary?”

The prosecutor counter-signs the triplicate carbon-copy plea form, gives the defendant one of the copies and instructs him or her to wait across the hallway back in Courtroom A. Once the prosecutors have gone through all of the plea offers with all of the *pro se* defendants, they join everyone else in Courtroom A where the commissioner takes the bench, and the arraignment calendar formally begins.

The arraignments are done at a bristling pace. The public defenders enter not-guilty pleas on behalf of their dozen or so clients in minutes and are dismissed for the day. The prosecutors then guide the commissioner through the rest of docket, beginning first with those defendants who require the assistance of an interpreter. We watched as four Spanish-speaking defendants in a row pleaded guilty to driving without a valid license.

“Do you admit you are guilty of driving without a valid license?” the commissioner asked one.

“Yes,” the defendant replied through the interpreter.

“I accept your plea. Two hundred and fifty dollars. How much time do you need to pay?”

And that was it. Each of the next three was called forth to the podium, and the same exchange occurred. The commissioner made no mention of any trial rights. There was no colloquy of any sort to ensure that each non-English-speaking defendant understood the trial rights he was waiving by pleading guilty.

After the interpreter was dismissed for the day, this same sort of thing occurred again and again throughout the afternoon. Throughout, the commissioner was inconsistent with his colloquy. For some, he asked: “Are you okay to enter this plea without the advice of counsel?” But for many, the right to counsel was not mentioned.<sup>71</sup>

The right to counsel in misdemeanors and petty offenses involving potential jail time is established in *Argersinger v. Hamlin*.<sup>72</sup> There, the Supreme Court held that, “absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”

## KENT COUNTY

Arraignments for in-custody defendants in Kent County are handled on a separate calendar from arraignments for out-of-custody defendants. Although the public defender office’s policy in Kent County, as elsewhere in the state, is to automatically take as its client any defendant who remains in state custody following the initial appearance in JP Court, we observed that those who are in-custody do not have a public defender or conflict lawyer present to represent them at their arraignment in the Kent County Court of Common Pleas.

One in-custody defendant was charged with two counts of theft. “Do you want to plead not guilty,” the judge began, “or do you want to work out a deal with the prosecutor?”

“I’ll work out a deal.”

“You don’t have a lawyer, but you’re okay to do this on your own, right?”

“Yes.”

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<sup>71</sup> We have been told that this was a problem specific to this individual commissioner who has since left the bench. That begs the question: if the next commissioner shares the same views, what prevents that new commissioner from treating defendants in much the same manner where there is no defense counsel appointed to represent them?

<sup>72</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

“And if you don’t like what the prosecutor is offering, you don’t have to accept it and you can plead not guilty and talk to a public defender.”

With that the defendant sat down at the prosecutor’s table to discuss the charges. A minute or two later, the prosecutor addressed the judge: “Your Honor, the defendant is going to plead guilty.”

The judge then turned back to the defendant. While explaining all of the due process rights the defendant would be relinquishing by pleading guilty, it became apparent that the defendant had not understood any of this prior to talking to the prosecutor. However, the plea was accepted as valid, and the defendant was sentenced to one year at Level 5 incarceration, suspended in lieu of two years of probation, plus restitution and court costs.

Another defendant was arraigned on several counts, including driving with a suspended license, no insurance, an unregistered vehicle, shoplifting, and conspiracy in the 3rd degree. After asking the defendant if she would like to plead not guilty or to talk to the prosecutor, the judge advised her: “You’d be waiving your right to an attorney to talk to the prosecutor, but you can see if you want to work out a deal today. You want to do that?”

“Yeah,” the defendant replied. She eventually pleaded guilty to the shoplifting charge, with all other charges dropped, and was sentenced to one year at Level 5 incarceration, suspended in lieu of two years of Level 3 probation, and court costs.

The next defendant appeared before the judge on three counts of theft. “You already have the public defender’s office representing you on this charge,” the judge explained, “but as they’re not here, I’m going to go ahead and enter a plea of not guilty for you.”

“But wait,” the defendant interjected, “Am I going to get an offer today?”

“Well, you can talk to the prosecutor and hear what he’s offering. But you’d have to waive your right to have your lawyer with you.”

The defendant, despite looking distressed at having to proceed without counsel, opted to try to resolve his case on his own. He eventually rejected the plea offer – he disagreed with the prosecutor’s choice of treatment center – and pleaded not guilty instead.

Toward the end of the arraignment docket, a woman was brought up to the CCP courtroom from the lockup below. She was charged with 3rd degree assault, and had been sitting in jail for 19 days since her arrest. The judge noted on the record that the public defender’s office had entered an appearance already on her behalf. “I haven’t talked to anybody,” the defendant interjected.

As noted above, the public defender's office in Kent County, as with everywhere state-wide, automatically takes as its client any defendant who remains in the state's custody following his or her initial appearance before a Justice of the Peace Court magistrate. The usefulness of this policy is called into question, however, when the defendant is brought before the judge without counsel present. Further still, what use would that lawyer be if, as the defendant claimed, there had been no time to meet with the client in advance of proceedings in court?

Like each defendant who appeared in court earlier that morning, this particular defendant was directed to try to work out a deal with the prosecutor, or to go back downstairs to the court's lock-up facility to wait to talk to her lawyer. The defendant was visibly rattled, and chose in the end to talk with the prosecutor there in the courtroom. We could hear as the prosecutor spoke with the defendant in hushed tones. He began by explaining that he would offer one year of probation at Level 2, including anger management classes, in exchange for a guilty plea.

"I don't have an income," the defendant interrupted. "Is that going to cost me money?"

"I don't know," the prosecutor responded.

The defendant thought for a moment and then said, "I'll take it. Whatever, I'll work it out. I just want this nightmare over with." And then to the judge, who was still seated at the bench, she continued, "I didn't do this. I just want to get out of jail and see my son."

"I can't accept a guilty plea if you're still saying you didn't do it," the judge replied.

"I just want to get out of jail."

"We can discuss bail reduction if you want."

The defendant began weeping. "I'll just plead guilty and get this over with."

"Are you sure you want to do this without talking to your lawyer?" the judge asked.

"I'm really worried about being able to pay the cost of anger management classes."

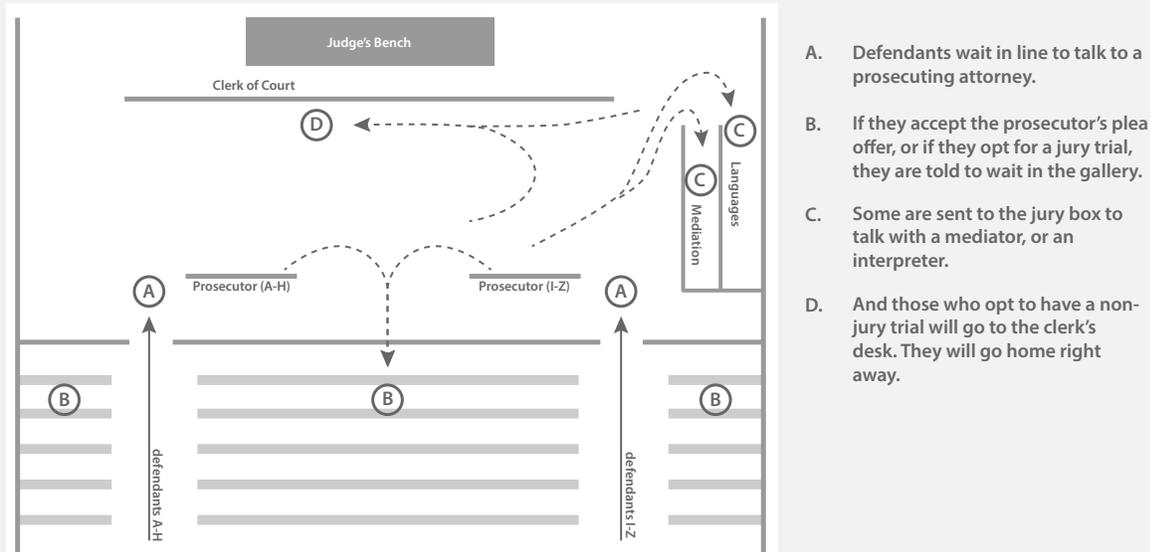
"My understanding is they have a sliding scale based on ability to pay."

"My ability is zero," the defendant replied.

"Well, I don't know what they're going to do, but that's the idea."

The defendant stood silent for a moment, fighting back more tears. "I'll just plead guilty, because I have to get out of jail."

## Kent County: CCP walk-in arraignments



“Okay,” said the judge. “I’ll sentence you to one year at Level 5, suspended for one year at Level 2 probation. You’re ordered to attend anger management classes. And you have to pay all court costs.”

Arraignments for walk-in defendants in Kent County’s Court of Common Pleas are conducted by a similar method to that of Sussex County. Courtroom 8 is one of the largest in Kent County’s recently constructed courthouse, and so it is most suited to handle the heavy volume of out-of-custody defendants appearing at each arraignment docket.

A defendant going to his court appearance climbs the stairs to the second floor of the courthouse to be greeted by a bailiff at a podium just outside of Courtroom 8 directing him to one of two lines of other out-of-custody defendants: last names A through H to the left; I through Z to the right. On an average day, these two lines total approximately 200 individuals.<sup>73</sup> As the lines make their way through the courtroom’s large outer doors, across a small anteroom, and between three sections of gallery benches (see graphic above), the first person a defendant encounters is one of two prosecutors sitting at counselor’s tables. The tables hold stacks of case files placed there by the clerk’s office. Inside, the files contain the affidavit of probable cause, the police report, and the defendant’s criminal and driving records. Calling up the defendants one-by-one, the two prosecutors work through their respective stacks of files.

<sup>73</sup> On the day of our court observation, there were 187 cases on the calendar. One deputy attorney general estimated that the average calendar has +/- 200 cases scheduled.

# COURT COSTS AND FEES

All defendants face costs and fees imposed either by court rule or statute. The more the defendant chooses to fight the charges against him, the higher the up-front costs he faces and the greater the potential financial penalty should he be convicted.

By not accepting a plea at the preliminary hearing, a felony defendant is automatically assessed \$100 by the Superior Court for the transfer of the case from the Court of Common Pleas. The security fund assessment likewise automatically increases from \$3 to

\$10 for each charge. And the return on the indictment by the grand jury adds another \$100. By not pleading guilty at the earliest possible moment, the defendant is taxed a minimum of \$210 for the privilege of defending himself in court. Even a defendant who pleads guilty of a single misdemeanor charge has to pay a minimum \$70 in court costs and fees (\$50 for a non-jury case in CCP, \$3 security fund, \$15 violent crime fund, \$1 videophone fee, and \$1 DELJIS fee).

## Court of Common Pleas

Non-jury case	\$50
Jury case	\$125
Capias	\$20
Appeals to Superior Court	\$50
Appeals from a lower court	\$125
Court Security Fund assessment	\$3 per charge

## Statutory Fees

Fund to Combat Violent Crimes penalty (Title 11 § 4101(h))*	\$15 per charge
Videophone Fund penalty (Title 11 § 4101(d))*	\$1
DELJIS Fund penalty (Title 11 § 4101(f))*	\$1

## Superior Court

Transfer from a lower court	\$100
Appeal from a lower court	\$100
Indictment by true bill	\$100
New information from AG's office	\$100
Court Security Fund assessment	\$10 per charge

## Family Court

Criminal case	\$55
Capias	\$25
Appeals to Superior Court	\$90
Court Security Fund assessment	\$10 per charge

## Conditional Penalties

\$100.00 additional penalty if victim is 62 years or older (Title 11 § 4101(i))\*

50% additional surcharge on fines collected for any Title 21 (traffic) violations (Title 11 § 4101(g)\*\*)

## Notes

\* Penalty assessments cannot be suspended as part of any sentence.

\*\* The judge can waive all or some of the surcharge.

The prosecutors see their role at the arraignment docket, to some degree, as helping to reduce some of the trial calendar's volume by clearing out as many cases as they can. "Our goal is to make a plea in every case," one DAG explained. The other described the general process for us.

The defendant is called up to discuss a potential plea, but in doing so the prosecutor is looking to flag certain cases for possible diversion programs. Defendants that are eligible for introduction to mental health court are sent over to the mental health court manager to see about approval for entry into the program.<sup>74</sup> Entry into the drug court followed the same process. If the deputy attorney general flags a case for potential mediation, such as shoplifting, the defendant is sent over to the jury box to speak to the mediation coordinator. If a defendant has language issues, then he or she is also sent to the jury box, but to speak to the interpreter. "For everyone else, we're trying to work out a plea. If they want to plead guilty, they can settle it today. If they plead not guilty, then they have to choose: jury trial or non-jury trial."

If the defendant opts for a non-jury trial, she proceeds to the clerk of court's desk at the foot of the judge's bench where she submits her not guilty plea form, fills out an application for a public defender, and receives from the clerk the date for the bench trial. Having done that, the defendant is then free to leave. If, however, the defendant wants to exercise her right to a jury trial, then she is instructed to have a seat in the gallery to wait for the commissioner to take the bench.<sup>75</sup> (Where defendants exercise the right to a trial by jury, the court in Kent County schedules the matter for a case review in advance of the trial date. Where there is no jury trial requested, the matter is scheduled directly for trial.)

The commissioner, in fact, is absent from the bench this entire time. So too are defense lawyers, either from the public defender's office or conflict counsel. This does not mean, however, that all defendants appear without already seeking public representation. "Some have talked to the public defender's office before the arraignment," one of the prosecutors told us. The prosecutors know this because the case file reads "represented by public defender's office" on the jacket. For each of those defendants, the public defender has already entered a "10(d)" written waiver of the arraignment, and the defendants were free to go home pending their next date in court.

Most defendants, though, do not have counsel at arraignment.

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<sup>74</sup> Potential entrants to mental health court program first must be approved by the court's manager.

<sup>75</sup> Allowing those who waive the right to a jury trial to enter a not-guilty plea by written form and then leave, while at the same time requiring that all others who wish to exercise the right to a jury trial to sit for hours to have their not-guilty plea heard in person by the commissioner, pressures many defendants to waive that right.

## WHAT IS A "CONFLICT" ANYWAY?

In 1932, the U.S. Supreme Court stated in *Powell v. Alabama*: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."<sup>i</sup> Non-lawyers, they argued, do not know the rules of evidence or the code of criminal procedure. If such individuals attempt to mount their defense alone, they risk being convicted based upon immaterial facts or conjecture. They cannot know whether the state's plea offer is good or bad. They are incapable of preparing for trial. They do not know how to cross-examine witnesses. That is why the Supreme Court held in *Powell* that an accused person "requires the guiding hand of counsel at every step in the proceedings against him."

But what if the defendant does not trust that his appointed attorney's "guiding hand" was in fact guiding him honestly? What if the accused person suspects that his lawyer's advice accounts for interests irrelevant – or worse, entirely contrary – to his own? What if, when his lawyer speaks, the defendant thinks: *is he really advocating on my behalf?* The accused, certainly, has a constitutional

right to be heard. But how can he when trust is lost?

Trust is central, therefore, to the proper functioning of our American system of justice, and is a principal tenet upon which the entire legal profession is founded.

At the annual meeting of its House of Delegates in July 2000, the American Bar Association adopted a resolution reaffirming the core values of the legal profession, which included the lawyer's duty to maintain "undivided loyalty" to the client and to "avoid conflicts of interest" with the client.<sup>ii</sup> The ABA codified and expanded upon these core values in its *Model Rules of Professional Conduct*. The *Model Rules* were first adopted by the ABA House of Delegates in 1983, and have since been adopted by the state bar associations in 49 of 50 states, plus the District of Columbia. The Delaware State Bar Association was one of the first to do so, in 1985. The *Delaware Lawyers' Rules of Professional Conduct* have since been modified and were approved as a rule of the state court on February 16, 2010. Failure to adhere to

<sup>i</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>ii</sup> "RESOLVED, That the American Bar Association adopts the following statement of principles: each jurisdiction is urged to revise its law governing lawyers to implement the following principles and preserve the core values of the legal profession:

1. It is in the public interest to preserve the core values of the legal profession, among which are:
  - a. the lawyer's duty of undivided loyalty to the client;
  - b. the lawyer's duty competently to exercise independent legal judgment for the benefit of the client;
  - c. the lawyer's duty to hold client confidences inviolate; and
  - d. the lawyer's duty of avoiding to avoid conflicts of interest with the client; and
  - e. the lawyer's duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice; and
  - f. The lawyer's duty to promote access to justice."

ABA House of Delegates, *Daily Journal, Annual Meeting 2000*, available at: <http://www.americanbar.org/groups/leadership/2000dailyjournal10.html>.

the court's *Rules of Professional Conduct* may result in disciplinary action against the attorney – even loss of license to practice law.<sup>iii</sup>

The *Rules of Professional Conduct* expressly prohibit all Delaware lawyers from representing a client whenever a conflict of interest exists,<sup>iv</sup> commenting further that “[l]oyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”<sup>v</sup> It is therefore imperative that the attorney avoids and eliminates any conflict of interest between himself and his client – whether real or merely perceived – or else the attorney must withdraw from representing the client with whom the conflict exists.

We have not yet discussed what a conflict looks like in real life – only that they are to be avoided. So, what is a conflict of interest, anyway? What does one look like in real terms?

Conflicts come in three basic categories:

*Another Client:* where the attorney already represents another individual whose interests are in opposition to the newly appointed defendant.

*Third Person:* where the attorney represents an individual in a different matter unrelated to the defendant’s case.

*Personal Interest:* where the attorney’s personal interests are in direct conflict with the client’s case-related interests.

The first two are fairly straightforward. Because an attorney cannot represent two or more clients whose interests might be at odds with each other, separate representation must be provided for all co-defendants in a particular criminal case. Similarly, under the “third-person” rule, an attorney cannot represent a defendant if the attorney already represents a client in a different case who happens to be the state’s main witness to the alleged offense. But, just as an individual attorney in both of these scenarios has to withdraw from representing the person with whom there is a conflict, so too does the entire law firm in which that attorney practices.<sup>vi</sup> Because of this, conflicts of interest involve systemic considerations as much as they do a single lawyer and his client.

By establishing that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him,” the U.S. Supreme Court made it an obligation of state governments to establish the structure (or method) through which such representation is provided.

This structure must provide constitutionally effective services for the clients of the primary and conflict systems alike.

<sup>iii</sup> See Delaware *Rules of Professional Conduct*, Preamble 14, page 2. Attorneys alleged to have violated the *Rules of Professional Conduct* are subject to a three-tiered review process before being disciplined or even sanctioned with loss of license to practice law. The petition of the Office of Disciplinary Counsel initiates the review process. That petition is then reviewed by a Preliminary Review Committee, and if found meritorious, it is then submitted for the review of the full Board of Professional Responsibility. More information is available at: <http://courts.delaware.gov/supreme/committees.stm>, and <http://courts.delaware.gov/odc>.

<sup>iv</sup> Delaware *Rules of Professional Conduct*, Rule 1.7. See also, Rules 1.8 and 1.9.

<sup>v</sup> Comment to Rule 1.7, *Rules of Professional Conduct*. Commentary available at: <http://courts.delaware.gov/rules/DLRPCwithCommentsFeb2010.pdf>.

<sup>vi</sup> *Rules of Professional Conduct*, Rule 1.9.

One prosecutor suggested, “It would be really helpful if the JP Court judges would advise the defendants of the right to counsel, and then have the defendants actually get counsel prior to the arraignment.” To this particular prosecuting attorney, the frustration of trying to move such a heavy volume of cases was compounded by the simple fact that most people appearing for arraignment “don’t know what’s going on.”

But every defendant who appears for arraignment – with the exception of those few charged with drug-related misdemeanor offenses<sup>76</sup> – has already appeared before a Justice of the Peace Court magistrate. Each was provided with notice of the right to the assistance of public counsel. Yet, despite being told to go to the public defender’s office between the date of the initial appearance in JP Court and their arraignment date, a significant majority do not.

Whatever the reasons for this disconnect, the defendant’s failure to affirmatively exercise his right to the assistance of public representation does not on its own amount to an affirmative and valid waiver of that right. A defendant certainly has an option to forego his right to counsel and to proceed without the assistance of a lawyer – to proceed *pro se*.<sup>77</sup> But our courts are supposed to protect the accused by ensuring that before he waives any of his due process rights – including the right to be represented by counsel – he fully understands what he is doing;<sup>78</sup> for any such waiver to be valid, it must be voluntary, knowing and intelligent.<sup>79</sup> In *Iowa v. Tovar*, the U.S. Supreme Court most recently established that, in order for a waiver of the right to counsel to be effective and valid, a judge must ensure that the defendant possesses the information necessary “to make an intelligent election” depending on “a range of case-specific factors, including the defendant’s education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding.”<sup>80</sup>

Does a defendant’s signature affixed to the bottom of a standardized court form amount to a “knowing, voluntary and intelligent” waiver of the right to counsel? Certainly not without even the most minimal examination by the judge into the defendant’s “education or sophistication.” Further still, such a waiver must be rendered *before* a critical stage may commence. Therefore, the entire arraignment process in Kent County, commencing with plea negotiations with the prosecutor and eventually ending with an uncounseled plea before the commissioner, is a violation of that due process right.

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<sup>76</sup> The JP Courts transfer directly to CCP any out-of-custody defendant’s matters that the legislature has not granted it the authority to attempt to resolve at JP Court. Misdemeanors involving drugs account for the majority of such cases. In those matters, the defendant’s initial appearance before a judicial officer will be in CCP.

<sup>77</sup> *Faretta v. California*, 422 U.S. 806 (1975).

<sup>78</sup> *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942).

<sup>79</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

<sup>80</sup> *Iowa v. Tovar*, 541 U.S. 77 (2004).

## NEW CASTLE COUNTY

In New Castle County, the conflict system is absent from misdemeanor arraignment proceedings in the Court of Common Pleas. There are now two conflict attorneys under contract with the Office of Conflicts Counsel to handle CCP duties in that county. (See overview of conflict contracts, page 52.) There used to be only one.<sup>81</sup> According to figures provided by the Office of the Public Defender, on average, those two attorneys together are appointed to 860 misdemeanor conflict cases per year – or 430 each. As we discuss further in Chapter 6, national workload standards require that attorneys handling misdemeanor cases should handle no more than 400 such cases in a given year. Prior to the addition of another attorney to split the CCP workload, each of these 860 misdemeanors were assigned to just one attorney, meaning he alone was handling the workload that could reasonably be expected of two full time attorneys. Some years, the attorney's conflict caseload even exceeded 1,000 misdemeanor cases. Now with two conflict attorneys, the workload demands are lessened significantly, but each attorney still operates in excess of accepted national maximums, working at 108% capacity. And this assumes their contracted work takes up 100% of their time. But that assumption, of course, is wrong. Each also has a private practice.

Neither attorney was comfortable giving us an estimate they felt accurately reflected the ratio of publicly appointed cases to privately retained cases each year. Most contract attorneys we spoke with across the state estimated a 60/40% appointed-to-retained split. Assuming the same 60:40 ratio for these CCP conflict attorneys, their combined public and private caseload equates to 717 misdemeanors each year for each attorney.<sup>82</sup> Each lawyer is doing the work of nearly two full time attorneys (or 179% national standards). Even assuming the ratio of private cases is high, and instead their 430 appointed misdemeanor cases represents 70% of each attorney's annual workload, yielding a far more conservative estimate of each attorney's total annual workload, that still means each conflict attorney is handling a total workload well in excess of nationally accepted norms (154%).<sup>83</sup>

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<sup>81</sup> Soon after the conflict system was transferred to the OPD, a second contract was added for CCP conflicts in New Castle County by rededicating internal OPD resources. That second contract started in FY 2012-13.

<sup>82</sup> If 430 misdemeanors is only 60% of total caseload, then 100% of total caseload must be 717.

<sup>83</sup> The 6AC provided an advance draft of this report to both OCC and OPD's leadership for comment. According to OCC, the conflict lawyers handling CCP cases in New Castle County estimated to them that their public cases are 80% of their total caseloads (with private cases being 20%). Either way, the point is the same. The conflict system has no mechanism to check the accuracy of that 80% estimate, as it makes no requirement of its contract attorneys to report private caseloads. And even if that 80% estimate is accurate, it still reflects attorneys trying to handle more cases than they ethically can. (If 430 cases reflects 80% of total caseload, then 100% of total must be 538 misdemeanors – 134% of national standards.)

## THE COLLOQUY AND THE WAIVER OF COUNSEL

Any defendant's waiver of the right to the assistance of counsel must be knowing, voluntary and intelligent. To guide the trial judge's colloquy in making a proper determination on the record of the effectiveness of the defendant's waiver, the Sixth Circuit Court of Appeals in *U.S. v. McDowell*, 814 F.2d 245 (1987) referenced the *Benchbook for United States District Judges*. Originally produced in 1969, the *Benchbook* was updated in March 2013, and now reads at 1.02(C):

"If the defendant does not want counsel:

The accused has a constitutional right to self-representation. Waiver of counsel must, however, be knowing and voluntary. This means that you [the judge] must make clear on the record that the defendant is fully aware of the hazards and disadvantages of self-representation.

If the defendant states that he or she wishes to represent himself or herself, you should ask questions similar to the following:

1. *Have you ever studied law?*
2. *Have you ever represented yourself in a criminal action?*
3. *Do you understand that you are charged with these crimes: [state the crimes with which the defendant is charged]?*
4. *Do you understand that if you are found guilty of the crime charged in Count I, the court must impose a special assessment of \$100 and could sentence you to as many as \_\_\_ years in prison, impose a term of supervised release that follows imprisonment, fine you as much as \$\_\_\_\_, and direct you to pay restitution? [Ask the defendant a similar question for each crime charged in the indictment or information.]*
5. *Do you understand that if you are found guilty of more than one of these crimes, this court can order that the sentences be served consecutively, that is, one after another?*
6. *Do you understand that there are advisory Sentencing Guidelines that may have an effect on your sentence if you are found guilty?*
7. *Do you understand that if you represent yourself, you are on your own? I cannot tell you or even advise you how you should try your case.*

8. *Are you familiar with the Federal Rules of Evidence?*  
9. *Do you understand that the rules of evidence govern what evidence may or may not be introduced at trial, that in representing yourself, you must abide by those very technical rules, and that they will not be relaxed for your benefit?*

10. *Are you familiar with the Federal Rules of Criminal Procedure?*

11. *Do you understand that those rules govern the way a criminal action is tried in federal court, that you are bound by those rules, and that they will not be relaxed for your benefit?*

[Then say to the defendant something to this effect:]

12. *I must advise you that in my opinion, a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself.*

13. *Now, in light of the penalty that you might suffer if you are found guilty, and in light of all of the difficulties of representing yourself, do you still desire to represent yourself and to give up your right to be represented by a lawyer?*

14. *Is your decision entirely voluntary?*

[If the answers to the two preceding questions are yes, say something to the following effect:]

15. *I find that the defendant has knowingly and voluntarily waived the right to counsel. I will therefore permit the defendant to represent himself [herself].*

It is probably advisable to appoint standby counsel, who can assist the defendant or can replace the defendant if the court determines during trial that the defendant can no longer be permitted to proceed pro se."

Although this suggested colloquy is made specific to the federal courts, it can easily be adapted to state courts and state criminal procedures.

No wonder the contract attorneys for New Castle County's Court of Common Pleas simply do not have time to appear for misdemeanor arraignments, even for cases to which they have already been assigned. "CCP is entirely calendar-driven," said the Office of Conflicts Counsel's chief attorney, Stephanie Volturo. There are multiple misdemeanor dockets occurring all at the same time, including arraignment calendars, jury trial calendars, and non-jury trial calendars – often in neighboring courtrooms on the same floor of the courthouse. With both attorneys already busy representing conflict clients in other courtrooms all day, Volturo explained, they are simply not available to appear at arraignments. "We'd need another contract attorney to be able to staff arraignments."

Importantly, however, many defendants appearing for arraignment already have conflict counsel assigned to represent them. Following the initial appearance at Justice of the Peace Court, where they are advised of the right to counsel, many misdemeanor defendants *do* in fact go to the public defender's office to see about getting public representation. Wherever the public defenders find a conflict, the Office of Conflicts Counsel is notified, one of the two conflict attorneys is assigned to the case, and the client is notified of the assignment. But if the defendant attempts to call the attorney about the case, the conflict lawyer tells the individual that he will not be there to assist at arraignment; the defendant should instead enter a plea of not guilty on his own and ask for a jury trial. Despite having been assigned a lawyer, those defendants join the ranks of many appearing each week for arraignment without representation.

The arraignment calendar starts with defendants checking in at the clerk's desk inside the courtroom. There, the clerk asks each defendant whether he has an attorney. As in both Sussex and Kent Counties, significant numbers of misdemeanor defendants in New Castle County appear for arraignment without representation – nearly all formerly appeared in Justice of the Peace Court some time prior to the arraignment date, but failed to go about getting public counsel in the interim.

In New Castle County, unrepresented defendants are given the opportunity to be interviewed by the public defender's office that morning. The bailiff instructs them to "go downstairs" to the public defender's office. Defendants, however, are not compelled to interview with the public defenders. Many opt to continue with their arraignments without representation. Based on this decision of the defendant – to get public counsel or to appear *pro se* – the clerks divide the day's docket into two stacks of case files: defendants already represented by the public defender's office or by private counsel (or those wishing to speak to the public defender); and those who have elected to proceed without representation.

The largest stack is the one placed on the prosecution's table, which represents all of the *pro se* defendants. A team of about ten prosecutors then goes through as many of the files as they can before the judge takes the bench a couple of hours later. Each deputy attorney general grabs one case file at a time, calls out the name of the defendant, and then meets with each individual to discuss potential plea options.

We watched as discussions between prosecutors and unrepresented defendants occurred all over the courtroom – some in the jury box, a couple at the prosecutor’s table, some up at the judge’s bench. We heard as one defendant explained to the prosecutor negotiating with him that he was the victim of a scam where another driver caused a crash and then his partner took the defendant’s car when he got out. The defendant was the one that called the police. His car was later discovered a mile or so away, but when the police questioned the defendant they realized that he did not have a valid license. The defendant explained to the prosecutor that he was on his way to school when the accident happened, and that he usually does not drive but had no alternative on the night in question. After agreeing to a plea deal, the prosecutor finally asked if the defendant understood that by pleading he was giving up his right to an attorney, his right to a trial, his right to question witnesses, and so on, noting: “We have to make sure you understand the system for the plea to be valid.”

Meanwhile on the counselor’s table belonging to the defense, the clerks left a far smaller stack of files for any defendants being represented by the public defender’s office, but for the first hour or so, there were no defense attorneys in the courtroom.

At one point, a defendant went up to the bailiff to ask about his public defender. Only then did the bailiff make a general announcement that the public defender was downstairs in lock-up and would return to the courtroom at some point. Anyone who had been screened,<sup>84</sup> the bailiff continued, needed to just sit quietly until the judge was on the bench at which point the public defender would come up. When the public defender returned upstairs to the courtroom, he worked through the files left for him on the counselor’s table containing all of his out-of-custody clients’ matters. Each public defender (there appeared to be two attorneys staffing the calendar) called a defendant’s name and led them out to the hallway where there are a number of benches outside the courtroom, or they met with their clients at the counselor’s table if no other attorney was already doing so.

Neither the prosecutors nor the defenders finished meeting with all of the defendants prior to the judge taking the bench two hours later to begin formal proceedings. In hushed whispers, throughout much of the morning, DAGs and defense attorneys continued calling individual defendants to follow them out to the hallway.

The judge began the arraignment calendar with a general colloquy about court costs and fees. “You have the right to either a bench trial or jury trial,” he continued. “If you want a bench trial, everything can be resolved later in the day.” Bench trials would be held in that same courtroom that afternoon; jury trials would need to be scheduled for a future date. The judge emphasized that he was in no way bound by the plea deals

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<sup>84</sup> See page 128 for a description of the public defender office’s process for screening potential clients for financial eligibility.

## COLLATERAL CONSEQUENCES OF CONVICTIONS

Each criminal conviction carries a sentence levied directly by the judge on the individual. In more serious cases, sentences can involve jail time. In less serious cases, the sentence may be some combination of a fine and probation. Those are the direct punishments prescribed by statute for the offenses involved.

But each individual who pleads guilty or is found guilty as the result of a trial may also face one or several “collateral consequences” as a result of that conviction in addition to the sentence imposed by the judge. For example, some state statutes and federal laws may preclude convicted persons from voting, serving on a jury, holding public office, getting a job, owning a firearm, or perhaps even being a parent or getting a divorce. Although it is outside the scope of this project to examine Delaware’s statutes<sup>i</sup> for such “restrictions” which “serve as punishments in addition to conviction and sentence imposed by the court,”<sup>ii</sup> it is *not* outside the

scope of the attorney’s obligation in advising his client, for example, whether or not a plea offer by the state is in fact a good deal for that client.

In *Padilla v. Kentucky*,<sup>iii</sup> the U.S. Supreme Court established that criminal defense lawyers have an obligation to warn clients of the potential immigration consequences of a guilty plea, and that failure to do so is grounds for reversal due to ineffective assistance of counsel under *Strickland v. Washington*. In making such a determination, the Court was careful to note that it has “never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance.’” In other words, *Padilla’s* holding was limited to immigration consequences solely because that was the question posed in the specific case. It has never determined advice of counsel regarding any other collateral consequences to be outside of that scope.

<sup>i</sup> The American Bar Association and the DOJ National Institute of Justice have joined together to create a “National Inventory of the Collateral Consequences of Conviction” to serve this purpose, but Delaware as of yet is not a participant in the project. The Inventory is available at: <http://www.abacollateralconsequences.org/CollateralConsequences/map.jsp>.

<sup>ii</sup> Olivares, Kathleen M.; Burton, Velmer S. Jr.; Cullen, Francis T., “The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later,” 60 Fed. Probation 10 (1996).

<sup>iii</sup> 559 U.S. 356 (2010).

agreed to by the prosecutor – he takes them under advisement, but it is his right to pass sentence.

With the general colloquy complete, a lone prosecutor ran proceedings from behind the podium in the center of the courtroom, calling the calendar by whichever case was ready to proceed. “Next on your calendar, Your Honor, we have number 16, [John Smith]” or “Next, Your Honor, number 32, [Jane Smith],” and hearing his or her name the defendant joined the prosecutor at the podium in the center of the courtroom. (Af-

ter completing negotiations with the stack of *pro se* defendants, the remaining prosecuting attorneys all left the courtroom.)

We watched as the deputy attorney general called to the podium a man in his mid-20s. “Your Honor, [defendant’s name] will be accepting a plea to No Valid License, 2nd Offense, for which the state is seeking the minimum fines. *Nolle pros* the remaining charges.” While we are unable to know what the remaining charges may have entailed,<sup>85</sup> we can be certain that a second offense of “driving without a license” carries a potential punishment of up to six months in jail.<sup>86</sup> The defendant did not have counsel.

“Is your name [John Smith]?” the judge asked.

“Yes.”

“Did you read, sign, and understand the guilty plea form?”

“Yes.”

“Do you have any questions?”

“No.”

“You will pay court costs and fines in the amount of one hundred and fifty dollars.”

The prosecutor moved on: “Next on your calendar, Your Honor, we have number . . . .”

For this defendant, that was his arraignment. The potential jail sentence allowable under statute was never mentioned, nor was the right to have counsel at public expense. There was no formal waiver of any trial rights, including the right to counsel, beyond the defendant’s signature on the Guilty Plea Form. But, as was the case in Sussex County and Kent County, the judge’s colloquy in New Castle County made no attempt to ascertain whether the defendant’s written waiver was intelligently made. Perhaps the Court of Common Pleas interprets the defendant’s choice not to go about interviewing for a public defender that morning, despite being asked if he would like to do so, as

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<sup>85</sup> While the judge has access to the full set of charges against each defendant, which are listed on his copy of the docket next to each defendant’s name, they are never stated aloud.

<sup>86</sup> See, Title 11 Del. Code, Sec. 2701, which states: “(a) No person shall drive a motor vehicle on a public street or highway of this State without first having been licensed under this chapter, unless expressly exempt from the licensing requirements”; “(b) No person shall drive a motor vehicle on a public street or highway of this State after serving a period of suspension, revocation or license denial, without first having obtained a valid license through proper reinstatement procedures as prescribed by this title”; and “(e) Whoever violates subsection (a) or (b) of this section shall for the first offense be fined not less than \$50 nor more than \$200. For each subsequent like offense, the person shall be fined not less than \$100 nor more than \$500 or imprisoned for a term not to exceed 6 months, or both.”

amounting to a waiver of that right. But as we have already shown above, that policy falls short of the due process requirement as established by U.S. Supreme Court case law.

This was the same basic process that was followed throughout.

A man in his mid-30s appeared in court without a lawyer to be arraigned on a misdemeanor charge of driving without a valid license, 3rd offense, as well as speeding and driving a vehicle without proper tags. Under Delaware law, his alleged offenses carried a potential sentence of up to one year in jail,<sup>87</sup> and perhaps more.<sup>88</sup> The deputy attorney general said the defendant was pleading guilty to driving without a valid license, 3rd offense. In exchange for his guilty plea the state was seeking fines in the amount of \$151 and was dropping the remaining charges against him.

“Did you read, sign, and understand the Guilty Plea Form?” the judge asked.

“Yes.”

“Do you have any questions?”

“No.”

“You will pay the costs and fines in the amount of \$151.”

But then a court clerk interjected: “He has a *capias*<sup>89</sup> out for failure to pay fines in another matter.” Hearing this, the judge turned his attention back to the defendant. “How much can you pay today?”

“I don’t know,” the defendant shrugged, clearly searching. He mentioned that he was not entirely certain how much he had in his bank account at that moment. The judge

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<sup>87</sup> See, Title 11 Del. Code, Sec. 2701, which states: “(a) No person shall drive a motor vehicle on a public street or highway of this State without first having been licensed under this chapter, unless expressly exempt from the licensing requirements”; “(b) No person shall drive a motor vehicle on a public street or highway of this State after serving a period of suspension, revocation or license denial, without first having obtained a valid license through proper reinstatement procedures as prescribed by this title”; and “(e) Whoever violates subsection (a) or (b) of this section shall for the first offense be fined not less than \$50 nor more than \$200. For each subsequent like offense, the person shall be fined not less than \$100 nor more than \$500 or imprisoned for a term not to exceed 6 months, or both.”

<sup>88</sup> See Title 21 Del. Code § 2115, which states in part: “No person shall: (1) Operate . . . any motor vehicle . . . which is not registered or which does not have attached thereto and displayed thereon the number plate or plates assigned thereto by the Department [of Motor Vehicles.]” See also Section 2116(a) of the same Chapter and Title, which reads in part: “Whoever violates this chapter shall, for the first offense, be fined not less than \$10 nor more than \$100 or be imprisoned not less than 30 days nor more than 90 days or both. For each subsequent like offense, the person shall be fined not less than \$50 nor more than \$200 or imprisoned not less than 90 days nor more than 6 months or both.”

<sup>89</sup> A “*capias*” in Delaware is the same as a “bench warrant” in other jurisdictions. That is, it is a warrant for a person to be arrested for a willful disregard for the authority of the court (e.g., missing a court date).

remained silent, flipping through some papers on his desk. “Ten dollars?” the defendant offered, finally.

“Let’s see if we can put this into perspective for you. You can either pay the court today or I can send you to prison. So, how much can you pay?”

“Ten dollars,” the defendant replied, confidently.

The judge was not satisfied. “One hundred and fifty one dollars. Either pay the full amount today, or go to prison. Please go with the bailiff.” The defendant was taken into custody and escorted through a door to the side of the courtroom. From there he was taken downstairs to the courthouse’s central lockup, to be held until he paid the court in full.

We watched as a man in his late-50s stood for his arraignment without a lawyer. He was charged with driving with a suspended license. This individual was already on probation from an earlier offense. He admitted to driving a car. He was trying to get to an appointment to check in with his probation officer. Ordinarily, his elderly mother had been driving him to his meetings, but she was ill. And there was no public transportation that could get him from his home to the location of his probation officer. So, he was stuck. On the one hand, he could do whatever it takes to make his probation appointment, even if that means driving himself while his license remained suspended. Or, on the other hand, without any other means of getting himself there, he could choose to miss his probation appointment and potentially get his probation revoked. Either way, he breaks the law.

The judge objected: “This court cannot condone breaking the law to prevent you from breaking the law.”

The man became upset at this and told the judge, “The last time my mother fell ill, I took the 90 days in jail rather than risking screwing up on my probation.”

“So are you looking for another 90 days?” the judge asked.

Terrified, the defendant said, “No. I am asking you to be lenient and just give me a fine so I can care for my mother.”

The judge turned to the court staff and asked how many fines the defendant currently had. He had quite a few. The court staff also alerted the judge to the fact that the defendant had been determined to be a habitually poor driver five years ago. The judge then became frustrated: “If I just give you a fine it goes to the back of the line with everything else and, frankly, you don’t look like you are going to live long enough to pay off your current fines.”

The judge gave the defendant another 90 days in jail.

Time and again during the course of this study, criminal justice policymakers shared the same outlook on the misdemeanor courts. They understand the academic reading of the Constitution and that the right to counsel attaches with the threat of jail time, but assert that no one is actually going to jail in these cases. However, therein lies the fallacy; people *are* going to jail.

Time and again during the course of this study, criminal justice policymakers shared the same outlook on the misdemeanor courts. They understand the academic reading of the Constitution and that the right to counsel attaches with the threat of jail time, but assert that no one is actually going to jail in these cases. However, therein lies the fallacy; people *are* going to jail.

Sometimes the jail time is levied for failure to pay a fine or court costs that was earlier assessed as part of a sentence or probation. But, jail time is jail time. How the defendant winds up there is an irrelevant distinction, just as is the length of time he is detained. “We are by no means convinced,” the U.S. Supreme Court held in *Argersinger v. Hamlin*, “that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.”<sup>90</sup>

Not everyone proceeds without representation during arraignment. What happens to people who *are* represented by appointed counsel?

During misdemeanor arraignment in New Castle County, the deputy attorney general called up to the podium a woman in her mid-30s and announced to the judge that she would be seeking a continuance. “What request would you like to make of the court?” the judge asked the defendant.

“Your Honor, I would like a continuance to be able to get from my grandmother proof that she had insurance and that I did have her insurance at the time,” she replied.

“You received this citation on April 13,” said the judge. More than 12 weeks had passed. “Why didn’t you get the information together before today?”

The public defender noticed the individual at the podium and began to rise from his desk. Seeing this, the judge turned his attention toward the public defender: “This is your client, Mr. [Attorney]?” the judge asked him.

<sup>90</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

“Yes, Your Honor. I guess my client is wishing to request a continuance to show that her grandmother had insurance at the time of the incident.”

“This is from 2009,” the judge said, as he flipped through his files. “Why didn’t your client get the information together before today?”

“I never talked to him before,” the defendant interjected.

“I’m asking Mr. [Attorney],” the judge continued.

The attorney shrugged. “You’ll have to ask her, Your Honor,” he responded.

“I’m asking you.”

“I don’t know,” said the public defender.

The woman had counsel representing her. Yet, in effect, she was left representing herself. Why? She had already been down to the public defender’s office to get screened to make sure she was financially eligible to receive public counsel, perhaps even that day. Why then was she left without an advocate during her arraignment – a “critical stage” in her case?

The answer is quite simple: her attorney did not have sufficient time to meet with the client, form the relationship or develop the bond of trust between attorney and client, hear the client’s side of the story, or anything that would have resulted in the lawyer effectively advocating for her at her hearing.

Part One of this report focuses on *Principle 3*’s call for the early appointment of counsel. By providing defendants with the opportunity to get screened for representation even at their arraignment date in CCP, the public defender’s office in New Castle County hints at meeting the demands of *Principle 3*. Recall, however, that the right to counsel is the right to the *effective* assistance of counsel.<sup>91</sup> What good is it then from the client’s perspective that her attorney is provided early in the process, if her attorney lacks sufficient time to assist her effectively?

“It is vain,” the Supreme Court has noted, “to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case.”<sup>92</sup>

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<sup>91</sup> *McMann v. Richardson*, 397 U.S. 759 (1970).

<sup>92</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

## A QUICK OVERVIEW OF THE CONFLICT SYSTEM IN EACH COUNTY

In Delaware, there is the conflict system as it operates from day to day across each of the courts and in each county, and then there are the contracts by which each of the attorneys in the conflict system is compensated. One has little to do with the other.

In general, each contract provides a flat annual fee for which attorneys accept a limitless number of case assignments each year. Apart from the specific exceptions to this general rule (explained below), in each county, the conflict attorneys' contracts allow them to earn an hourly rate above and beyond their annual flat fee only for specific types of case assignments. If appointed to represent a defendant on a certain serious, non-capital felony matter, such as Second Degree rape or racketeering, the contract lawyer can begin billing OCC at a rate of \$60 per hour, but only after spending 25 hours on the case (the first 25 hours being covered by the contract's flat rate), and up to a maximum of 334 such hours (or a total of \$20,000) per attorney per year. For capital cases, the attorney can begin billing at \$60 per hour from the moment she is appointed (rather than waiting until her 26th hour on the case to begin billing OCC), and there is no maximum number of hours she can accrue.

Beyond that, the conflict programs in each county are organized as follows:

### SUSSEX COUNTY

Of the three counties, Sussex County's conflict defense system is the easiest to

explain. Three private attorneys handle all of the Superior Court conflict cases. They each get paid the same amount (\$65,262 annually), and they generally split the total workload equally. One of the attorneys, however, serves an additional function from the others. This attorney accepts all new contract cases as they are declared by the Office of the Public Defender, and then divides the incoming caseload among himself and his fellow conflict attorneys. The terms of his contract do not mention this at all, nor is he paid any extra for serving in this capacity. Likewise, the terms of the other two attorneys' contracts make no reference of there being a lead attorney, or of what their obligations to him might be. It is just the way things are done there. Lastly, while their actual appointed caseload is limited to Superior Court alone, their contracts make no mention of such a limitation.

A lone private attorney has an annual contract with OCC to provide representation in both the Family Court and the Court of Common Pleas. The contract stipulates that OCC will pay for work in both courts in equal amounts each year: \$32,631 for Family Court and \$32,631 for CCP. In theory then, her workload ought to split relatively equally between the two courts. But she has an additional obligation in CCP to represent conflict defendants in preliminary hearings, which she does in rotation with the three Superior Court attorneys. Each attorney is on duty every fourth week. No mention of this obligation appears in her contract, nor does it appear in any of the contracts for the three Superior Court conflict attorneys.

## NEW CASTLE COUNTY

In New Castle County, there are 13 contract attorneys who take conflict appointments in Superior Court. They pick up cases during preliminary hearings in the Court of Common Pleas, which they staff through a rotation of four duty weeks per attorney each year. Then they follow their cases as they progress up to trial in Superior Court. The requirement to commence representation on Superior Court cases at preliminary hearings is not expressed in the Superior Court attorneys' contracts, nor is there detail on how the duty-week rotation is to be administered. Beyond their duty weeks, these attorneys can expect to be assigned to cases directly by the OCC. Often these are cases that OPD has identified as conflicts after the preliminary hearing (as discovery comes in).

In addition to those 13, another two attorneys handle all misdemeanor conflicts in the Court of Common Pleas. Although they may get assigned cases prior to arraignment, they have no expectation to staff arraignment calendars on behalf of their conflict clients. The contract makes no mention of OCC's expectations for the CCP attorneys.

With no attorneys under contract to handle the conflict workload in Family Court, private attorneys work entirely under a system of rotating appointments for which they are paid at a rate of \$60 per hour. This is the only trial court in any county to have no dedicated conflict contract system. Instead, the Family Court picks from a list of about ten attorneys the specific attorney it wishes to assign to a particular case, and makes that request of OCC by email. OCC then formalizes the assignment, and the appointed attorney submits a voucher for payment at the end of the case. Some of the attorneys who have contracts for Superior Court work also take individual case assignments for

Family Court work. The rest of the Family Court attorneys have no contracts with OCC. And the Family Court judges are not prohibited from appointing attorneys outside of the pre-approved list.

## KENT COUNTY

Kent County's conflict system is the most difficult to explain. For Family Court, a single attorney is responsible for any conflict cases and, unlike other contracts around the state, his contract limits his responsibility to accepting appointments only in Family Court matters. In return he is paid \$55,262 annually. While this attorney has no contractual limit to the number of cases he can be assigned in a given year, additional conflict attorneys are sometimes necessary to handle cases involving multiple conflicts (e.g., three or more co-defendants, with the public defenders representing Client A, the contract attorney taking Client B, and Client C needing conflict counsel of his own). One private attorney has informed the Office of Conflicts Counsel of his willingness to take Family Court appointments as needed, and so he tends to be assigned to most of those cases. In return, OCC pays him at a rate of \$60 per hour.

Conflict work in Superior Court is split among three contract attorneys. One attorney has what is considered a "full" contract, and the other two each have "half" contracts. The full/half distinction is based on the maximum number of cases each attorney can expect to be assigned each month and suggests that the total monthly conflict caseload for that court is split 50%-25%-25% among the three attorneys. In truth, it is a mischaracterization. The two attorneys with half contracts are appointed to a maximum of five new Superior Court cases per month

(60 per year), for which they are paid a total of \$32,500 annually. The attorney with a full contract, on the other hand, gets 15 new cases per month (180 per year), for which he is be paid \$100,000 annually. The full/half distinction does not quite fit. Rather, the attorneys in effect are compensated at a flat fee per case of approximately \$6,600, with one attorney willing to accept more cases per month than the other two.

Once the conflict system reaches its maximum of 25 new cases each month it can continue assigning cases to the same contract attorneys, but now at a rate of \$60 per hour. None of this division of labor among the Superior Court attorneys is mentioned anywhere in any of the attorneys' contracts, nor are their monthly caseload caps, nor that those caps are flexible rather than rigid workload controls.

A fifth contract attorney handles misdemeanor conflict cases in Kent County. His contract with OCC limits his responsibilities only to "representation in the Court of Common Pleas," for which he is paid \$44,000 annually. But in addition to representing misdemeanor defendants in CCP, this attorney is also expected to help out by staffing felony preliminary hearings in CCP. This additional requirement is not spelled out in his contract, nor specifically how the workload during prelims should be divided between himself and the county's sixth conflict attorney.

This sixth conflict attorney also works in the Court of Common Pleas, but only on preliminary hearings. She handles no misdemeanor case assignments, and does not continue with the felony cases up to Superior Court following the preliminary hearing. She is solely responsible for running the preliminary hearings operation, which involves managing the assignment of cases within the county's conflict system and advocat-

ing on behalf of conflict clients at their preliminary hearings along with the other CCP conflict attorney. (See page 70 for a full explanation.) For this, her contract with OCC pays her "\$20,000 for Superior Court appointments and \$5,000 for Court of Common Pleas appointments," while making no distinction between the two sets of appointments for which she receives separate sums of money each year. In fact, no mention of her responsibility of managing the preliminary hearing process appears in her contract anywhere.

## THE OFFICE OF CONFLICTS COUNSEL

This lack of a connection between the contract and reality is part of the same evolution by which the entire conflict system has been created. As much as OCC inherited from the Courts the conflict system in each county as it existed before, so too did OCC inherit all of the Courts' contracts for conflict services.

We asked Stephanie Volturo, the head of the state's Office of Conflicts Counsel, if she found this frustrating. "Extremely," she replied. "But I didn't want to start making small adjustments [to the contracts] here and there. We wanted to use [the DOJ grant under which this study is being conducted] to really see if the improvements we might consider would actually improve things, or whether something altogether different from such a piecemeal approach would be better."

# CHAPTER 3

## EARLY APPOINTMENT OF COUNSEL AND FELONY PRELIMINARY HEARINGS

By statute, the Superior Court has jurisdiction over all adult felonies and certain higher-level misdemeanors. For most of those cases, the defendant has the right to have a preliminary hearing before a Court of Common Pleas judge, held within ten to 20 days of his arrest.<sup>93</sup> Whereas the United States Supreme Court determined that a preliminary hearing is a “critical stage” of a criminal case, the defendant has a right to the effective assistance of counsel at such hearings. This fundamental right, however, is consistently violated across Delaware.

### SUSSEX COUNTY

According to one judge, Sussex County has between 50 and 100 preliminary hearings scheduled each Thursday, but rarely do defendants actually go ahead and exercise the right to a preliminary hearing. “If we get two or three [defendants] who actually want to have a prelim, we’re going to be very busy.” So in reality, the preliminary hearing docket is used primarily as a venue for plea negotiations between prosecutors and defense attorneys, and otherwise as a bail review hearing for in-custody defendants.

The judge estimated that, in a given preliminary hearing calendar, 20 to 40 percent of defendants usually appear in-custody. Of the remaining 60 to 80 percent, one-third will have gone over to the public defender’s office to be screened for eligibility by the day of their preliminary hearing. The other two-thirds appear in court as *pro se* defendants, but the public defender’s office will assist them during the preliminary hearings “as friends of the court.”<sup>94</sup>

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<sup>93</sup> *Rules of Criminal Procedure for the Superior Court of the State of Delaware*, Rule 5(d). In many cases, however, the arrest comes after the indictment of the grand jury. (One attorney estimated 20% of all felony cases are the result of such “Rule 9 Indictments,” as they are referred to in Delaware.) In such cases, because the grand jury has determined there is sufficient evidence to proceed to trial, there is no need for a preliminary hearing before a Court of Common Pleas judge to determine probable cause. For defendants arrested by Rule 9 Indictment, the first appearance is at arraignment in Superior Court.

<sup>94</sup> The judge also estimates that maybe 10-15% of all cases on the calendar are resolved that day either by pleading down from a felony to a misdemeanor in CCP, or the prosecutors *nolle pros* (drop the charges against the defendant). Another judge commented, “If the prosecutors are offering a plea at the preliminary hearing, then they’ve probably over-charged to begin with.”

Here is how it works. Following arrest, the defendant is “brought forthwith” before a Justice of the Peace Court magistrate,<sup>95</sup> who sets bond and the matter is bound over to the Court of Common Pleas for a preliminary hearing. While the statute requires preliminary hearings be held within ten days of arrest if in-custody (20 days if out-of-custody),<sup>96</sup> in truth the preliminary hearings in Sussex County generally are held no fewer than four days and no longer than nine days from arrest.<sup>97</sup> According to the CCP judge, some 60% to 80% make bond at some point prior to their preliminary hearings, and many of those make bond and are released right away. The public defender’s office interviews any defendant who is held overnight (by videoconference) for the purpose of determining eligibility to receive public counsel.<sup>98</sup>

For everyone else, who are not held overnight following the initial appearance before the JP Court magistrate, it is each individual’s responsibility to go to the public defender’s office prior to their court date in order to get screened for eligibility and conflicts of interest. (See side bar on the intake process, page 128.) The public defenders in Sussex County have a set deadline; anyone who wants to be represented by the public defender’s office has to come in for their interview at least a day in advance of their preliminary hearing. But, as noted above, a significant majority of out-of-custody defendants fail to do so. And so, by default, those defendants appear for their preliminary hearings as *pro se* defendants.

On the day of preliminary hearings, out-of-custody defendants file into the courthouse around 9:00am. For those who have retained counsel, the bailiff tells them to wait by the front entrance for their attorneys to arrive. Everyone else is told to sit in the jury waiting room down the hall from the courtroom. There in the jury waiting room each defendant, whether they went in advance to get screened and are already public defender office clients or have appeared that day without counsel, meets with a public defender who explains the process of the preliminary hearing calendar. Where a plea has been offered by the state, the public defender also conveys to the defendant the terms of the plea deal.<sup>99</sup> The difference for *pro se* defendants is that to them the public defender explains that he does not represent them – he cannot discuss the details of the case and cannot advise them on any decisions. Instead the public defender is acting as “a friend

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<sup>95</sup> This is also called the “preliminary presentment.”

<sup>96</sup> *Rules of Criminal Procedure for the Superior Court of the State of Delaware*, Rule 5(d).

<sup>97</sup> Because preliminary hearings are scheduled every Thursday, the CCP judges have set Tuesday as a cut off for new matters on the preliminary hearing calendar – meaning arrests from Tuesday through to the rest of the week will have preliminary hearings scheduled for the Thursday of the following week. But for anyone arrested on a Sunday or a Monday, their hearings might be as few as four or five days from arrest.

<sup>98</sup> Those who are deemed eligible (and it seems that just about everyone who cannot make bond right away is *de facto* eligible) become the public defenders’ clients right away, even if they post bond sometime prior to their preliminary hearing date.

<sup>99</sup> By reducing a felony to a misdemeanor, the matter can be resolved that day in CCP, rather than waiting to have the case heard in Superior Court.

of the court,” meeting with unrepresented defendants solely to help them fill out the forms and generally to make the entire process run more smoothly.<sup>100</sup>

Everything appears to be geared toward convincing defendants to forego the right to a preliminary hearing. As one judge explained it, “the prosecutors in this county don’t want to get tied up with all of these mini-trials.” So the prosecutors in Sussex County (and in Kent County as well, as we will discuss shortly) long ago started offering the defense a trade: waive the preliminary hearing and we will give you a copy of the police report. The police report is highly valuable to defense attorneys in Delaware, even though it is often heavily redacted when finally provided to the defense. It contains the arresting officer’s statement (more information than included in the affidavit of probable cause produced immediately following arrest) but, under Delaware case law, the police report is not discoverable material.<sup>101</sup> And so the defense takes that trade.

Sussex County defense attorneys consider the preliminary hearing to be a fruitless proceeding anyway. “All that’s going to happen is the arresting officer is going to read from his copy of the police report,” said one public defender. And so implicitly, if not outright explicitly, the public defender’s role at the preliminary hearing calendar is, therefore, to try to convince as many defendants as possible to waive the right to a preliminary hearing – including those who are *pro se*.

We were surprised to learn of the prosecution’s trading of police reports for the waiver of preliminary hearings in Kent and Sussex counties. It is not a statewide policy, however, as this is not the prosecution’s practice in New Castle County. Where the government is represented in criminal proceedings by a locally elected district attorney, a variance in policies and procedures from one county to the next is commonplace. But the responsibility to prosecute crimes in Delaware falls to a single statewide agency – the state’s Department of Justice. One would expect policy to be more uniform throughout the state. How then has the prosecution function in two of three counties adopted a policy that stands in contradistinction to its stated mission to “safeguard the constitutional rights of defendants”?<sup>102</sup>

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<sup>100</sup> The 6AC provided both the OCC and OPD’s leadership with the opportunity to review an advance draft of this report for comment. The public defenders informed us that the office in Sussex County is now providing *pro se* defendants an informational handout that includes instructions for them to ask for a continuance to seek counsel, rather than assisting them during preliminary hearings as “friends of the court.” The defenders also explained that further changes are being discussed among all criminal justice system stakeholders.

<sup>101</sup> See: <http://statecasefiles.justia.com/documents/delaware/court-of-common-pleas/136830-0.pdf>.

<sup>102</sup> According to the Department of Justice’s website, “The Criminal Division of the Department of Justice is responsible for the prosecution of criminal cases. Its mission is to represent the State in all criminal cases, and in so doing safeguard the constitutional rights of defendants and the human rights of victims and their families. This responsibility includes the preparation and presentation of criminal cases before the Superior Court, the Court of Common Pleas, Family Court, and in some matters before the Justice of the Peace Courts.” See: <http://attorneygeneral.delaware.gov/office/criminal.shtml>.

True, the police reports are not discoverable in Delaware,<sup>103</sup> and so the government is under no obligation to provide them to the defense. But without knowing early on what his client is accused of having done, it is nearly impossible for the defense lawyer to do much of anything in the case. Without early access to the police report, the defense will be forced to wait until discovery comes in, which will be weeks if not months from the arrest. The prosecutors in New Castle County are similarly under no obligation to provide police reports, but they do so willingly. Is the prospect of having to conduct an actual preliminary hearing so daunting in Kent and Sussex counties, that leveraging defendants into making such an unfair trade is now acceptable policy? Or has the supposition that the preliminary hearing itself is an empty right of the accused become so pervasive outside of New Castle County that all members of the criminal justice system have stopped bothering to ask the question?

After each walk-in defendant has finished talking with the public defender in the jury waiting room, they are instructed to head down the corridor to Courtroom A to check in with the bailiff.

Meanwhile, two additional public defenders are back in the lock-up, which is located just off of Courtroom A (behind the jury box), meeting with all of the public defender office's in-custody clients. That is how the preliminary hearing calendar is divided among the public defender office staff: one attorney takes all out of custody defendants (both clients and *pro se* defendants) and the other two take all in-custody clients.

The preliminary hearing calendar is conducted in batches. First, the judge hears any cases involving defendants represented by privately retained counsel. After these cases have been heard, the judge hears next all of the cases for whichever public defender is ready first. With fewer clients to meet, the two public defenders handling the in-custody caseload go first and second. The third public defender, representing the large group of out-of-custody defendants, goes last. We watched as this last group was split further into sub-categories, based on the pre-determined outcome of the hearing.

"Your Honor, I have a couple of *pro se* recommendations," the public defender announced before calling each *pro se* client forward, one at a time. "[Defendant's name] is appearing *pro se*. I have communicated the state's plea recommendations to him, he has decided to accept the plea offer tendered by the state, and as a friend of the court I assisted him with the paperwork." The judge then addressed the defendant: "With the public defender's help, do you understand the rights you are waiving by pleading guilty?" And with the defendant's affirmation, the judge accepted the plea and proceeded to sentencing. And so on and so forth for all unrepresented defendants who had decided to take the prosecution's misdemeanor plea offer.

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<sup>103</sup> See: <http://statecasefiles.justia.com/documents/delaware/court-of-common-pleas/136830-0.pdf>.

“Next, Your Honor, I’ve got some PD waivers.” This was the second batch: all of the walk-in defendants who had been pre-screened by the public defender’s office, and so they were actually being represented by the public defender that day. The public defender turned in the Waiver of Preliminary Hearing form on behalf of the client (these defendants did not have to wait around to appear before the judge). For each, the public defender stated on the record: “[Defendant’s name] has waived his right to a preliminary hearing, and the public defender enters an appearance on his behalf.”

“Next, Your Honor, I’ve got some *pro se* waivers.” Just as he had done for the earlier “PD waivers,” the public defender read through the list in rapid succession, but with a slight variation: “[Defendant’s name] has elected to waive his right to a preliminary hearing. I have instructed him to appear for his arraignment in Superior Court with retained counsel or having interviewed with the public defender’s office [for public counsel].” Again, none of these defendants had to wait to appear before the judge because they had already signed the Waiver of Preliminary Hearing form.

One public defender told us that, for a short while, he had been assigned to handle the walk-in defendants at preliminary hearings. It was one of his first assignments when he joined the office. “No one told me what I was supposed to be doing there, handling all of the walk-ins. There was just a stack of case files, so I sat down and started calling names.”

We asked him how he reacted to being asked as a “friend of the court” to convey plea offers from the prosecution to the unrepresented defendants. “I thought it was ridiculous. Our office wasn’t representing them. I didn’t represent them. So I couldn’t advise them whether it was a good plea offer or not. But, of course, that’s the only thing any of these people wanted to know. So I told each of them, ‘Look, I am not your attorney and I can’t ethically represent you. My advice is to tell the judge that you would like a continuance [on your preliminary hearing] to give you time to hire a lawyer on your own, or to go over to the public defender’s office for an interview.’”

We note here that this lawyer’s advice to secure counsel is precisely what the state’s *Rules of Professional Conduct* requires of each attorney in dealing with an unrepresented person.<sup>104</sup> But after 20 minutes or so, one of the bailiffs came into the room. “What are you doing?” he asked.

“What do you mean?”

“I’ve had, like, ten people in a row say they’re asking for a continuance to get counsel.”

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<sup>104</sup> *Delaware Rules of Professional Conduct*, Rule 4.3: “The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel . . . .”

The public defender was perplexed. He was doing what he thought he was supposed to do. The bailiff left the room, and the public defender continued to advise the *pro se* defendants to ask for a continuance. The bailiff, though, had found another public defender and complained about what was happening with all of the walk-ins. Eventually, the supervising public defender arrived. “Before I could say anything, he said: ‘I know . . . I know . . . you’re right. But, listen, it’s just how this is done here.’ And so I stopped telling *pro se* defendants to ask for continuances, and a couple of weeks later I was out of CCP anyway [to begin handling a Superior Court caseload].”

The U.S. Supreme Court estimates that 94% of all criminal convictions in state courts are the result of plea negotiations<sup>105</sup> noting, without judgment, “the reality that criminal justice today is for the most part a system of pleas, not a system of trials.”<sup>106</sup> The states are free to serve as laboratories of democracy, and they have discretion to try new ideas.<sup>107</sup> But they do not always get it right. “When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution.”<sup>108</sup> And so, when Delaware – like all of its sister states – seeks to resolve the overwhelming majority of its criminal cases through plea negotiations, it retains the original constitutional obligation to protect the rights of the accused.

At preliminary hearings in Sussex County, the unrepresented defendant is provided the mere semblance of the right to counsel. The defendant is granted the assistance of a living, breathing human who happens to have license to practice law, but who also explains that he is not the defendant’s lawyer – he is only there to help the defendant by relaying the prosecution’s plea offer and in filling out some forms. “Friend of the court” or otherwise, the defendant has no lawyer.

In *Cronic*, the Supreme Court reminds us that “the adversarial process protected by the Sixth Amendment requires that the accused have ‘counsel acting in the role of an advocate’”<sup>109</sup> – a right protected at each critical stage of the case, including preliminary hearings and plea negotiations. *Cronic* also points to circumstances in which the adversarial process is “presumptively” found to have broken down completely, with no need for the defendant to demonstrate prejudice in appeal.

<sup>105</sup> *Missouri v. Frye*, 566 U. S. \_\_\_\_ (2012).

<sup>106</sup> *Lafler v. Cooper*, 566 U. S. \_\_\_\_ (2012).

<sup>107</sup> U.S. Supreme Court Justice Louis Brandeis famously asserted that a “state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” Dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

<sup>108</sup> *Evitts v. Lucey*, 469 U. S. 387, 401 (1985).

<sup>109</sup> *United States v. Cronic*, 466 U.S. 648 (1984), quoting *Anders v. California*, 386 U. S. 738, 386 U. S. 743 (1967).

“Most obvious, of course, is the complete denial of counsel.”<sup>110</sup> So-called *pro se* defendants in Sussex County preliminary hearings certainly fit this definition. However, the Court continued, “if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.”<sup>111</sup> So, if there is a complete breakdown in the adversarial system, then it is entirely appropriate to “[conclude] that, under these circumstances, the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair.”<sup>112</sup>

The *Cronic* Court gave criminal justice stakeholders an example of systemic deficiencies that prevent a meaningful adversarial process – the case of the so-called Scottsboro Boys in *Powell v. Alabama*. Reviewing *Cronic* and *Powell* together, it is clear that the U.S. Supreme Court has defined a meaningful adversarial process as one in which the system has both appointed an attorney and also given that attorney the time and resources to do an effective job. Reflecting on the lack of advocacy given the Scottsboro Boys, the *Powell* Court said: “from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense.”

So, what of the defendant in Sussex County who *did* meet the public defender office’s deadline and is to receive the assistance of public counsel at her preliminary hearing? The lawyer for such a defendant is supposed to do more than being of “friend of the court,” relaying a plea offer from the state, and helping to fill out forms. Yet even in these instances, the defendant that followed instructions to be properly screened in advance does not have a lawyer at the hearing who has previously met with her to discuss the case, or launched an investigation, or interviewed witnesses,

We watched as one *pro se* defendant was ordered to pay a “public defender assessment” (Title 29, Sec. 4607) as part of his sentence. We have no way of knowing whether this is common or a rare occurrence. But for this particular defendant, the additional penalty seems unfair.

As with all *pro se* defendants appearing for preliminary hearings, the public defender made it very clear he was not advising the defendant during the plea negotiations with the state, and that he was not representing him during the court proceeding itself. And of course, during sentencing, the public defender did not advocate on his behalf for the judge to waive the public defender assessment.

Ironically, the defendant was compelled to pay \$100 for the privilege of publicly funded advocacy that he never received.

<sup>110</sup> *United States v. Cronic*, 466 U.S. 648 (1984).

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

or considered potential suppression issues, or studied statutory provisions regarding collateral consequences, or, frankly, anything substantive to distinguish the role the attorney plays for her from that he plays for *pro se* defendants. In fact, in advising the defendant of her plea offer, the attorney has available only a few minutes of discussion with her on the case and the benefit of however many years of experience the lawyer has accrued.

How is it any different for the defendant who *has* counsel, than it is for the defendant who has none?

In *Powell*, the Court concluded, “[i]t is vain to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case.”<sup>113</sup> Or, as the Court said in *Cronic*, “if counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.”<sup>114</sup> Thus, if a defendant is not given an attorney with the time to conduct a thorough investigation, the system is inherently defective.

Citing *Powell*, *Cronic*, and countless other decisions, the Supreme Court reaffirmed with two recent decisions<sup>115</sup> this right to “effective assistance of competent counsel” during plea negotiations. “The right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.”<sup>116</sup>

Each defendant’s right to *effective* representation applies equally to those represented by conflict counsel.

The only defendants represented by conflict counsel at preliminary hearings in Sussex County are those identified by the public defender’s office in advance. With the public defender’s office informally assisting any defendant who appears for his preliminary hearing without representation, and doing so without first checking for any conflicts of interest, this number is generally quite small. The obvious conflicts – usually cases involving two or more co-defendants – are identified right away. But, not all conflicts are identified before the date of the preliminary hearings. One contract attorney estimated that, out of every ten clients he represents, one or two are identified as conflicts by the public defender’s office after arraignment in Superior Court.

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<sup>113</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>114</sup> *United States v. Cronic*, 466 U.S. 648 (1984).

<sup>115</sup> *Missouri v. Frye*, 566 U. S. \_\_\_\_ (2012), and *Lafler v. Cooper*, 566 U. S. \_\_\_\_ (2012).

<sup>116</sup> *Lafler v. Cooper*, 566 U. S. \_\_\_\_ (2012), quoting *McMann v. Richardson*, 397 U. S. 759, 771 (1970).

This contract attorney estimated that he picks up between eight and ten new felony clients with each preliminary hearing calendar he covers. The three private attorneys who contract with OCC to handle Superior Court cases, along with the fourth attorney who handles Family Court and CCP duties under contract, all rotate coverage with each attorney staffing preliminary hearings every fourth week. With one preliminary hearing calendar per month, that attorney's estimated eight to ten new felonies per hearing amounts to 96 to 120 felony cases per year. If we were to look only at this attorney's court-appointed work, he would be handling 64% to 80% of the maximum workload allowed by national standards, as we will discuss in greater detail in Chapter 6. This, however, is before taking into account his private caseload. "The caseload doesn't leave enough time for client communication," he told us, "and there's no way to make ends meet without private clients as well."

Workload concerns alone are not the only issues preventing the Superior Court contract lawyers from providing effective representation. For example, the attorneys do not in fact pick up their cases at preliminary hearings . . . at least, not really.

Here is how it actually works. The four contract attorneys for Sussex County rotate coverage of preliminary hearings in the Court of Common Pleas, with each attorney handling every fourth week's calendar. Preliminary hearings are held on Thursdays. The day before, the public defenders send over the names of any defendants they have identified as conflicts, and thus will not be able to represent. Without any additional information, a list of names only provides the contract attorney with the number of defendants he or she should expect to represent the following morning.

On the day of preliminary hearings, a non-attorney staff member from the public defender's office brings over to the courthouse an accordion file that holds all of the individual case files that have been opened for the conflict attorneys. In each case file, this staff member has placed:

1. the public defender interview worksheet (printed from the state's online criminal justice database, DELJIS<sup>117</sup>), which includes basic information about the case and the client (including financial information used to determine client eligibility, and reasons for determining a conflict of interest);
2. additional notes about the client, including notes of the client's factual account of the incident in question, as recorded by the public defender's intake investigator; and
3. the affidavit of probable case (also printed off from DELJIS).

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<sup>117</sup> Delaware Criminal Justice Information System, or DELJIS. See: <http://deljis.delaware.gov/pdfs/BY-LAWS.pdf>.

The accordion file is placed on the defense counsel's table in Courtroom A where the contract defender on duty will retrieve it. Given the public defender office's interview deadline, there will be no additional conflict clients added to the calendar beyond those with case files in that accordion file. Armed with this information, the conflict attorneys begin meeting with their clients, and onward they proceed through the docket with most cases resulting in a waiver or a plea (few preliminary hearings are actually held).

After the preliminary hearing calendar, however, the contract attorney is not allowed to keep the case files for the clients he has just represented. Instead, all case files are returned to the accordion file, where the staff member from the public defender's office retrieves them and brings them back to the office. The public defender's office then closes the file (corresponding to the Court of Common Pleas closing proceedings on the matter when it is bound over to Superior Court), and once the new case is opened by the Superior Court the public defender's office formally declares a new conflict of interest in the new case.

The original case file is then physically transferred over to the lead contract attorney's office for him to distribute among his fellow Superior Court contractors. But before transferring the file over to the lead contract attorney, the public defender's office removes some of its contents, including the investigator's notes from the intake interview and the affidavit of probable cause. Only the interview worksheet (the client's name, basic case information, contact information, and his financial eligibility information) remains.

Generally for felony defendants, the lead attorney returns the case file and reappoints the same contract attorney who represented the defendant at the preliminary hearing. However, it does not always work that way. For example, there is one attorney who handles every fourth preliminary hearing calendar that is only contracted to handle CCP and Family Court cases. She cannot be reconnected to defendants that she represented at a preliminary hearing but that are bound over to Superior Court.

This particular attorney raised this specific issue regarding her role at the preliminary hearings. "I don't think I should even be handling prelims at all, because I don't follow the cases to Superior Court," she told us. "That's the stage you establish rapport with the client." This of course points to another major systemic flaw in Delaware's right to counsel programs – the lack of continuous representation of the client, from start to finish, by the same trial lawyer – but we will discuss that in depth later on.

## NEW CASTLE COUNTY

A New Castle County conflict attorney shared the opinion of the above Sussex County contract attorney that he should not be involved preliminary hearings. “It’s not part of our contract,” he said. And he is right: his contract makes no mention of his obligation to represent conflict clients in preliminary hearings. In fact, the terms of his contract have limited relevance to what his true responsibilities and obligations are to his clients.

The annual contract for Superior Court conflict representation in New Castle County reads: “Your responsibility under the appointment will be to accept the assignment of defense in criminal cases in representation in the Supreme Court, the Superior Court, the Court of Common Pleas and the Family Court, whenever the necessity arises.” It then adds a series of conditions, including the contract’s start and end date, the attorney’s rate of pay, that s/he cannot be appointed to a case outside of New Castle County without his/her agreement, among others. Nowhere does the contract expressly state that the Superior Court contract attorney’s appointed caseload is limited to those case-types where the Superior Court has jurisdiction. In fact, the contract states just the opposite: the attorney is responsible for accepting cases in “the Supreme Court, the Superior Court, the Court of Common Pleas and the Family Court.” Only the Justice of the Peace Court is omitted. And nowhere does the contract note the attorney’s obligations in periodically staffing preliminary hearings in the Court of Common Pleas.

While this example is specific to contracts for Superior Court appointments in but one county, we did not find any contract for conflict counsel services anywhere in the state that accurately and fully details the attorney’s actual obligations. (See overview of conflict contracts, page 52.)

Contractual disagreements aside, in practice and in a manner somewhat similar to Sussex County, the conflict attorneys in New Castle County begin representing appointed clients at their preliminary hearings in the Court of Common Pleas. Each Superior Court contract attorney is on a three-month rotation, staffing the preliminary hearing calendar for one week every three months, for a total of four preliminary hearing weeks per year. (If there are multiple co-defendants, the public defender’s office will notify the Office of Conflicts Counsel in advance, and OCC will make sure there is an additional Superior Court attorney appearing in court that day for each additional co-defendant’s preliminary hearing.) Preliminary hearings are held four times each week in the Court of Common Pleas: every Monday, Tuesday, Wednesday, and Friday.

The process is fairly simple. If the public defender’s office identifies any conflicts for that preliminary hearing calendar, then the contract attorney on duty that week picks up the

client's case and continues with the case up to Superior Court. On average, there are between 12 and 15 conflict cases total during each week's preliminary hearing dockets.<sup>118</sup>

Not all defendants appear for their preliminary hearings having already gone to the public defender's office to be screened for appointed counsel. But many have. Despite the public defender's office screening incarcerated defendants by videophone within 24 hours of arrest, it does not necessarily mean that conflict counsel will be appointed right away. In fact, the conflict lawyers told us that they do not learn the identities of the clients they are expected to represent, nor how many there are, until they show up in court the morning of the preliminary hearing calendar. There, the attorney finds nothing waiting for him and, not knowing in advance who his clients are, he cannot prepare case files in advance. At most, the attorney can get a copy of the affidavit of probable cause and the pre-sentence report from the clerks.<sup>119</sup>

Most of the unrepresented defendants' cases get called in quick succession at the beginning of the docket. "Do you have an attorney?" the judge asked one defendant.

"No."

"Would you like the public defender?"

"Yes."

"Okay, the state's going to offer you a plea this morning. Have a seat in the hallway. When the public defender comes up from downstairs, he'll call your name."

The next defendant was called forward. He too was unrepresented by counsel. "I want to plead guilty," he said.

"Well you don't do that here," the judge said. "What you can do is fill out a waiver and then your case will be heard in Superior Court."

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<sup>118</sup> This estimate is according to OCC's chief attorney. Contract attorneys we spoke with agreed with this estimate, but noted that some weeks they could receive as few as five new cases and as many as 20. The Office of Conflicts Counsel further estimated that contract attorneys are assigned an additional three or four conflict cases outside of their scheduled four duty weeks per year. This is an average total of 96 cases per attorney per year.

<sup>119</sup> The 6AC provided both the OCC and OPD's leadership with the opportunity to review an advance draft of this report for comment. The public defenders have since informed us that this process is changing: OPD will now inform the CCP court clerks in advance of the preliminary hearings which cases are conflicts, and the clerks then print out the affidavits of probable cause and have a stack of APCs waiting in the courtroom for the conflict lawyer on duty that day. The APCs, however, are still not provided to the conflict attorneys in advance of their arriving in court.

## CONFIDENTIAL COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT

*ABA Principle 4* requires: “Defense counsel is provided sufficient time and a confidential space within which to meet with the client . . . To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.”

Apart from the lack of time with which to meet with their clients, defense attorney often lack access to private meeting space at the state’s courthouses. Consider for example the Kent County Courthouse, the state’s most recently built.

Completed in 2011, the courthouse itself is beautifully constructed, with a broad brick atrium running down the center of the first two floors. Balconies wrap around the second floor of the central atrium connecting the outer doors to each of the courtrooms. Despite there being one private meeting room per courtroom (a total of eight), those meeting rooms are constantly in use. And so attorneys often meet with clients wherever they can, be that inside the courtroom itself or on the benches overlooking the balconies outside of the courtroom, and where such conversations are not confidential.

For defense lawyers with clients being held in custody, the lock up downstairs presents its own set of problems. The interview rooms at the Kent County Courthouse are not soundproof. Beyond a security door, defense attorneys wait in a corridor for their clients to be brought into one of seven

interview rooms. (If they are trying to hold multiple client meetings at once, attorneys use two or three of the interview rooms at one time.) Each interview room is split into two equal halves (each half about 3.5 ft. wide by 5 ft. deep), divided by reinforced glass with a grate underneath the window for the attorney and client to communicate with each other through the divider. We stood in the waiting area, and through the closed doors we could hear quite clearly every conversation in each room in use. It is not clear, if ever two co-defendants were placed in neighboring rooms on the far side of the glass barriers, that those co-defendants could possibly listen in on each other’s privileged conversations with their attorneys – but their attorneys certainly could.

Making matters worse, attorneys cannot pass directly to their clients any documents through the dividing windows in the interview rooms. There are no “transaction drawers” built into the walls. Instead, all papers for the defendants must be passed through the Department of Corrections officers’ window, located on one side of the waiting area, which has such a transaction drawer. The DOC officers bring papers from the attorney over to the client, but in doing so those papers leave the attorney’s line of sight. In other words, the attorneys have to trust the DOC officers not to read confidential information passed through to their clients, or forego sending anything at all. Most attorneys we talked with choose the latter.

Some public defenders told us that an even bigger concern is the video connection to the prisons. "Sometimes the DOC officer stays there with my client, and I can see him on camera. So, I'm like, 'Hello . . . Can you please leave?' But sometimes they just linger around anyway." Another public defender added that the problem is the video feed is so narrow that he can only see the client, "but we have no idea who is standing just off-screen."

One public defender told us, "If I have something confidential to tell them, I tell them in person. I don't put it in writing." But then there is still the problem of all conversations being audible to anyone standing in the waiting area. In short, either by voice or by

writing, an attorney is not able to review anything in complete confidence with an in-custody client.

This is just one county's courthouse. We detail similar problems in Sussex County Family Court (page 94), and Kent County Family Court (page 91). Furthermore, where public defense attorneys have access to private meeting space in the courthouse, but do not employ that confidential space in a confidential manner (page 30), there is a need for additional training within the public defense system on communication with the client (pages 159-160).

“What am I waiving?” the defendant asked.

“Well, you have a right to a preliminary hearing, which will require the arresting officer to come in and testify. And the judge uses that testimony to determine probable cause.” The judge then explained the probable cause concept to the defendant. “It’s a pretty low standard of proof – far lower than what the state has to prove at trial. But you can waive that hearing and get this taken care of sooner.”

“When do I hear the prosecutor’s plea offer?”

“They’re not offering you a plea today.”

The defendant filled out a waiver without further comment, was handed a slip of paper with his arraignment date in Superior Court, and left.

“We waste so much time at the preliminary hearing,” said one conflict attorney, “because we have to wait there in the courtroom until we know there’s a conflict. So the public defender tells me I’ve got a conflict, and I go over and check the plea list. Then I go downstairs to the lockup to talk to my client for a few minutes and talk through the plea being offered, and by the time I get back upstairs to the courtroom the public defenders have found three more conflicts for me. And so I have to turn right back around and go downstairs again.”

The plea list the attorney referred to is a series of notes prepared by the prosecutors regarding the cases scheduled for that day’s preliminary hearing calendar and, for each case, the specifics of the plea the prosecutor is offering. We asked if the plea list is emailed to the conflict lawyers in advance of the day’s docket. “If it’s being emailed, it’s only going to the public defender’s office,” the attorney replied. “We don’t get it emailed in advance.” Then again, as the attorney had already pointed out, the public defender’s office does not declare conflicts in advance of the preliminary hearing, and so the prosecutors would not necessarily know which plea offers for which defendants’ cases should be emailed to the conflict lawyer on duty that week.<sup>120</sup>

The delay in the screening process and the delay in declaring conflicts place an additional strain on the conflict lawyer. “I may have a personal conflict with one of the defendant’s I’m appointed to represent that day,” said one contract attorney, “but I can’t know that from the courthouse.”

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<sup>120</sup> The public defender’s office expressed the exact opposite opinion when provided with the opportunity to review an advance draft of this report. They assert that the office does, in fact, declare conflicts in advance. The 6AC accepts this position, but notes that it is not the fault of not declaring – it is the fault of something in between that prevents the conflict attorneys from finding out about those cases. In the end, the point is irrelevant. This indigent defense system does not work effectively for conflict clients, and therefore the system needs to rectify the problem across the primary and conflict functions.

Unlike in Sussex County (and as yet discussed in Kent County), the prosecutors in New Castle County make no deal with the defense to turn over the police report as a trade for the waiver of the preliminary hearing. Perhaps because of that, the attorneys in New Castle County tend to view the hearings as more useful than elsewhere in the state. In fact, many held the opposite view from their counterparts in Kent County and Sussex County. Perhaps it is an opportunity, as one example, to put the arresting officer on the stand, under oath, as a way to bolster a motion to suppress later. The attorney can develop testimony regarding a questionable traffic stop that led to a felony drug arrest, as another example, in order to check that testimony against the discovery materials later on as leverage in plea-bargaining.

“I’ll talk it through with my clients, whether or not they want to have the preliminary hearing, and if they’re wavering at all I’m going to do the hearing rather than waive it,” one attorney explained. “It’s their constitutional right, and under no circumstances am I going to try to talk them out of it.”

## KENT COUNTY

Unlike in the other counties where, at least to some degree, felony-level contract attorneys begin representing their clients at the preliminary hearing in the Court of Common Pleas and then follow the case up to Superior Court, Kent County is the only county where the conflict system splits the work of representing each felony defendant by level of court.

Two contract attorneys handle the preliminary hearings in the Court of Common Pleas. If the case is bound over to Superior Court, then it will be assigned to one of three attorneys who take conflict case assignments under contract in Superior Court. None of this is stated in any of the attorneys’ contracts. It is just the way it is done through an understanding developed over the years.

Here is how it works. One of the two CCP-level contract attorneys effectively serves as the coordinator of the conflict defender system for felony cases in Kent County. Unlike the county’s other CCP-level contract attorney, this attorney does not represent any conflict defendants in misdemeanors; her job is solely to run the show at preliminary hearings each week.

Preliminary hearings are held on Fridays. Throughout the week, when the public defender’s office identifies a defendant as a conflict for their office, it notifies the Court of

Common Pleas with a “Public Defender Declaration of Conflict” letter.<sup>121</sup> The attorney who only handles preliminary hearings is emailed a scanned copy of each declaration of conflict, and by Thursday afternoon she usually has received a small stack of letters for defendants needing conflict representation.

Using these conflict declarations, the preliminary hearing attorney checks the defendants for any additional conflicts among the contract attorneys. To do so, she maintains an informal register of all felony defendants’ names who have been diverted over to the conflict system, and who represented them, since 2009.<sup>122</sup> The informal register is a three-ring binder holding a stack of well-worn pages, each marked with a combination of handwritten notes and color-coded highlighting, which the attorney has systematized over the months and years. Each week she adds in new information in an MS Excel workbook she has saved on her computer back at her office, before printing off new pages and adding them to the front of her binder. The binder also includes a tally of monthly caseload assignments by year for each of the Superior Court contract attorneys. Using this system, she reviews the incoming workload and determines which new cases will be assigned to which Superior Court attorneys, being careful to monitor against each attorney’s monthly maximum. (See overview of contracts, page 52.) “It’s a crude method of doing it,” the preliminary hearing attorney explained, “but it’s pretty much all I have to work with.”

Once she has figured out who among the three Superior Court attorneys will eventually pick up the case in Superior Court, the preliminary hearing attorney divides the cases between herself and the CCP lawyer for the purposes of representing the conflict defendants at the preliminary hearing in the Court of Common Pleas. The preliminary hearing attorney represents all of Superior Court Attorney A’s future clients,<sup>123</sup> and the CCP lawyer handles all of those destined for Superior Court Attorney B or Superior Court Attorney C. (See chart, next page.) In theory, with Attorney B and Attorney C understood to be holding “half” contracts compared to Attorney A’s “full” contract, the preliminary hearing workload under this arrangement evens out among the preliminary hearing attorney and CCP lawyer.<sup>124</sup>

Like in New Castle County and Sussex County, none of this is spelled out in any contract or policy anywhere. It is just the way things are done in Kent County, and only because that is how the conflict defender system has evolved over the years.

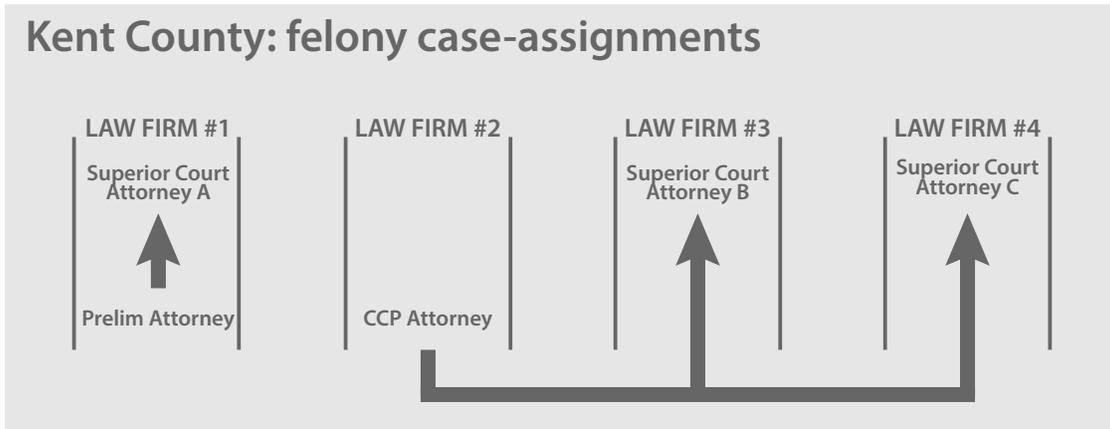
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<sup>121</sup> An example of a Declaration of Conflict letter is included as Appendix A.

<sup>122</sup> The year 2009 was the preliminary hearing attorney’s first year under contract and serving in this role.

<sup>123</sup> The preliminary hearing attorney and Superior Court Attorney A are partners in same law firm.

<sup>124</sup> As detailed on page 53, the distinction between “full” and “half” contracts in Kent County is a bit flawed, with Attorney A actually taking 60% of cases and Attorneys B and C handling the remaining 40% combined. Therefore, the workload at the preliminary hearings does not even out on its own among the preliminary hearing attorney and the CCP lawyer.



The evening before preliminary hearings, the prosecutors email the preliminary hearing attorney a “cheat sheet” of the coming morning’s calendar, listing cases where there is a plea offer, those that they will *nolle pros*, reduce charges, seek diversion, etc. She brings this cheat sheet, along with all of the declaration of conflict letters she has received, with her to the courthouse on Friday morning, usually arriving before 9:00am.

There, on defense counsel’s table, she finds the pretrial service reports that the public defender’s office left for her in a stack labeled “conflicts.” Those reports are generally three or four pages long and contain information on the pending charges against the defendant, his or her prior convictions, bail amounts, the probation department’s version of the facts of the case, and their treatment or sentencing recommendations. Along with the declaration of conflict letter already emailed over to the preliminary hearing attorney, the pretrial services report is all that the public defender’s office provides to the conflict defenders.<sup>125</sup> Once the deputy attorney general or the AG’s paralegal arrives, the preliminary hearing attorney asks them for the affidavit of probable cause (the police statement) for each conflict case, which she photocopies<sup>126</sup> before returning back to them.

For any additional conflicts the public defenders office declares throughout the morning – almost always as out-of-custody (walk-in) defendants appear in court and are directed to the public defenders office to be screened for eligibility to receive public counsel – they bring over a small slip of paper, called a “PD Case Worksheet,” containing significantly less information about the case than even the declaration of conflict letters contain. This worksheet provides the conflict attorneys with the defendant’s

<sup>125</sup> Importantly, we note that the pretrial services’ report was dated three days prior to the day of the preliminary hearings. We struggle to think of reasons why this could not be provided to the conflict attorneys directly by pretrial services on the day produced, rather than waiting until the day of the prelims.

<sup>126</sup> On the second floor of the Kent County Courthouse, there is a small conference room with a photocopier that the attorneys are able to use.

name, the defendant's SBI number, the name of the conflicting client represented by the public defender's office, and the reason for the conflict.

The preliminary hearing attorney then paperclips together all of the information she gathered for each case, leaving for the CCP lawyer a pile of cases for him to pick up when he arrives some time later that morning, and keeping the rest for herself. As described above, the preliminary hearing attorney handles those cases eventually bound for Attorney A, and the CCP lawyer handles those to be assigned either to Attorney B or Attorney C. But, to some extent, the preliminary hearing attorney also handles any additional outliers. As the attorney explained it, she often has to give limited information to multiple co-defendants during preliminary hearings. Consider, for example, a case with five co-defendants: numbered 1, 2, 3, and so on. The first might hire private counsel, the public defenders will represent co-defendant #2, and the CCP lawyer will represent co-defendant #3. But the system simply has no safety valve to ensure conflict-free representation is provided that day to defendants #4 and #5 (although each has the same constitutional right to counsel as defendants #2 and #3).<sup>127</sup>

At this point, the conflict lawyers have all the information they will get. And so they begin talking with each defendant. Again, the defendants these attorneys represent at the preliminary hearings are their clients for the purposes of preliminary hearings only. If a case continues one way or another to Superior Court, then another attorney handles the case there. So, while the attorneys refer to the defendants they represent at preliminary hearings as their "clients," ownership over the final outcome of each case is rather loosely held.

Some of their clients are walk-ins and the rest are in-custody defendants being held downstairs in the lock-up. The conflict attorneys generally tend to their in-custody clients first before returning upstairs to talk with their out-of-custody clients. But in

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<sup>127</sup> The constitutional right to counsel is unequivocal regardless of whatever co-defendant number is assigned to which defendant. But, because the system has no safety valve to deal with such multi-defendant situations (the preliminary hearing attorney cannot always rely on the availability of additional private attorneys to take such cases at a moments' notice), the conflict attorney frequently will discuss limited aspects of the case with defendants #4 and #5. If incarcerated, it was reported that the cases of defendants #4 and #5 would be continued without any explanation to the defendants if left without counsel. As such, the conflict attorney generally explains to them what is occurring during the preliminary hearing "without getting into the facts of the case." However, this attorney reported that if there was a way to get defendants #4 and #5 out of jail, she most likely would represent them both "for that limited purpose." But, without substantive conversations about the facts of the case, the attorney can never know if "getting out of jail immediately" is always advisable for the defendant. Similar pressures exist for non-incarcerated defendants, to whom the conflict lawyers will also provide a generic explanation of the preliminary hearing process and who are provided the opportunity to waive the hearing altogether or continue proceedings for one week.

addition to those two groups of conflict clients appearing for preliminary hearings (in-custody and out-of-custody), there is a third group that is effectively left to one side: those whose charges are being reduced.

For any case where the Attorney General's office has decided to reduce the charges to misdemeanor-level, thereby filing charges in the Court of Common Pleas rather than Superior Court, the DAG stipulates that on the record during the call of the calendar. In effect, their cases will not be heard that day – but none of the defendants know that in advance. As one of the contract attorneys explained it, “I just don't have the time to deal with them. I'm not going to talk to them even though they are conflicts.” Conflict counsel will represent them eventually, still in the Court of Common Pleas, but not until the day of their arraignment on their now-lowered-to-misdemeanor charges.<sup>128</sup> And so, even though the bailiffs tell them “wait for your attorney to call your name,” no one ever calls. Most eventually learn they can leave by talking directly with the prosecutors but, even still, we watched a number that had been sitting there for two or three hours.

The actual preliminary hearing calendar began when the commissioner took the bench sometime later that morning. Proceedings started with all of the waivers going first, before moving to guilty pleas toward the end. A deputy attorney general managed the docket: “Next, Your Honor, is number 9. PD waiver.”

“So noted,” the commissioner responded.

“Number 11 is also a PD waiver,” the DAG continued.

“Noted,” said the commissioner.

“Number 12 is Mr. [Private Attorney's] case. He's filed a waiver and enters his appearance.”

“Noted.”

Most cases were handled this way. The public defenders, conflict defenders, and private attorneys alike entered their appearances on behalf of their clients, waived each client's right to a preliminary hearing on their behalf, by way of a written waiver form, and the client was free to go without having to wait to be called. So too were written waivers entered on behalf of defendants being held in-custody downstairs.

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<sup>128</sup> The CCP contract attorney will represent each of these defendants, as he handles all misdemeanor cases. The other attorney only handles preliminary hearings.

Every once in a while, a defendant would appear before the commissioner, which generally was seen as interrupting the flow of proceedings. “The defendant asks for a continuance to seek private counsel to assist him in his preliminary hearing,” the prosecutor said of one such individual.

“Let me see if I can explain some things for you,” said the commissioner. “The public defenders have offered to represent you at this proceeding. You can have the hearing today, and get private counsel afterward. But nothing is going to happen at this stage other than the police officer will sit on the stand and you’ll be able to ask him some questions and he’ll get all of the answers he needs by reading directly from his police report. But of course you won’t know what the police report says. What any attorney – public defender or otherwise – will advise is for you to waive your right to a preliminary hearing in order to get the police report, which you absolutely will not get if you don’t waive the prelim.”

“They told me to waive it,” the defendant said of his conversation with the public defender’s office. “But I heard that it’s not good to waive it.”

“Well you heard it out there [at the public defender’s office], and then you heard from me. Did a member of the bar tell you any differently?”

After a few more minutes, the commissioner finally ended the discussion: “We don’t have anymore time. I’ll grant you a continuance.”

Only one preliminary hearing was actually held out of the 40 or 50 cases on the preliminary hearing calendar that day. The rest were either waived, or continued for a week. The cases where pleas had been reached were called last.

We watched as one in-custody defendant, represented by a public defender, entered a reduced plea to possession of drug paraphernalia and driving without a valid license. The prosecutor recommended a probationary period at Level 2 along with fines & court costs. “Do you admit you are guilty of the charge of possession of drug paraphernalia and driving without a valid license?” the commissioner asked.

“Yes, Your Honor,” the defendant replied.

“I accept your guilty plea, and will sentence you as follows . . .” The commissioner made no mention of the rights the defendant was forfeiting by pleading guilty in order to ensure that the plea was intelligently made.<sup>129</sup>

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<sup>129</sup> When considering guilty pleas, judges have an obligation to ensure that “the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U. S. 25, 31 (1970). (See also *Hill v. Lockhart*, 474 U. S. 52, 56 (1985); *Boykin v. Alabama*,

As discussed earlier, all defendants have a right to *effective* assistance of counsel, even during plea negotiations.<sup>130</sup> This right applies equally to the primary system (the public defenders) and the conflict system.

Consider the amount of information, however, that the conflict defenders have available for each client on the day of preliminary hearings. They have the client's name and SBI number, the name of the conflicting client represented by the public defender's office and the reason for the conflict, the affidavit of probable cause, and the pretrial service reports. Consider further that the attorneys only begin representing those defendants that very morning.

As the Supreme Court notes, and as this report details, our state courts have transformed the concept of criminal justice from a system of trials to a system of pleas. Where the "consultation, thoroughgoing investigation and preparation" that is so "vitaly important" is absent, because the attorney is left trying to represent in plea negotiations clients they have only met for a handful of minutes that morning, the clients "do not have the aid of counsel in any real sense."<sup>131</sup>

And in *Cronic*, the Court held that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."<sup>132</sup> In Delaware's system of pleas, the adversarial process has broken down.

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395 U. S. 238, 395 U. S. 242 (1969); *Machibroda v. United States*, 368 U. S. 487, 493 (1962).) Here, the commissioner was entirely inconsistent. For this defendant, there was no colloquy ensuring the defendant understood all of the constitutional rights he was waiving by entering his guilty plea. For the very next defendant also entering a guilty plea, however, there was.

<sup>130</sup> *Missouri v. Frye*, 566 U. S. \_\_\_\_ (2012), and *Lafler v. Cooper*, 566 U. S. \_\_\_\_ (2012).

<sup>131</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>132</sup> *United States v. Cronic*, 466 U.S. 648 (1984).

# CHAPTER 4

## EARLY APPOINTMENT OF COUNSEL AND JUVENILE ARRAIGNMENTS

Delaware adopted the juvenile court model early on. The state's first juvenile court was launched in 1911, first as a pilot program in the City of Wilmington, before being extended in 1923 to include all of New Castle County. Ten years later, in 1933, Kent County and Sussex County both created their own juvenile courts.<sup>133</sup> Believing "that compliance with the law by the individual and preservation of the family as a unit are fundamental to the maintenance of a stable, democratic society," a single Family Court now has statewide civil and criminal jurisdiction, replacing the individual juvenile courts that had previously existed in each county.<sup>134</sup> Unlike many other states, Delaware's Family Court has jurisdiction to hear criminal prosecutions of adults accused of misdemeanors against children and against other adults of the same family.<sup>135</sup>

While the state's Family Court has evolved structurally and procedurally over the decades, the due process rights of children and adults facing criminal prosecution in the Family Court have long been established. In its watershed 1967 decision, *In re Gault*, the U.S. Supreme Court declared that each child accused of a delinquent act "requires the guiding hand of counsel at every step in the proceedings against him."<sup>136</sup> The rehabilitative theory at the root of the juvenile court model, it argued, was insufficient reason to do away with the same due process protections that would otherwise have been afforded to the accused if he were an adult. (See side bar discussion on the genesis of the nation's juvenile justice system, page 79.)

Delaware's Family Court, therefore, has the same obligation as all other criminal courts to provide the accused – whether child or adult – with access to effective representation

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<sup>133</sup> See Family Court History: <http://courts.delaware.gov/family/history.stm>.

<sup>134</sup> Title 10 Del. Code § 902(a).

<sup>135</sup> 2006 Annual Report of the Delaware Judiciary, Family Court, at 50: "The Family Court has jurisdiction over statutorily enumerated juvenile delinquency matters, child neglect, dependency, child abuse, adult misdemeanor crimes against juveniles, child and spousal support, paternity of children, custody and visitation of children, adoptions, terminations of parental rights, divorces and annulments, property divisions, specific enforcement of separation agreements, guardianship over minors, imperiling the family relationship, orders of protection from abuse and intra-family misdemeanor crimes. Cases are appealed to the Supreme Court with the exception of adult criminal cases, which are appealed to the Superior Court." Available at: <http://courts.delaware.gov/aoc/AnnualReports/FY06/FamilyCourt.pdf>.

<sup>136</sup> *In re Gault*, 387 U.S. 1 (1967).

triggered the moment “formal judicial proceedings have begun,”<sup>137</sup> and “during any ‘critical stage’ of the postattachment proceedings” thereafter.<sup>138</sup>

## THE INITIAL APPEARANCE

The “initial appearance before a judicial officer” triggering the right to counsel can occur in a number of different ways for Family Court cases. Two variables in particular have significant impact on the course of proceedings: whether or not the child is taken into custody by the police, and the time of day at which the arrest occurs.

As with adults, any time an officer arrests a child, the child is taken before a committing magistrate to determine whether the child should be detained pending trial and, if so, then under what conditions. But depending on when the arrest occurs, the sequence of court hearings for that child varies slightly. If the arrest occurs outside of Family Court business hours – for example, after school or over the weekend – then the child is brought back to the police station and appears before a Justice of the Peace Court magistrate<sup>139</sup> by videoconference.<sup>140</sup> This appearance only serves as the bail hearing. The child’s detention status following that hearing in JP Court guides the timing of the next events. If the child is not detained, his case is scheduled for arraignment in Family Court on a later date.<sup>141</sup> But if JP Court magistrate sets bail and the child remains in state custody (meaning he or his parents cannot afford bail), then the JP Court sets the case for a bail review in the Family Court, which must occur on the Family Court’s next business day.<sup>142</sup> The Family Court judge at this subsequent bail review hearing also takes this opportunity to arraign the child.

If the arrest occurs during business hours for the Family Court of that county, then the child is brought before a Family Court commissioner instead.<sup>143</sup> Like a child’s hearing before a JP Court magistrate, this hearing before the Family Court commissioner serves to set bail. But it is *also* the arraignment. The commissioner informs the defendant of the nature of the charges against him and automatically enters a not-guilty plea on his behalf. (We note here that the commissioner’s automatic entry of a not-guilty plea on behalf of juvenile defendants during their arraignments does not satisfy the right to have counsel present at this “critical stage” of their cases,<sup>144</sup> because no critical stage can occur without counsel present.)

<sup>137</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, No. 07-440 at 19 (June 23, 2008).

<sup>138</sup> *Ibid.*

<sup>139</sup> 10 Del. C. 1004.

<sup>140</sup> Several JP Courts throughout the state operate 24 hours per day, seven days a week. Therefore, a Justice of the Peace is available somewhere at any time of day to serve as committing magistrate.

<sup>141</sup> Generally two weeks from the initial appearance.

<sup>142</sup> 10 Del. C. 1007(d), and Family Court *Rules of Criminal Procedure*, Rule 5.1. The Court will review the bail, modify if appropriate, set conditions as appropriate.

<sup>143</sup> 10 Del. C. 1005.

<sup>144</sup> *Hamilton v. Alabama*, 368 U.S. 52 (1961).

## THE RIGHT TO COUNSEL FOR CHILDREN IN DELINQUENCY PROCEEDINGS

In the American legal system, children are held apart from adults, and for very good reason. Under our state and federal laws, children are incapable of committing crimes. Instead, they commit “delinquent acts.” Because of this, children are not exposed to trials in criminal courts, and thus the potentially severe punishments that might result from a guilty verdict rendered by a jury are reserved for adults. The concept of justice, for children, is radically different.<sup>i</sup>

It was not always this way.

Early on, criminal procedure in our state courts was largely based on English common law, which for centuries held that children under the age of seven were incapable of possessing criminal intent. Because a six-year-old could not even understand the concept of a crime, any bad thing he might do must be an accident. But, upon reaching the age of seven, children were treated just like adults. They could be arrested, tried, and punished for their actions. They could be sentenced to lengthy prison terms or even death.

To our more modern minds, the legal separation of child from adult being cemented at

the age of seven seems ludicrous. Our state and federal laws over the years have demonstrated that young adults should not be treated as adults. Individuals under 18 years of age, after all, cannot serve on juries, vote, drink, or smoke because, as the U.S. Supreme Court put it, “the legislatures have wisely decided that individuals of a certain age aren’t responsible enough.”<sup>ii</sup> The Supreme Court recently detailed the scientific gap that differentiates children from adults, in its 2005 decision in *Roper v. Simmons* prohibiting the death penalty from being applied to anyone under 18 years of age, pointing to the “underdeveloped sense of responsibility” documented in numerous studies of children, their susceptibility to negative influences and peer pressure, and the “transitory nature of their personality traits” as evidence.<sup>iii</sup>

The founders of the nation’s first juvenile court systems did not have this exhaustive body of scientific analysis available to them well over a century ago, but nevertheless they correctly recognized that children are indeed different, and should therefore be dealt with by the courts in a different manner from adults. By the later stages of the 19th Century, many advocates had become frustrated (and some even disgusted)

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<sup>i</sup> For the history of the juvenile justice system in America, we relied upon the U.S. Supreme Court’s published opinions in *Kent v. United States*, 383 U.S. 541 (1966) and *In re Gault*, 387 U.S. 1 (1967), along with a report of the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Justice: A Century of Change* (Juvenile Justice Bulletin, December 1999), available at <http://www.ojjdp.gov/publications/PubAbstract.asp?pubi=3911>. See also, American Bar Association, *The History of Juvenile Justice*, at: <http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf>.

<sup>ii</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>iii</sup> *Ibid.*

that more and more children were serving lengthy sentences along with hardened adult criminals in our state prisons.

To those early reformers, children were not just developmentally different from adults. To them, the child is naturally good. He can be shepherded away from doing bad things, and society's role is to intervene before it is too late. Children, therefore, should not be punished. Instead, they should be treated and rehabilitated. This required a fundamental shift in focus – the court should be concerned with the juvenile offender, rather than the offense. But the punitive nature of adult criminal procedure was clearly at odds with this notion. Therefore a new, more clinical style of court system was needed, entirely distinct from the criminal courts, complete with its own set of rules.

Illinois was the first state to adopt the juvenile court model in 1899, but from there it quickly spread to every state in the Union.<sup>iv</sup> The new juvenile court discarded questions of guilt and innocence inherent in the adversarial process of our criminal courts, and instead the state was to act in the best interests of the child. It was called "*parens patriae*," a Latin phrase that translates to: "parent of the nation."

Before, when a child was accused of a crime and tried before a judge and jury, the court was required to afford the child the same procedural rights as it would to an adult defendant. The new juvenile courts did away with procedural rights for children altogether. In fact (the argument went) children have

no rights. A child, after all, has spent all of his days being in the custody of some caring adult. He is told to go to school, do his chores, and go to bed. The custody and care his parents afford him is all that he is entitled to.<sup>v</sup> If the child commits a delinquent act, his parents have defaulted in their custodial obligations, and the state may intervene on the child's behalf. The state becomes the parent: *parens patriae*.

In a criminal case, however, there are all sorts of procedural requirements and restrictions placed upon the state whenever it tries to take away a person's liberty. But, because the juvenile courts were considered civil and benevolent in nature, rather than criminal and punitive, those same procedural safeguards for adults had no application in delinquency proceedings. Among the safeguards children lost when the juvenile courts were created, several are found in the Bill of Rights, such as: being entitled to bail; the right to be notified of the charges; the right to confrontation and cross-examination; trial by jury; privilege against self-incrimination; and, of course, the right to counsel.

Although the creation of the juvenile court system was well intended, the results were mixed at best.<sup>vi</sup> Children were taken into the custody of the state, and parents frequently were left un-notified for days of their child's arrest. In determining whether a child should be detained or released back into the custody of his parents, juvenile court proceedings carried such an air of informality that they were frequently mistaken for being

<sup>iv</sup> U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Justice: A Century of Change* (Juvenile Justice Bulletin, December 1999), available at <http://www.ojjdp.gov/publications/PubAbstract.asp?pubi=3911>.

<sup>v</sup> "The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right 'not to liberty, but to custody.'" *In re Gault*, 387 U.S. 1 (1967).

<sup>vi</sup> See *Kent v. United States*, 383 U.S. 541 (1966), and *In re Gault*, 387 U.S. 1 (1967).

completely arbitrary. Given the rehabilitative theory at the root of the juvenile court model, the state often failed in its duty to serve effectively as “parent of the nation.” The constraints of funding and bureaucracy alike had left children in state custody without access to the essential social services promised to them.

By 1966, the U.S. Supreme Court famously expressed concern that, under the juvenile court model, children were receiving “the worst of both worlds.”<sup>vii</sup> They get “neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”<sup>viii</sup> Well, if that was the case, then what was the point of the juvenile courts in the first place? As a result, in state after state, the juvenile court model as a whole was directly challenged in state and federal courts as fundamentally unconstitutional. But each time, it survived.

So, rather than attacking their very existence, the legal question shifted toward the process of the juvenile courts: could the nation continue to justify affording children less protection than was given adults in criminal trials?

## THE RIGHT TO COUNSEL FOR CHILDREN IN TRANSFER HEARINGS

In 1961, in Washington DC, a woman was robbed and raped in her own apartment. Fingerprints matched a 16-year-old named Morris Kent. He had a bit of a record with

the juvenile court, having been apprehended when he was only 14 for a slew of purse-snatchings and burglaries. So, having been under the authority of the juvenile court for two years already, and now standing accused of such a heinous crime, the juvenile court judge felt justice might better be served if Morris was instead tried as an adult in criminal court, rather than as a delinquent in juvenile court.

Morris’ mother quickly hired a lawyer to represent him, who immediately went to the juvenile court’s social service director – the person who had been ultimately responsible for the court’s supervision of Morris during the previous two-year probationary period. But the lawyer was denied access to his client’s social service file. He instead filed a motion with the judge to grant him access to the file and also filed a motion for the juvenile court judge to retain jurisdiction over Morris’ case in order to maintain the same course of treatment and rehabilitation on which he had been for the past two years. Morris’ lawyer assumed there would then be a hearing on his motions, with a full opportunity to argue his side of the facts before the judge. But the judge held no hearing. He made no ruling on any of the motions. He made no findings of fact. Instead, the juvenile court judge entered an order that only said, after a “full investigation, I do hereby waive” jurisdiction over the petitioner – Morris Kent – and direct that he be “held for trial for [the alleged] offenses under the regular procedure of the U.S. District Court for the District of Columbia.”

In just about every state, including the District of Columbia, the juvenile court was given authority to waive its jurisdiction over a child in certain circumstances. The con-

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

<sup>viii</sup> *Ibid.*

tion was that certain offenses were so heinous that, if committed by an adult, they would amount to a felony or, worse, that they could be punishable by death. In those cases, if the juvenile judge felt the child was not amenable to a state-sponsored program of treatment, training, and rehabilitation, then the public good was best served by transferring the child's case to adult court.

Before doing so, however, most juvenile courts were required to conduct a full investigation. In many states, however, this "full investigation" followed the same form as all other juvenile court proceedings – meaning there was essentially no form at all. If there was a formal hearing in which the child could present his side of the argument, he was lucky. Morris Kent appealed his case all the way to the U.S. Supreme Court, where the question before the Court was whether the child had a right to be heard at this stage, and whether that right to be heard contained the right to due process under the Fourteenth Amendment.

In *Kent v. United States*, the U.S. Supreme Court noted that the "objectives" of the juvenile courts are "to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae*, rather than prosecuting attorney and judge. But the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness."<sup>ix</sup> In other words, if the premise that the juvenile court rightly afforded children special protections that should not be afforded to adults – including protection from having to face criminal charges and questions of guilt and innocence – was to be accepted, then whether or not a child ought to be deprived

of those special protections by being transferred to adult court is a question of critical importance.

"[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony — without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults with respect to a similar issue would proceed in this manner. It would be extraordinary if society's special concern for children . . . permitted this procedure."<sup>x</sup>

Children, therefore, have a right to a formal hearing before having their cases transferred to adult criminal court, and the formal hearing "must measure up to the essentials of due process and fair treatment."

A year later, in 1967, the Court relied on its sweeping language in *Kent* to settle, once and for all, its "substantial concerns" for the complete absence of due process protections available to children in all juvenile court proceedings.

## IN RE GAULT

In 1964, Gerald Gault was 15 years old when he, along with a friend of his, was taken into custody by the sheriff's department in Gila County, Arizona.<sup>xi</sup> They were accused of making lewd phone calls to an elderly woman. Gerald still had six months of probation left from a previous brush with the law – he had been with another kid who had stolen a woman's purse. No one called his parents to let them know he had been arrested this second time. His parents came home from

<sup>ix</sup> *Ibid.*

<sup>x</sup> *Ibid.*

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

work that evening, and Gerald simply was not there. Eventually his older brother found out he was being held at the county detention center. When they got to the detention center, they learned that there would be a hearing at the juvenile court the following day.

On the day of the hearing, the superintendent of the detention center – who was also Gerald’s probation officer – filed a petition against Gerald, entirely devoid of facts or any real allegations. Instead it merely called for the judge to hold a hearing regarding Gerald’s “care and custody” because “said minor is under the age of eighteen years, and is in need of the protection of this Honorable Court; [and that] said minor is a delinquent minor.” The petition was never shown to Gerald’s parents. Only the judge saw its contents. The hearing was held in the judge’s chambers. The superintendent was there along with Gerald, his mother, and his brother. The woman who had been the recipient of the lewd phone calls was not there, and so there was no real witness. Instead, the judge questioned Gerald directly. There was no mention of offering Gerald the opportunity to speak with a lawyer.

The same things happened at a second hearing held the following week. The hearing was entirely informal, the judge did all the questioning, and there was no mention of a lawyer to help Gerald in his defense. Given what he was accused of having done, had Gerald been an adult, under Arizona law he would have faced a maximum of \$50 in fines or two months in jail. But the judge found him to be a delinquent child, and so

Gerald was placed in the State Industrial School until he reached his 21st birthday. Such was the disproportionate penalty for children.

Relying heavily on the sweeping rhetoric of its decision in *Kent v. United States*, the watershed 1967 decision of *In re Gault* is critically important to the course of the right to counsel in America. But more than merely focusing on the right of children to have the assistance of counsel in delinquency proceedings, *Gault* examined the substance of juvenile court procedure and found the complete lack of formal procedure entirely unacceptable under the Constitution. “Due process of law” the Court noted “is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.”<sup>xii</sup>

As it had in the past, the Court accepted the entire premise of the juvenile court model – that classifying juvenile offenders as “delinquent” connotes less stigma than the “criminal” classification carries, that the juvenile courts are not open to the public to protect the child from full disclosure of his “deviational behavior,” and so on – but rejected the premise that those benefits could only be preserved by maintaining the status quo. The notion, that introducing due process rights for children would strip the juvenile courts of their purported value, was ludicrous.<sup>xiii</sup>

In fact, the juvenile courts’ own performance record belied that these supposed benefits

<sup>xii</sup> *Ibid.*

<sup>xiii</sup> We use the term ‘ludicrous’ here because it fits the tenor and tone of the major U.S. Supreme Court cases on this point. See, for example, *In re Gault*, 387 U.S. 1 (1967): “In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase ‘due process.’ Under our Constitution, the condition of being a boy does not justify a kangaroo court.”

actually existed. The Supreme Court noted that the claim of secrecy is “more rhetoric than reality,” as judicial discretion to disclose juvenile court records had afforded law enforcement nearly unchecked access to children’s files. And as for the “benefit” of being cast as a delinquent youth, the Court found it “disconcerting . . . that this term has come to involve only slightly less stigma than the term ‘criminal’ applied to adults.” Juvenile courts, therefore, had no basis to justify their heavy-handedness, and general air of procedural chaos. “Under our Constitution, the condition of being a boy does not justify a kangaroo court.” Children, it was determined, would now be afforded due process rights normally reserved for adults facing criminal charges.

Specifically, because children were subject to “the awesome prospect of incarceration in a state institution until . . . the age of 21,”

the Supreme Court determined that juvenile delinquency matters were “comparable in seriousness to a felony prosecution.” Just as it had in *Gideon v. Wainwright* four years earlier, the Court held that a “child requires the guiding hand of counsel at every step in the proceedings against him.”<sup>xiv</sup>

State governments, therefore, have an obligation under the Fourteenth Amendment to notify the child of his right to have counsel assist him in any proceeding that might result in the government taking away his freedom; and, if the child or his parents could not otherwise afford the cost of representation, then the state must provide him with representation.

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<sup>xiv</sup> *Ibid.*

What happens next, however, depends on the seriousness of the alleged offense. If the child is charged with a misdemeanor, the case is scheduled for trial, some three to four weeks away; if the charge is a felony, then the Family Court commissioner schedules the matter for case review, two weeks out; and if it is a serious felony, then Superior Court may have statutory jurisdiction to handle the child's case as an adult prosecution, and the case is set for preliminary hearing in Family Court, which must occur within ten days of arrest.<sup>145</sup> (This last scenario is discussed in greater depth on page 117.)

Most often, however, an arresting officer releases a child into the custody of his parent or guardian, rather than taking him into custody.<sup>146</sup> Instead of being brought immediately before a Family Court commissioner or JP Court magistrate, the defendant receives from the court a summons to appear for arraignment, by way of a Notice of Hearing letter,<sup>147</sup> at a future date. That arraignment is that child's initial appearance on the charges against him. Being a critical stage of a case, the arraignment cannot occur unless counsel is provided for the accused.<sup>148</sup>

## NEW CASTLE COUNTY

The arraignment for children in New Castle County Family Court begins at the court clerk's desk in the hallway outside courtrooms 1A and 1B. As the child and his or her parents arrive on the day of arraignment, they check in at the clerk's desk where the clerk asks a series of questions:

“What's your name?” or “What's your child's name?”

“Did you receive a copy of the charging document?” or “Did you get a copy of the citation?”<sup>149</sup>

“How are you going to plead?”

“Do you have a lawyer?”

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<sup>145</sup> Family Court Rule 6(c).

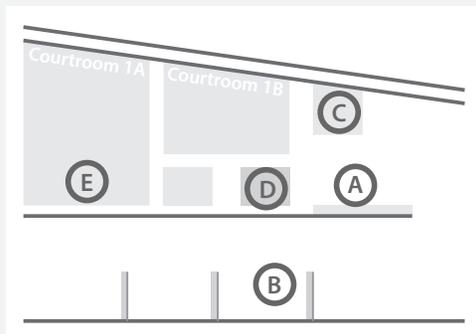
<sup>146</sup> The state has responsibility over any child it detains pending trial. There are three semi-secure detention facilities and two non-secure detention facilities statewide for housing juveniles, with a total capacity of 211 kids. According to Family Court Chief Judge Chandlee Kuhn, the facilities at NCCDC, Stevenson House, and Ferris School, can hold 64, 55, and 72 children respectively. (Ferris School only holds children post-sentencing, rather than for housing juvenile defendants pretrial.) And the two Peoples Place facilities in Milford and Townsend can hold ten children each.

<sup>147</sup> An example Notice of Hearing Letter is included as Appendix B. The letter lists the charges against the defendant, the arresting officer's affidavit, and a summons to appear for arraignment in Family Court. The letter also informs the defendant of “the right to be represented by an attorney in any criminal proceeding before this court,” and provides a phone number for the nearest public defender office branch with instructions to call immediately if the individual is otherwise unable to hire private counsel. An example Complaint & Summons is attached as Appendix C.

<sup>148</sup> *Hamilton v. Alabama*, 368 U.S. 52 (1961).

<sup>149</sup> The charging document generally comes in one of three forms: a ticket from the arresting officer, a summons which is delivered by mail, or by a citation delivered by a JP Court magistrate.

## New Castle County Family Court: juvenile arraignments



- A. Clerk of Court's desk, where defendants check in.
- B. Waiting area.
- C. Public defender investigator's work-space.
- D. Attorney conference room, attached to Courtroom 1B.
- E. Arraignments conducted in Courtroom 1A.

"Did you want to talk to the public defender or do you want to go without representation?"

Behind the desk, two or three clerks manage the flow of that day's set of case files. Depending on each defendant's (or the parent's) response, the arraignment calendar is segregated into two primary batches: (a) those that want to talk to the public defender and (b) those that do not want representation or just do not know. (See chart, above.)

Those falling into the latter category are given a clipboard and pen and are asked to fill out and return back to the clerks a Basic Data Sheet, which asks the child and parents to verify the defendant's name, date of birth, phone, address, and other general information, and a Rights of Juveniles Form.<sup>150</sup>

The Rights of Juveniles Form reviews the constitutional rights each defendant has at the outset of the case. It includes the right to have counsel and to be appointed public counsel "if the Court finds that my parents/custodians cannot afford one."<sup>151</sup> It continues by reviewing other constitutional rights, including the rights to remain silent, a speedy trial, question witnesses, and to be presumed innocent. Toward the bottom is a grey box titled "Waiver of Right to Counsel," with the instruction beneath it reading "(Check Box to Indicate if Waiving Your Right to Counsel)." Next to the checkbox it reads: "I have not retained a lawyer, privately or through the public defender's office, and I waive my right to be represented by a lawyer at my arraignment today. I understand that it is my responsibility to obtain a lawyer immediately if I want to be represented by a private lawyer or public defender at trial." The Rights of Juveniles Form then asks for the parent/custodian, and then the child, to affix their signatures at the bottom certifying they have read and understand their rights.

<sup>150</sup> A copy of the Rights of Juveniles Form is included as Appendix D.

<sup>151</sup> The public defenders note that their office's policy is that all children automatically qualify for public counsel, regardless of the parents' income. Nevertheless, this is what the form says.

Once an unrepresented defendant fills out and returns the clipboard with accompanying forms, a clerk then paperclips those forms to the top of the defendant's case file. Once a sufficient number of case files are ready, the clerk brings them into the courtroom and hands them to the commissioner. Those defendants' cases are called first, in groups of five at a time.

The commissioner presiding over the criminal calendar during the week of our visit described the process inside the courtroom at this stage as the "pre-arraignment." She began by reviewing with the five defendants and their parents, *en masse*, the arraignment process and constitutional rights listed on the Rights of Juveniles Form, with added emphasis on the right to counsel: "Because this is a criminal matter, you have the right to have the public defender represent you at no cost." And then one-by-one, the commissioner called each defendant to stand.

"Who do you have here with you today?" the commissioner began with the first defendant.

"My grandma."

"Okay, and ma'am do you have custody of your grandson?" the commissioner asked of the grandmother, who was seated next to the defendant.

"Yes."

Turning back to the child, the commissioner asked, "Do you understand your rights?"

"Yes."

"Do you understand the charges against you?"

"Yes."

"How do you want to plead?"

"Guilty."

"Okay. The prosecutor is going to talk to you about your case. But here's the thing, and this is important: the prosecutor doesn't represent you. He represents the state. So he will probably offer you some sort of a plea deal. But you don't have to take it. You can talk to a public defender if you think it's in your best interest. They have someone on the floor here today. So you can talk to them if you want to."

The commissioner told a teenage boy who also appeared for arraignment, "the prosecutors are going to offer you a deal in exchange for your plea." The boy's father who was

there with him said, "I called a lawyer and he just told me to ask for Probation Before Judgment."

Looking at her files, and noting that the boy had pending disorderly conduct charges elsewhere, the commissioner replied, "It is very unlikely that the prosecutor will offer a deferment since you have these charges out of Sussex [County]. But talk to him and see what he's offering in exchange for your plea."

"We were told by the prosecutor in Sussex that his charge would be dropped, or included with a deal here, so that he could get a deferment," said the father.

"The Sussex prosecutor can't promise you anything that will bind the prosecutor here. You might want to talk to the two prosecutors separately and see what your best deal is from each one. But the prosecutor here, it's pretty clear, will consider the Sussex charges when offering you a deal, and it is unlikely to be a deferment. You can go out into the hall, wait for your file and then talk to the prosecutor . . . and maybe call the Sussex prosecutor . . . and if you don't like the deal, you can go to trial."

At this point the father asked, "Can he withdraw his guilty plea and talk to a public defender?"

"Yes he can." And then to the teenager, "Do you wish to change your plea?"

"Not guilty," said the boy, "and I would like to talk with a public defender."

"There is a public defender in the hall today. Wait in the hall for your file and then talk to the public defender."

The commissioner then asked another defendant to stand. "Who do you have with you here today?"

"My mom."

"Do you understand your rights?"

"Yes."

"Do you understand the charges against you?"

"Yes."

"How do you want to plead?"

"Guilty."

The commissioner then addressed the child's mother. "Mom, do you think it's in your son's interest to take this plea without first talking to a lawyer?"

"Yeah, we were hoping we could get some sort of arbitration."

"Well, arbitration is something that the prosecutor will have to work out with the victim. It really depends on what the victim wants to do."

"I'm actually the victim."

"Okay. Because it's a family member, we may not be able to take your son's guilty plea. We can't proceed without a public defender." Turning back to the child, the commissioner continued, "Whenever the victim is a family member we usually appoint the public defender because we want to protect your rights."

Throughout the state, so many of the questions regarding the rights of the accused and specific case decisions involving the accused, such as the decision to plea guilty or not-guilty, were posed of the accused child's parents. This presents numerous potential conflicts that should be avoided. It was a happy accident for the commissioner, and happier still for the child, that she learned the child's mother in this particular case was the alleged victim. In many other cases we observed, the parents answered the commissioner's question – *Do you think this is in your child's interest?* – with nothing more than a "yes" or a "no."

Importantly, there is no prosecutor nor public defender in the courtroom at this time – they are busy negotiating pleas just outside the door to the courtroom. If anyone wants to speak to the public defender, then the process starts for him or her just as it would have had they elected to seek public representation from the outset.

Here is how that process works. If the defendant wants to talk with the public defender's office, she and her parents are told to sit on one of the benches along the corridor and wait for the public defender to call them.

During a break in one juvenile arraignment docket, a commissioner lamented that so many kids waive the right to public counsel at their parent's urging.

We explained that other states handle the question of waiving counsel differently.

In Wisconsin for example it is now statute\* and the practice of the court that all children are represented by the indigent defense system, beginning at arraignment. At the end of the matter, if the parent is found able to pay some portion or all of the cost of representation of their child, then the court can bring action against the parents to recoup those costs. But the child is always represented.

The commissioner exclaimed: "Oh! That's so much better." A bailiff and a staff member from YRS happened to have been sitting in the courtroom with us, who both agreed: "That's the way it should be."

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\* See generally, Chapter 48 of the Wisconsin Statutes (Children's Code) and Chapter 938 (Juvenile Code). The chapters have a number of parallel provisions as far as right to counsel (48.23 and 938.23, respectively) and parental payment of attorney fees (48.275 & 938.275).

Meanwhile the clerk hands the case file for that defendant to an investigator from the public defender's office sitting at a table just behind the clerk's desk. The PD investigator's job is to review the case files she receives from clerks, looking at the charges and the defendant's criminal history, and then split those files for the defendants the public defenders will be representing that morning into two piles: (a) those defendants who are eligible for arbitration or the First Offenders Program; and (b) everyone else.

The public defender's office assigns one attorney to staff arraignments in New Castle County Family Court.<sup>152</sup> The public defender then retrieves the court's case files from the public defender investigator, working them one at a time. The attorney meets with the prosecutor to discuss any possible plea deals, including whether any defendants are eligible for diversion or arbitration,<sup>153</sup> and then meets with each defendant. In those cases where the prosecution is offering a plea, the public defender discusses the offer with the defendant and his or her parents. And, if they accept it, then the public defender brings the court's case file for that defendant to the commissioner inside the courtroom to inform her that the defendant is taking a plea. When the commissioner is ready, she calls into the courtroom the prosecutor, public defender, defendant and the parents to formally enter the plea. In such cases, the defendants are sentenced that day.

If there is no plea offer, the public defender fills out a 10-D Form (a written waiver of the arraignment), attaches it to the court's case file, and then brings it to the commissioner inside the courtroom. By submitting a 10-D, the defendant waits for a trial date and is free to go home without appearing before the commissioner. "But I tell them to go upstairs to get an interview before they leave," said the public defender assigned to juvenile arraignments that day. That is because the public defender's office does not formally commence representation of any children until *after* the arraignment. Everyone seeking public representation must first interview with the Office of the Public Defender in order to be screened for potential conflicts of interest that require that conflict counsel be appointed on the case.

There is no conflict attorney available during arraignments, and so, to the extent that children have access to representation at their arraignment, they do not have access to conflict-free representation.

Not every defendant seeks out the public defender's office during the arraignment. We watched as several children once again appeared before the commissioner without counsel to re-submit their guilty pleas (each had already been asked to plead during the pre-arraignment), this time having discussed the government's offer with the prosecutor.

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<sup>152</sup> This is a relatively recent development. Prior to the 2013 summer, the public defenders with cases scheduled for the arraignment dockets in New Castle County's Family Court would simply represent their clients' cases and then head back upstairs to their offices on the second floor. Now the defenders staff the front desk.

<sup>153</sup> Arbitration requires the defendant to "accept responsibility" for the alleged incident rather than admit guilt. See: [http://courts.delaware.gov/help/proceedings/fc\\_arbitration.stm](http://courts.delaware.gov/help/proceedings/fc_arbitration.stm).

## KENT COUNTY

The Kent County Family Court is at its busiest on Wednesdays. Children and their parents appearing for arraignment fill the small waiting area on the second floor of the courthouse. The rows of seats fill up quickly, so people inevitably stand along the corridors and down the halls waiting to be called. The focal point of the waiting area is the clerk's desk where defendants check in as they arrive for their hearings.

As each defendant checks in, the clerk asks if he has representation, wants a public defender, or wishes to proceed *pro se*. If the child and parents want to continue without counsel, the clerk hands them a Rights of Juveniles form to fill out, which includes a waiver of the right to counsel.<sup>154</sup> Once the completed form is returned, the clerk attaches the form to the top of the defendant's case file and places the file in a stack of similar files waiting for the prosecutor's attention. The prosecutor then grabs the file and calls the defendant's name so that she can begin plea negotiations directly with the defendant and the defendant's parents.

For those defendants seeking representation from the public defender's office, the clerk tells each one to go sign up for an interview when the defendant checks in at the front desk. This is done by way of a clipboard attached to a door in the back corner of the waiting area. In the small office beyond the door, an investigator<sup>155</sup> with the public defender's office handles all of the screening for each defendant that comes in for an interview. The investigator checks for financial eligibility for public counsel for adult defendants<sup>156</sup> and for potential conflicts of interest for all prospective clients. Having squared everything away, the intake screener tells the defendant and parents to have a seat back in the waiting area to be called by the public defender. When she is ready, the public defender calls the defendant and the defendant's parents to follow her down the corridor toward whatever quiet place she can find. There, the attorney, the defendant, and the defendant's parents quickly discuss the case. The attorney then goes and discusses the matter with the prosecutor to see what plea deal the state is offering, and then returns to discuss that plea option with the defendant.

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<sup>154</sup> Attached as Appendix D.

<sup>155</sup> This public defender office staff member is not an "investigator" in the sense that most other public defender offices across the country use that term. She does not handle case-related obligations, like finding and interviewing witnesses, assessing crime scenes, and collecting and examining evidence. Instead, she devotes all of her time to the intake processing of prospective clients who come into the office, or directly at the courthouse during arraignment days. Other jurisdictions call this staff position an "intake processor."

Upon review of the draft report, however, the public defender's office informed us that it has changed this staffing assignment. Now, a trained investigator, who we are told is capable of substantive case-related tasks described above, conducts the screening interviews in Family Court.

<sup>156</sup> Per OPD policy, all children automatically qualify for public counsel, regardless of their parents' income.

Access to resources in juvenile cases is seriously lacking. “We have social workers from the prosecutor’s office assigned to Family Court, but there’s not a comparable level of resources on the public defender’s side,” said one commissioner. The dearth of resources for juvenile representation, and the overall lack of time available for the attorneys, directly impacts the quality of plea deals the attorneys are able to negotiate on behalf of their clients. Another Kent County Family Court commissioner told us, prior to taking the bench that morning: “The public defenders will take a number of pleas today that are handled without further factual development.”

The result of this entire process is that all children appearing for arraignment wind up in one of two categories. Everyone pleading not guilty does so by way of a Rule 10 written arraignment and gets to go home with a trial date in hand. And everyone pleading guilty sits and waits to go before the commissioner.

We watched as one defendant who was being held in the state’s custody appeared for his arraignment, along with the assistance of the public defender. He was in his late teens, and was being charged with two felony counts: burglary and theft of a credit card. Since he was already on probation, the appearance was his violation of probation (VOP) hearing too. The state was asking for Level 5 incarceration.

“Your Honor, I spoke with my client today,” said the public defender, “and I’ve also spoken with him by videophone previously, to discuss the case. We do not dispute the state’s version of the plea agreement, but we do dispute the probation officer’s sentencing recommendations.”

The public defender then introduced new information to the judge regarding her client’s drug habits in an effort to get the defendant access to a drug treatment program in lieu of incarceration. “The only way to get the client access to child services is to sentence them,” the commissioner presiding over the hearing told us when we spoke that morning. “So, ‘best interest’ frequently overrides ‘advocacy.’ The pressure on the government is diminished if the public defender thinks the client could use help [in the form of treatment services].” Nevertheless, it appeared to us that the sentencing option voiced by the public defender on behalf of this particular defendant reflected true advocacy of the client’s wishes. After all, by virtue of being incarcerated pending his hearing, the child had more time to meet with his lawyer to discuss his case than just about any child out-of-custody.

Far too many children appear without representation. In fact, one commissioner expressed that most children do not have counsel at arraignment.

“I’m not satisfied [John] really understands the consequences of pleading guilty,” the commissioner said of the next defendant to appear for arraignment in her courtroom. The 16-year-old boy faced several charges, including possession of marijuana, terroristic threatening, disorderly conduct, and offensive touching. He too was on probation

at the time. The prosecutor was recommending his probation be enhanced to Level 4, along with a number of court costs, as his sentence.

“Why don’t you explain to me what an attorney does?” the commissioner asked.

“He umm . . .” the child began, shifting his weight from side to side as he searched for the right answer. “The attorney . . .”

“Do you understand the state is recommending that you be sent to Level 4?” the commissioner asked. “To Stephenson. Right away. Today.”

The defendant wavered, but still could not find the correct words. The commissioner in the end halted proceedings and referred the boy to the public defender’s office.

This defendant, like all defendants appearing before the court without counsel that morning, had filled out the Rights of Juveniles form, which included a written waiver of his right to counsel. But, as the commissioner demonstrated, his waiver of that right was far from “knowing” or “intelligent.” This belies the notion, accepted in courts across the state, that a child’s signature on a carbon-copy form amounts to a valid waiver of his right to the advice of counsel.

Further still, it demonstrates that 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. As discussed earlier, the plea negotiation is a critical stage of the case, meaning the negotiation cannot happen unless counsel is present or the defendant’s right to counsel been knowingly, voluntarily, and intelligently waived.<sup>157</sup> Yet prosecutors make it a practice to meet with unrepresented defendants in every criminal court we visited across the state.

As the report of the National Right to Counsel Committee, *Justice Denied*, notes: “Not only are such practices of doubtful ethical propriety, but they also undermine defendants’ right to counsel.”<sup>158</sup> The National Right to Counsel Committee report notes further:<sup>159</sup>

“Beyond the court’s role in making certain that a defendant’s waiver of counsel is valid, prosecutors have a professional responsibility duty ‘not [to] give legal advice to an unrepresented person, other than the advice to secure counsel.’<sup>160</sup> Similarly, the ABA has recommended that prosecutors should refrain from negotiating with an accused

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<sup>157</sup> *Lafler v. Cooper*, 566 U.S. \_\_\_, No. 10-209 at 3-4 (March 21, 2012); *Padilla v. Kentucky*, 559 U.S. \_\_\_, No. 08-651 at 16 (March 31, 2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).

<sup>158</sup> Report of the National Right to Counsel Committee, *Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel* (April 2009), page 8. Available at: <http://www.constitutionproject.org/pdf/139.pdf>.

<sup>159</sup> *Id.*, at 88.

<sup>160</sup> The NRTC report cites to ABA *Model Rules*, Rule 4.3. We note that Rule 4.3 of the Delaware *Rules of Professional Conduct* is identical.

who is unrepresented without a prior valid waiver of counsel.<sup>161</sup> Prosecutors also are admonished by the ABA to ensure that the accused has been advised of the right to counsel, afforded an opportunity to obtain counsel, and not to seek to secure waivers of important pretrial rights from an accused who is unrepresented.<sup>162</sup>

While this issue is raised in the context of children, the same ethical standards for prosecutors apply to discussions with lawyerless adult defendants.

The majority of out-of-custody juvenile defendants do not go to the public defender's office to get screened in advance of the initial appearance. According to the public defender on duty that day, there were 65 cases on the arraignment calendar. Of those, two were incarcerated – automatic eligibility to receive public counsel. Only three of the remaining 63 came into the office for a screening interview. Compounding the issue, the conflict attorney does not staff arraignments. Defendants who qualify for public representation, but who cannot be represented by the public defender's office, simply do not get a lawyer that day. "We'll just inform them of their options," a public defender explained. "We'll say, 'Sorry, the public defender's office can't represent you because of a conflict and so you can either go *pro se*, or you can enter a Rule 10 [written arraignment] and have conflict counsel represent you at your trial."

This of course adds pressure to conflicted defendants and/or their parents to just get it over with, and plead guilty that day.

## SUSSEX COUNTY

The Family Court in Sussex County is split by floor, with commissioners and misdemeanors on the 2nd floor, and judges and felonies on the 3rd floor. Whereas arraignments of all types are heard by a commissioner elsewhere, in Sussex County felony arraignments are presented directly before a judge. Each of the two floors schedule their dockets independently of each other – with misdemeanor domestic violence arraignments on Mondays and misdemeanor juvenile arraignments on Wednesdays, both on the 2nd floor, and felony juvenile arraignments also on Mondays and Wednesdays on the 3rd floor – presenting significant hurdles for public defenders and conflict counsel to be able to appear for every docket at which they are required.

Complicating matters further, the primary and conflict defender systems both dedicate fewer resources to the representation of clients in Family Court than in any other court proceedings in Sussex County. The public defender's office only recently added one attorney part-time to its Family Court team (he also devotes half of his time to the Court of Common Pleas, located across the Circle in Georgetown) bringing the office's total number of Family Court attorneys to 1.5. The office's supervising attorney frequently

<sup>161</sup> ABA *Standards For Criminal Justice: Prosecution Function* 3-4.1(b), 3-3.10(a) (3d ed. 1993).

<sup>162</sup> *Id.*, at 3-3.10(c).

helps to alleviate workload concerns by standing in from time to time on certain calendars, such as mental health court. The conflict system only has ½ of one part-time contract attorney<sup>163</sup> devoted to Family Court; she too splits her time between Family Court and the Court of Common Pleas.

Each of the courtrooms on both floors remains locked until a case is ready to be heard by a judge or commissioner, and then the courtroom is unlocked and only those parties relevant to the case are invited inside.<sup>164</sup> This means that all people who have business before the court that day – prosecutors, defenders, bailiffs, administrative staff, victims and the accused alike – have to sit together in the central waiting area just off of the elevators on the 2nd and 3rd floors.

At the center of the 2nd floor is a large square receptionist's kiosk, staffed by court personnel, where defendants are asked to check in upon arriving for arraignment. Rows of long wooden benches surround the kiosk on three sides, where everyone must wait after checking in. Neither the prosecutors nor the public defenders have proper office space at the courthouse. Instead, 6-foot high cubicles have been erected for the opposing attorneys, with a desk and two chairs in each, tucked in opposite corners of this main waiting room. But, as three rows of benches buttress the public defender office's cubicle, the conversations between client and attorney within can be overheard quite easily. The conflict attorney has no such meeting space available – if the public defenders are already using their cubicle, she has to meet with her clients wherever they sit, out in the open. This violates *Principle 4's* requirement that defense counsel is provided with confidential space, in addition to sufficient time, to meet with their clients.<sup>165</sup>

<sup>163</sup> We define a part-time attorney as any lawyer handling appointed cases, whether as an employee of a traditional public defender agency or under contract or paid by the hour, who also has an active private caseload. All of Delaware's conflict attorneys have private practices, in addition to their contracts with the Office of Conflicts Counsel, and so each must be considered part-time.

<sup>164</sup> This is in direct violation of the Delaware Constitution, Section 9, which states unequivocally: "All courts shall be open." No exception is made for the Family Courts.

<sup>165</sup> According to the public defenders, this is an improvement

**ABA Principle 4: Defense counsel is provided sufficient time and a confidential space within which to meet with the client.** Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.

The central waiting area on the 3rd floor of the courthouse is arranged in much the same way as the 2nd floor, but without separate cubicles for prosecution and defense. Instead, tucked behind the receptionist's desk is a small office with a table and two chairs, a photocopier, and a filing cabinet. This office is all the meeting space available to the prosecutors, the defenders, probation officers, DFS and YRS workers alike. With no confidential space available, defenders meet with their clients in whispered voices wherever they can.

Not all defendants appear for arraignments on the 2nd or 3rd floor with counsel. We watched as a deputy attorney general met with felony defendants to discuss cases and negotiate pleas all without the presence of a defense lawyer. “[Jane Smith]?” the prosecutor called, and then joined the child on whichever bench she sat.

“[John Smith]?” the prosecutor called the next defendant.

“I have [John Smith] right here,” a public defender answered from a bench where he was meeting with a client.

This caught the prosecutor off guard. “I have him listed as *pro se*,” she said. “You’ve got to tell me who you’re representing, so I know.”

After watching this general process for a few minutes more, we asked the public defender to describe what was happening – why the prosecutor was calling names of children at all. “The DAG’s fishing for plea deals,” the public defender replied.

For any case, misdemeanor or felony, involving an out-of-custody defendant, that child is appearing in Family Court for his or her first appearance before a judicial officer. (In all likelihood, they had not appeared before a JP Court magistrate.) The only advice of the right to counsel those children received prior to this court date was contained in the Notice of Hearing letter they had received in the mail.<sup>166</sup> And so, anyone failing to call the public defender’s office for an interview in advance of the arraignment is considered by the prosecutors to be *pro se* – they have effectively defaulted on their right to the assistance of counsel. (See Kent County discussion, pages 91-94.)

Having successfully negotiated plea deals with a handful of unrepresented felony defendants, the judge was ready to hear these *pro se* cases. They were called in one-at-a-time.

The prosecutor informed the judge that the first defendant, a 17-year-old girl, was pleading guilty to the felony charge of possession of a controlled substance, and then sat

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over what was. Evidently, it was a challenge just to get the cubicles installed for their attorneys’ use.

<sup>166</sup> The Notice of Hearing letter advises defendants: “you have the right to be represented by an attorney in any criminal proceeding before this court. If you feel that you can not afford to hire an attorney, immediately contact the Office of the Public Defender at (302) 856-5310, where they will determine if you qualify for the services of their attorney.”

down. The defendant stood at the defense table with her grandfather standing beside her. (The grandfather had custodial rights of the girl.) The judge addressed the grandfather: “Do you want to plead guilty?”

“Yes,” the grandfather replied.

“Do you understand you have the right to an attorney?”

“Yes.”

“But you don’t want an attorney?”

“No.”

The judge paused. “Why not?”

“I’d like to take the plea that’s offered,” said the grandfather.

The judge paused for a moment. “You understand that getting an attorney doesn’t impact that, right?”

“Oh. . . no I did not.”

“So, do you want a public defender?”

“Well I think I’d like to just take the plea offer the prosecutor is offering.”

All this time, the defendant remained silent. None of the judge’s questions were posed to her, and so she gave no response. When the judge finally asked her what she wanted to do, she went along with her grandfather’s decision to plead guilty.

“On what basis are you making this plea?” the judge asked her. After hearing the defendant’s explanation of the facts and events resulting in her arrest, the judge launched into an extensive cross-examination: “When did you last smoke weed? . . . How often do you smoke? . . . You don’t have a job? . . . So how did you get the weed? . . . Oh, your brother gave it to you? . . . What’s your brother’s name? . . .”. In answering the judge’s questions, the girl made several incriminating statements on the record of herself and of other people, as well as detailing sensitive sexual assault issues in the course of explaining why she quit school. A minimally qualified defense lawyer, had one been present on behalf of this girl, would have objected to each question – they were irrelevant to the facts of the case at hand. “I find your waiver voluntary and intelligent,” the judge concluded and proceeded to sentencing.

Next, a 14-year-old boy appeared without counsel before the judge for his arraignment, alongside his mother. Neither spoke English, so a court interpreter assisted them during

Throughout Delaware, children often are treated as bystanders in their own hearings. Questions of due process are posed to their parents despite the right to due process being held by the defendant himself, and not his guardian.

their earlier discussions with the prosecutor. Like the previous defendant, the boy was pleading to the felony charge of possession of a controlled substance. His mother was one of the state's primary witnesses against him. It was she who found the drugs and called the police.

"Do you know you have the right to an attorney?" the judge asked the mother.

"Yes," the mother replied through the court interpreter.

"If you can't afford one, the court will appoint one for you."

"That's fine," said the mother.

"Then you need to go see the public defender," the judge urged, not certain if the mother's reply had amounted to an actual request for appointed counsel.

"Will I be able to deal with this today?" the mother asked.

"You'll have to go see the public defender, yes."

"But I really just don't want to have to come back again."

The judge eventually set the case for another hearing to give the defendant and his mother time to talk to the public defender's office. All of this was done over the mother's objections. The boy was silent the whole time.

Throughout Delaware, children often are treated as bystanders in their own hearings. The right to be heard resides with the defendant. The opinion of the parent or guardian as to whether she believes it to be in her child's interest to plead guilty or not guilty is irrelevant. But where the judge places all decision-making authority in the hands of the parent, as is the case in Sussex County's Family Court, the defendant is stripped of his right to be heard.

In courthouses across the state, we watched parents participate in meetings between attorney and defendant. In many, the parent is a witness to an incident or even the alleged victim. The interests of the parent in nurturing and in protecting the child do not trump the defendant's right to confidential communications with his lawyer. Children often appear in court scared. True, they are scared of going to jail. But, perhaps even more so, they are scared of angering their parents. By allowing, or even encouraging, the participation of the parent in privileged attorney-client conferences, the child is less likely to divulge to his attorney the full information the attorney requires in order to be effective.

On the 2nd floor in Sussex County's Family Court building, the process is similar to that on the 3rd floor. An adult appeared for his arraignment on a domestic violence charge before a Family Court commissioner. He was detained pre-trial and was represented by a public defender. The deputy attorney general spoke first, announcing that the defendant would plead guilty. When the prosecutor concluded, the public defender rose on behalf of his client.

"For the record, Your Honor," said the defender, "the public defender's office doesn't have a file on this case. But I met with the defendant today, and we are prepared to enter this plea."

"And so you're entering your appearance on behalf of the defendant?" the commissioner asked.

"Yes."

Despite proceeding at a very slow pace, the misdemeanor arraignments we observed in Sussex County are surrounded by an air of disorder and confusion. Misdemeanor arraignments are scheduled in groups of five cases in 30-minute intervals, starting with five at 9:00am. Out of 30 cases on the schedule for that morning, only six defendants were represented by the public defender's office. The prosecutor dismissed another five or six cases right away (*nolle pros*). The rest were *pro se*.

At 10:30am, no cases had been called for more than 45 minutes. Defendants, their parents, and court staff alike waited for something to happen. The bailiff explained the court was still on the 9:00am calendar call, meaning that cases from 9:30am, 10:00am, and 10:30am were further delayed. "What's the hold up?" a clerk asked one of the bailiffs. "We're waiting on the public defender," came the response. "He's left the building and no one knows when he's coming back." In truth, the defender was downstairs in the lockup meeting with his incarcerated clients regarding their appearances that morning. We asked if this type of standstill was common on the 2nd floor, and the bailiff said: "Yeah, not always, but some days it gets like this." Admittedly, the public defender was trying to do what he could juggling so many clients, but the episode shows how a lack of appropriate defender staff causes inefficiencies throughout the rest of the criminal justice system.

When the public defender came back upstairs, the court kicked back into motion. An adult he represented was brought before the commissioner to plead guilty to a charge of offensive touching. The deputy attorney general announced the plea agreement, and then she left the room to continue meeting with unrepresented defendants about other matters in the waiting area outside. The commissioner sentenced the defendant to 30 days in jail, suspended in lieu of one year at Level 2 probation, along with \$182 in costs and fees of which \$100 was for the services provided by the public defender's office that morning. As the commissioner was about to dismiss proceedings, the defender spoke up.

"Your Honor, this may be something we need to bring [the deputy attorney general] back in for," said the public defender as he flipped through pages in his case file. "It seems my client has already been in for 31 days."

"Max for offensive touching is 30 [days]," said the commissioner.

"So he's done already," said the public defender, suggesting that the guilty plea and sentence already rendered should both be voided, and his client released with credit for time served.

"I leave you to work it out with the prosecutor," the commissioner said as she stood to leave the bench.

With the sentence in limbo, pending both sides returning to the commissioner with a resolution, the bailiff escorted everyone out to the main waiting area and locked the courtroom door behind him once more.

The prosecutor's rush to get on with her remaining cases on that calendar, having left the courtroom before the commissioner had even accepted the defendant's plea, ensured that this matter could not be resolved without returning to the courtroom later that day. But the impact of the public defender's lack of time is clear. Two scenarios are possible. The attorney had advised his client regarding a plea deal to which he had not known the statutory maximum period of incarceration. Or, he knew the maximum punishment allowable by statute, but had not known that his client had been lingering in jail for 31 days. Neither is acceptable.

Every defendant has a right to *effective* representation in plea negotiations. But having been appointed to the case that morning, and having only minutes to meet with the client, how could any lawyer be effective? Obviously, no lawyer can.

# PART TWO

EFFECTIVE REPRESENTATION OF THE CLIENT

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"We're completely dependent upon the prosecutors to give us the police reports in a speedy fashion in order to declare conflicts," a private criminal defense lawyer told us during an interview at his office in Kent County.

"Here's an example," he continued, pulling a case file from a stack on his desk. "My client was arrested in May. The state took the case to the grand jury in July. He got indicted. Had his case review in September. And then in October, right before the final case review, the prosecutors got around to turning over the discovery and the public defenders saw the witnesses listed in the police report – whoops, we've got a conflict! And so I finally got appointed. In October. The guy was arrested in May!"

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# CHAPTER 5

## ONGOING REPRESENTATION OF THE CLIENT BY THE SAME ATTORNEY

The right of the accused to have the assistance of counsel at all critical stages of the case is clear. So too is it clear that this right is triggered into action at the defendant's very first court appearance, where adversarial proceedings against him commence. In Delaware, most often this is the initial appearance in Justice of the Peace Court. It is clear, further still, that no criminal proceeding that is a critical stage can occur unless counsel is present. And, beyond merely requiring the presence of counsel, that proceeding cannot occur unless the lawyer is capable of being an *effective* advocate for that individual.

Part One of this report established that Delaware fails to meet this minimum constitutional standard in all criminal courts, in all of the counties. Defendants are advised of the right to the assistance of counsel at their initial appearance, yet no formal activation of that right occurs unless the defendant is unfortunate enough to remain incarcerated pretrial. As a result, many defendants appear at subsequent critical stages in the Court of Common Pleas without representation – perhaps more without counsel than with. There they will 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.

Where defendants seek the assistance of counsel or where the process more readily affords it to them, the system prevents the attorney from conducting the consultation, thoroughgoing investigation and preparation required to be truly effective. Through no fault of her own, the attorney is provided too late and with too little time to be the zealous advocate that each defendant has as his privilege.

A lawyer must be appointed early to represent the accused so that he can work with the client to develop the level of trust that is essential to his ability to be effective – what the Supreme Court has described as “those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.”<sup>167</sup> What good is it from the defendant's perspective, however, if the lawyer provided early in the case is taken away, and replaced with someone else? After all, the “confessional” is not some article, like a sheet of paper, which can be passed from one attorney to another.

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<sup>167</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

**ABA Principle 7: "The same attorney continuously represents the client until completion of the case.**

Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing. The attorney assigned for the direct appeal should represent the client throughout the direct appeal."

For this reason, ABA *Principle 7* requires that the same attorney initially appointed to a case to continuously represent the client until the completion of the client's case – what is commonly referred to as "vertical representation." Delaware's indigent defense systems, however, often rely upon a system of "horizontal representation," in direct violation of this standard or, in its simplest form, a system where one attorney represents the client during one court proceeding before handing off the client's case to another attorney to cover the next stage.

As the American Bar Association explains, these systems are uniformly implemented as a cost-saving measure in the face of excessive workloads, and to the detriment of clients.<sup>168</sup> In fact, the ABA rejects the use of horizontal representation in any form, stating instead: "Counsel initially provided should continue to represent the defendant throughout the trial court proceedings and should preserve the defendant's right to appeal, if necessary."<sup>169</sup>

In explaining why horizontal representation is so harmful to clients, the ABA states:

"Defendants are forced to rely on a series of lawyers and, instead of believing they have received fair treatment, may simply feel that they have been 'processed by the system.' This form of representation may be inefficient as well, because each new attorney must begin by familiarizing himself or herself with the case and the client must be re-interviewed. Moreover, when a single attorney is not responsible for the case, the risk of substandard representation is probably increased.

<sup>168</sup> "When Public Defense Providers rely upon 'horizontal' systems of representation, in which multiple lawyers represent the client at different stages of a case, and lawyers often stand in for one another at court proceedings, it is usually because there are too many cases for which the Provider is responsible." ABA *Eight Guidelines of Public Defense Related to Excessive Workloads* (August 2009) at 5.

<sup>169</sup> American Bar Association, *Standards for Criminal Justice: Providing Defense Services* (3d ed., 1992), Standard 5-6.2.

Appellate courts confronted with claims of ineffective assistance of counsel have commented critically on stage representation practices.<sup>170</sup>

The problems with Delaware's horizontal model were described by one Sussex County judge: "Conflict attorneys aren't well prepared for preliminary hearings, but the public defenders aren't that prepared either. We're often waiting on the public defenders while they're in the lockup talking with their clients for the first time. And they're constantly re-interviewing them, because all that their clients are looking for is an advocate."

## ONGOING REPRESENTATION IN SUPERIOR COURT

The public defender's office employs a system of horizontal representation for all of its felony clients statewide. The defendant does not have a lawyer at his initial appearance following his arrest before a Justice of the Peace Court magistrate, unless he is brought before JP Court 20. (See side bar, next page.) This lawyer does not do anything other than advocate before the judge regarding bail. The public defender staffing bail hearings at JP Court 20 appears at these hearings for those defendants and no others. Felony defendants in all other JP Court locations, of course, do not have the benefit of counsel advocating on their behalf as the judge sets bail.

If the client remains in detention after his JP Court appearance, the following morning an investigator from the public defender office's intake unit interviews him by video-phone, beginning the process of providing him with public representation. (See side bar on the intake process, page 128.)

Following the intake interview, each felony case is assigned to a Superior Court attorney when the public defender's office accepts the defendant as its newest client. The attorney is notified of this new appointment through the office's internal case management system. Despite being assigned to defend the felony client at intake, the public defender does not get the file until after the preliminary hearing, meaning he is prevented from performing critical tasks on the case for some weeks after the incident.

As described in Chapter 3, staff from the public defender office's Court of Common Pleas team in each county instead handles the defendant's preliminary hearing before the local Court of Common Pleas.<sup>171</sup> Generally this occurs within ten days of the arrest. Attorneys with the public defender's office (in Kent and Sussex Counties to a greater degree than their colleagues in New Castle County) view the preliminary hearing as of limited value. (See page 57.) The CCP attorneys provided at this hearing, however, file no motions, launch no investigation, interview no witnesses, and only meet with the cli-

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<sup>170</sup> American Bar Association, *Standards for Criminal Justice: Providing Defense Services* (3d ed., 1992), commentary to Standard 5-6.2.

<sup>171</sup> The exception to this rule is that for any case involving murder or rape charges, the Superior Court attorney originally assigned begins representing the defendant at the preliminary hearing in CCP.

## THE USE OF ATTORNEYS IN JP COURT

Historically, the Justice of the Peace Courts never had lawyers from either side, prosecution or defense, involved in proceedings. According to Chief Magistrate Alan Davis, however, the state's recognition that DUI proceedings are often more complicated than other types of traffic or petty criminal matters led to the introduction of prosecuting attorneys in Justice of the Peace Court 20 (in downtown Wilmington) as a pilot project. The public defender's office matched that by assigning two of its attorneys to the same proceedings. The economic downturn in 2008 and 2009, however, caused the program to end as abruptly as it had started.

Now five years later, another project in JP Court 20 has been launched, again at the Department of Justice's initiative. This new project, however, is focused on the determination of bail at the defendants' initial presentment following arrest, but solely for those accused of Felony D offenses or worse. And as before, with the prosecution assigning one DAG to argue the state's position at bail, the Office of the Public Defender matched that by hiring a private attorney under contract to likewise staff such hearings. "The idea is that we want the best possible informa-

tion at bail," said Chief Magistrate Davis, "and you get that by everybody being represented – the state and the defendant."

The public defender contractor only handles bail hearings at JP Court 20. As such, no matter what happens next for the defendant – whether he bails out immediately or remains detained pre-trial – he will have a new attorney assigned to represent him. In fact, as no screening has occurred yet for this defendant, there has been no examination of potential conflicts, either with the public defender's office or with the contract attorney herself, which ought to have prevented this contract attorney from representing the defendant during this initial appearance.

According to Chief Magistrate Davis, there are no plans in the near term to expand the JP Court 20 bail hearing project to other jurisdictions. "Long term, though, we may want to limit the number of 24-hour courts. We could make one court our video court, and allow the AGs and PDs to be present at one court." But that, of course, is just one idea of one stakeholder. There are no plans to do so as of yet.

ent 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 – not yet.

One or two days later, in New Castle County and in Kent County, the public defender's office assigns the case file to one of the Superior Court lawyers in the county who continues with that defendant's case as it is bound over to Superior Court and eventually through final disposition. (In Sussex County, the trial lawyer is assigned prior to the preliminary hearing. Nevertheless, that lawyer does not become active on the case until

after the preliminary hearing.) The file includes only the arresting officer's warrant or the affidavit of probable cause, and whatever statements the client made to the intake staff. The Superior Court lawyer's secretary then automatically generates two letters: one to the client advising him of his newly appointed lawyer and his expectations going forward, and another to the Office of the Attorney General requesting discovery.

The appointment of trial counsel, however, does not necessarily trigger the start of substantive work on a case. Most public defenders told us they usually wait to see what comes back from discovery, and most often that does not occur prior to arraignment in Superior Court.

Following the preliminary hearing the case is bound over to Superior Court by way of indictment resulting from a hearing before a grand jury.<sup>172</sup> The grand jury meets every other week, and so the average case generally requires between six and eight weeks from the preliminary hearing in the Court of Common Pleas before the arraignment in Superior Court.

In New Castle County the public defender assigned to the case usually does not appear on behalf of the client at arraignment. Instead, the state public defender's office has a team of three attorneys staffing its "videophone unit." These attorneys appear, one in each county, alongside incarcerated defendants in the videophone room inside the state prison location for the purpose of arraignment. Additionally, if the defendant wishes to have his bond reviewed at the same time, the public defender in the room with him appears on his behalf for that purpose as well. Where defendants make bail and appear for arraignment in person rather than by videophone, the public defender's office has an attorney present in the courtroom to represent them. In New Castle County, the office assigns one public defender to the arraignment docket for this purpose. In Sussex County and Kent County, the assigned lawyers handle the arraignments.

And so, in New Castle County the first time the defendant appears at a court hearing alongside the actual trial lawyer is the "first case review" on the case. In the best-case scenario, this is approximately two months after the arrest. More likely, however, it is closer to three. (See felony trial timeline, next page.) All-the-while, with no attorney working substantively on the case, potential defenses may be compromised because of the delay in trial counsel starting work on the case. Although attorneys get to work on their cases earlier in Kent and Sussex counties, similar structural barriers prevent lawyers from substantively engaging in their clients needs early on.

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<sup>172</sup> *Rules of Criminal Procedure for the Superior Court of the State of Delaware*, Rule 7. The only way the case bypasses the grand jury to proceed directly in Superior Court by information is if the defendant waives the indictment by pleading guilty to a felony charge during the preliminary hearing. In these circumstances, the Superior Court has instituted a "plea by appointment" calendar to resolve such cases as quickly as possible.

## Felony timeline: from arrest to trial



The nexus between the requirement that trial counsel be appointed as early as possible and the requirement that the attorney who is appointed initially to represent the client remains with that client's case through to completion is to ensure that the minimum level of advocacy necessary to mount a meaningful defense commences as soon as possible. In those two to three months, however, between arrest and the first case review, promising investigative leads can go cold, witnesses can become harder and harder to track down, and memories can fade.

The conflict defender system largely follows the same horizontal scheme as the primary system. Of the three counties, only New Castle County ensures that once conflict counsel is appointed to represent the defendant at the preliminary hearing in the Court of Common Pleas, that same attorney stays with that client's case through to disposition. Almost.

That same attorney does not appear for that defendant's arraignment in Superior Court. Instead, arraignment for conflict counsel is handled horizontally. The contract lawyer on duty for preliminary hearings in CCP instead appears on behalf of all conflict defendants during the arraignment calendars in Superior Court that week. On this point alone, the conflict system for Superior Court in New Castle County likewise fails to meet the demands of national standards to provide continuous representation of the client with the same lawyer from appointment onward.

Functionally, the system of advocacy falls short as well. We asked one attorney, given the benefit of continuing to represent the client following the preliminary hearing, what sort of advocacy or case preparation is generally being done in advance of the arraignment. "Nothing," she replied. "There really is nothing that we *can* do." Instead, as another conflict defender described his role during this gap, "it's all about managing the client's expectations."

These attorneys, like most of their colleagues, feel constricted from launching an investigation without knowing the details of the crime scene, or the allegations against the defendant, or the identities of witnesses they might want to interview. "I don't do anything on the case until I have discovery," said one.

The prosecutor's office, upon indictment by the grand jury, turns over to the court its "automatic discovery." This includes

a redacted copy of the police report (with the names of any witnesses obscured), the defendant's criminal history, and any statements made by the co-defendant in the case. Other discoverable materials, such as laboratory tests and forensic reports, are provided later. The automatic discovery, however, is usually not provided until the eve of the first case review.

At the arraignment, with no discovery yet available, most attorneys still have not met with the client since the preliminary hearing. And that is only counting those defendants who were declared as conflicts by the public defender's office in advance. In a number of additional cases – for some attorneys, as much as 50% of their appointed caseload<sup>173</sup> – the public defender office's conflict on that case is not discovered until much later.<sup>174</sup> As the conflict lawyer does not staff the client's arraignment appearance, most of these conflict defendants as a result are meeting their attorneys for the first time at the first case review – some three-to-four weeks after the arraignment, and some two or three months after the arrest.

While some cases plead out right away, many attorneys consider the first case review to be the beginning of negotiations with the prosecution rather than the end point. "It's a good benchmark day," said one lawyer. "You're meeting the prosecutor who's been assigned to the case for the first time, and you're getting a sense as to how interested he is in the case: Are you going to be able to work something out, or are you going to go to trial?"

And as the case gets closer to the date of trial, the plea offers tend to improve from the client's perspective. So too does the level of action shown by his lawyer on his case. However, there are so many structural impediments preventing the attorneys from doing anything substantial early on in the case.

The conflict system in Sussex County is structured with the intent to follow the vertical representation format. Unfortunately, the system falls short of that goal. Each of the

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<sup>173</sup> Here is the math. At the low end of the spectrum, according to OCC, the attorney can expect ten cases each prelim. With four prelims per year, that amounts to 40 case assignments per year. (10 cases x 4 prelims = 40 total cases.) Additionally, at the low end, the attorney can expect to be assigned two cases by OCC every month outside of his regular prelim duties, for a total of 24 per year. (2 cases x 12 months = 24 total cases.) Out of the 64 total cases the attorney can expect, as a bare minimum, 38% come in after the preliminary hearing has already taken place. (40 cases + 24 cases = 64 total cases; 24 cases / 64 cases = 38%.)

At the high end of the spectrum, the attorney can expect 15 cases each prelim. With four prelims per year, that amounts to 60 case assignments per year. (15 cases x 4 prelims = 60 total cases.) Additionally, at the high end, the attorney can expect to be assigned five cases by OCC every month outside of his regular prelim duties, for a total of 60 per year. (5 cases x 12 months = 60 total cases.) Out of the 120 total cases the attorney can expect, as a maximum, 50% come in after the preliminary hearing has already taken place. (60 cases + 60 cases = 120 total cases; 60 cases / 120 cases = 50%.)

And so the attorney will have somewhere between 38% and 50% of all cases appointed following the preliminary hearing, meaning after the case has been bound over to Superior Court.

<sup>174</sup> To be clear, there are institutional reasons why some conflicts are not found until much later on in a case.

county's four conflict attorneys under contract with OCC rotate coverage at the preliminary hearings in the Court of Common Pleas. For cases that are bound over to Superior Court, the attorneys try to ensure that whichever lawyer handled a particular defendant's preliminary hearing the same lawyer is assigned to handle the trial stage. But, even then, the cases are not always assigned in that way for a number of reasons.

Most obviously, there are only three Superior Court contract attorneys. With the fourth contract attorney in Sussex County responsible for Family Court and CCP cases only, the cases bound over to Superior Court every fourth week cannot be assigned to that fourth lawyer going forward. Instead, all of the cases she handled at the preliminary hearing are spread equally among the other contract lawyers.

But even during the three Superior Court contract attorneys' regular rotations, there are exceptions to the general rule that cases will be assigned at trial to the same attorney who handled the preliminary hearing. Sometimes, the same attorney cannot continue to represent the defendant because of a conflict. For example, in a case with three co-defendants, the public defender's office takes Defendant A as its client, and co-defendants B and C are the responsibility of the conflict system. But, the conflict system only provides one contract attorney to handle the preliminary hearing calendar each week, meaning the one conflict lawyer winds up representing both co-defendants B and C that week at their respective preliminary hearings. Going forward, however, the conflict attorney only handles Defendant B's trial in Superior Court. Conflict counsel for Defendant C's trial has to be selected from one of the remaining two contract attorneys.

Other times, the workload in a given week is so heavy in comparison to other weeks that it is deemed unfair to give all of those cases back to the same attorney at trial. Instead, the attorneys will share the trial load. Similarly, the attorneys spread assignments on complex felonies among the contractors, rather than automatically appointing all of them to the lawyer that happened to handle the preliminary hearings. And in rare circumstances, the most senior of the three takes for himself a disproportionate share of the most serious cases (serious sex offenses, drug trafficking, or murder cases) as he alone, with double the number of years of experience the other two Superior Court attorneys possess when combined, is sufficiently qualified to handle them.

On the surface, each of these exceptions to the general rule seems to follow principles that are good for clients. One attorney cannot represent two clients whose interests may be at odds with each other, and so solving for this by appointing the second case to another conflict lawyer is a good thing. Similarly, no attorney has limitless numbers of hours to devote to a limitless number of clients, and so spreading the caseload around evenly is also a good thing. And it is likewise important that attorneys be appointed only in those cases that they are capable of handling. But, waiting until after the preliminary hearing to consider these points ignores that each of these factors is just as relevant at the beginning of the case as it is at the trial stage.

The conflict system needs to be structured, from the outset, in a way that it can handle these sorts of issues, while also providing continuous representation of the client by the same lawyer from beginning to end. On this point alone, Sussex County's conflict system fails to meet *Principle 7*. But, outside of the control of the conflict system entirely, the policy decisions of other criminal justice functions only make matters worse.

In fact, as described on pages 62-64, immediately following the preliminary hearing the conflict system stops representing the clients it has been assigned. All case files are turned back over to the public defender's office until such time as the office re-certifies a conflict on the same matter, the same conflict it had already declared before the Court of Common Pleas, but now before the Superior Court.<sup>175</sup> The public defenders reported that this generally occurs in a matter of a day or two.<sup>176</sup> Some conflict attorneys, however, suggested that it could take more than a week for the public defender's office to declare once more that it cannot represent the defendant involved in that case. Either way, there is a distinct period in which the defendant's advocate is stripped of the ability and authority to represent him. And it is the direct result of some unnecessary and obscure technicality of the court's doing.<sup>177</sup>

There are many reasons this is unfair. Most obviously, the primary system has no similar obligation. Its clients do not have to be re-referred by the court to seek the assistance of the public defender's office, they do not have to be re-screened for financial eligibility, and the office does not have to re-check for conflicts. Are any of these redundant steps necessary? The answer is "no."

Additionally, by retrieving the case files at the end of the preliminary hearing that it had provided the conflict defender on duty, the public defender's office is taking back into its possession confidential materials involving defendants for whom it has already declared a conflict. It was clear to us that the office's attorneys and staff do this without any malice at all and, frankly, they seem to do so with a detachment that is probably the natural result of such a weekly routine. Nevertheless, the retrieval of privileged materi-

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<sup>175</sup> The criminal justice system in Sussex County takes the position that, whatever the outcome of the preliminary hearing (charges were dropped, the defendant pleaded guilty to a lesser offense, or the hearing was waived and the matter bound over to Superior Court), the case has been disposed of in the Court of Common Pleas. The Superior Court, in turn, must open the same matter as a new case. Whereas the public defender's office may have already declared a conflict in the Court of Common Pleas, it must do so again once the new case has been by the Superior Court.

<sup>176</sup> The public defenders have since informed us that this whole process is being changed, and that it is working with the courts to no longer require the re-certification of conflicts.

<sup>177</sup> To show that the re-certification of a conflict in two separate courts – by the same agency, regarding the same defendant, who was allegedly involved in the same incident that resulted in the same arrest – is wholly unnecessary, even under Delaware's laws and court rules, we only have to point to New Castle County. There, the courts make no such requirement of the Office of the Public Defender. In fact, this may have been what enabled the conflict attorneys to begin representing their felony clients at the preliminary hearing in CCP and to continue with those same clients forward to Superior Court. In all likelihood, the reason the re-certification of conflicts is deemed necessary in Sussex County (and indeed in Kent County, which follows this same policy as well) is probably rooted in the fact that it has always been done this way.

als regarding clients it does not represent is a breach of ethical norms all on its own.<sup>178</sup> Either that, or it presumes that each conflict lawyer – knowing that he will have to yield possession of the case file at the end of the day – discusses nothing of consequence with the client, thereby not requiring that he take any notes.

This belies the usefulness of providing access to counsel at the preliminary hearing in the first place, which brings us full circle to *Principle 3*'s call for early appointment of counsel. Providing counsel purely for the purpose of relaying the prosecutor's plea offer, but without providing that lawyer with the necessary time and resources to effectively represent that defendant at the plea negotiations is tantamount to providing the defendant with no lawyer at all.

As a result, the first time conflict defendants in Sussex County get their actual trial lawyer is at arraignment in Superior Court. One of the three conflict lawyers handles the actual appointment of the cases. He does so by written letter to the other Superior Court lawyers once the conflicts are re-certified by the public defender's office, which usually arrives two weeks prior to the arraignment. But, according to some of the senior prosecuting attorneys we spoke with, even this case-assignment from the lead conflict attorney to the actual trial attorney is often "sluggish."

By the estimate of the county's supervising public defender, it takes ten to 12 weeks on average from preliminary hearing to arraignment in Sussex County. One of the conflict lawyers we spoke with estimated it closer to six weeks. This means, even if he started right away, the trial lawyer could not begin to look at the case, develop the theory of the defense, consider interviewing witnesses, or any of the vitally important things a lawyer has to do to begin preparing for trial, until more than a month – if not longer – has passed since the actual incident resulting in the client's arrest.

Kent County's conflict system yields more or less the same result, but by different avenues. Like Sussex County, the court requires the public defender's office to re-certify a conflict once the case is opened in Superior Court. And so, even if the conflict system is ready to formally appoint the trial lawyer to the case following the preliminary hearing, it must wait for the court before it can proceed.<sup>179</sup> But unlike Sussex County, there is no extra step involving the transfer of attorney-client materials from the conflict system back to the primary system. Nevertheless, as any form of horizontal system fails to meet the requirements of national standards, including *Principle 7*, so too does Kent County's conflict system. In fact, Kent County's horizontal model is by far the most disjointed we have seen anywhere in the country.

Whereas Sussex County purports to re-assign each case to the same attorney who originally handled its preliminary hearing, the horizontal model in Kent County's conflict

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<sup>178</sup> See generally, *Delaware Rules of Professional Conduct*, Rule 1.6. "Confidentiality of Information."

<sup>179</sup> According to the supervising public defender for Kent County, the Superior Court opens the new case the following business day. With preliminary hearings in CCP held on Fridays, this means the public defender's office can declare a conflict on each case in Superior Court on Monday morning.

system shares the obligation of representing a single client at various stages across separate private law firms. As detailed on page 70, two contract attorneys provide coverage of the preliminary hearing calendar in the Court of Common Pleas each week. Those two attorneys belong to separate law firms. But, of the three Superior Court contract attorneys, each of whom works out of a different law firm from the next, only one belongs to the same firm as one of the preliminary hearing contract attorneys. The contractors handling preliminary hearings try to ensure that the clients the one represents will go to her law partner for the trial phase, leaving the clients the other represents to be divided among the other two private lawyers. As a result, confidential case-related information is passed from one private firm to another as the case proceeds to trial in Superior Court.

As was noted on page 104, horizontal systems are almost always implemented locally as a cost-saving measure. But even here in Kent County, one can see how inefficient a model the horizontal system truly is. Consider, for example, the number of new conflicts the conflict defender system creates. No attorney, or member of that attorney's firm, can take as a client any person whose case presents a conflict of interest with a current or former client. Kent County compounds this rule with each new felony case it handles by doubling the number of firms for which such a conflict must exist.

And as with Sussex County, the horizontal system is not truly designed to provide trial advocacy early in the client's case. For this, the client must wait until after the case has been opened in the Superior Court, and until trial counsel has been assigned.

A Kent County Superior Court judge expressed that while the appointment process has improved, "the time of appointment needs improvement." According to the judge, the conflict defendant should have a contract attorney assigned to his case by the time he has left the preliminary hearing, but this is not happening. "Sometimes, counsel is not even appointed by the arraignment," he continued. Out of, say, 50 cases set for first case review, the Superior Court judge estimated that four or five do not have an attorney appointed to represent them. Another ten or 15 meet their appointed attorney for the very first time in court.

Importantly, the judge stressed to us that he finds no gap in quality between the attorneys of the public defender's office and the conflict system – "they are really quite able-bodied." Despite their comparable skill and ability, the judge expressed his opinion that there is a notable impact in the level of advocacy between the primary and conflict systems with less use of investigators, fewer pretrial motions and of weaker quality, and less preparation in general.

Another Kent County judge did not single out one systemic flaw, finding instead the prosecution and defense to be equally unprepared, particularly for final case reviews. The prosecutors, he explained, triage in favor of serious sex offenses, meaning they are generally less ready to discuss serious plea options in other felony matters. The defense however, and conflict counsel in particular, seems to be generally overwhelmed.

## DISCOVERY AND IDENTIFYING CONFLICTS

“The public defenders don’t pick up on conflicts quickly enough,” said one CCP judge in Sussex County. “Particularly at the prelims, the pretrial services reports tell us who all the conflicts are. We don’t want to have four or five preliminary hearings for four or five defendants.” But if the public defenders only realize a conflict at the last second, the judge has no choice but to grant a continuance. “And so it’s very frustrating.”

According to some defense lawyers we spoke with, Delaware prosecutors have begun trying to address the delay in identifying conflicts. Often, prior to the preliminary hearing, they verbally communicate to the defense lawyer the names of witnesses to

the alleged incident, so that the defense lawyer can check each of those names for potential conflicts. But in return, the defense lawyer must promise not to communicate any of this information to her client.

While we are encouraged to see courtroom adversaries trying to work together outside of the courtroom to address a systemic problem recognized by all, this particular solution presents new problems. No lawyer should ever promise to withhold from the client information germane to the case at hand – particularly the names of the client’s accusers – as a secret between herself and the prosecutor. No tradeoff is worth violating the bond of trust between attorney and client.

Criminal justice stakeholders in Sussex County shared the concerns expressed by their colleagues in Kent County. As one conflict attorney put it: “We’re getting creamed.” But many noted that it is not just the defense side that is struggling under the weight of too many cases with too few resources. The prosecutors are lagging as well. “The biggest slow down is the tardiness in the prosecutor’s office in gathering evidence,” said one Superior Court judge in Sussex County, noting that the court rule requiring that discovery be provided within 25 days of the arraignment<sup>180</sup> is often violated. As a result, the entire system gets bogged down, but no component more so, perhaps, than the defense.

The reliance upon prosecutors to provide information to the defense, rather than the defense gathering evidence of its own, is pervasive statewide. The impact is felt in many ways.

For example, conflicts of interest can come in a variety of shapes and sizes. (See side bar, page 39.) While cases involving co-defendants are easily identified, others involve a deeper examination of the individuals and circumstances involved.<sup>181</sup> The public de-

<sup>180</sup> Superior Court of the State of Delaware, *Criminal Administrative Order re: Policy, Time Standards, and Procedures Relating to Criminal Case Disposition* (January 16, 1991), Sec. 8(f). Available here: [http://courts.delaware.gov/Superior/pdf/Administrative\\_Order\\_criminal\\_16\\_jan\\_1991.pdf](http://courts.delaware.gov/Superior/pdf/Administrative_Order_criminal_16_jan_1991.pdf).

<sup>181</sup> For example, the public defender’s office may already represent the alleged victim in a different matter. Or it may have previously represented one of the witnesses in an earlier case.

fender's office waits for the prosecution to provide it with information it needs to more thoroughly check for conflicts. In the first instance, this comes in the form of the police reports provided as a trade for the defendant's waiver of his preliminary hearing in CCP in Kent and Sussex counties, or as a professional courtesy in New Castle County. But even the police report is not a panacea. Often, the statement of the arresting officer is incomplete – as the state continues to build its case against the defendant, its list of witnesses may grow. Often, the police report provided to the defense is heavily redacted, with witness names concealed. And the delivery of the police report is often delayed.

“As a prosecutor, I had at my beck and call the local police officers who I could send back out to interview more people, find more witnesses, or collect more evidence, all to help me build a better case,” said one senior public defender, noting that what limited investigative resources OPD has are dedicated to more serious cases. When asked how investigators could be used, in lieu of waiting for the prosecution for information about the case, the attorney said: “We could recreate the police report, but in a way that's unbiased and better for the defense's perspective. That's what we should be doing on each case, but we can't because we don't have enough investigators. So you have to decide where to place those resources.” As a result, in the bulk of misdemeanor and juvenile delinquency cases, the public defender's office launches no investigation of its own to find its own witnesses without regard to the police report. Instead, the police report is all that the defense has to work with until discovery comes in.

The conflict lawyers face the same structural impediments to identifying subsequent conflicts on cases diverted their way by the primary system. As one contract attorney put it: “We're completely dependent upon the prosecutors to give us the police reports in a speedy fashion in order to declare conflicts.”

This means that many conflicts are not identified and declared by the public defender's office until after the preliminary hearing. For many more, the conflict is not declared until after the arraignment in Superior Court – some four to six weeks after the arrest, if not more. Conflict lawyers in Sussex County estimated that perhaps 20% of all cases they are assigned come in after the arraignment. The numbers for New Castle County are even worse.

The Office of Conflicts Counsel estimates that Superior Court contract attorneys in New Castle County can expect to pick up between ten and 15 cases every preliminary hearing week they staff, and with four preliminary hearing calendars per year that amounts to between 40 and 60 cases per year. In addition, however, each attorney can expect to be assigned by OCC to another two to five cases every month outside of their regular preliminary hearing obligations, or between 24 and 60 cases total. This means, 38% to 50% of conflict cases are assigned after the case has already been bound over to Superior Court.<sup>182</sup> With the rate at which conflicts are not identified until well into the

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<sup>182</sup> See note 173 above.

trial stage pushing 30%, 40%, or even 50%, it suggests that this is not a rare occurrence, and certainly not an aberration. It is a clear systemic deficiency.

Nevertheless, for most people we spoke to, it seems to be a problem met with resignation. “The delay in identifying conflicts is not something that’s easily fixed,” said one Superior Court judge. We remain unconvinced.

Without a remedy, too many conflict defendants will continue to appear at a critical stage represented by a public defender for whom a conflict should have prevented that attorney’s appearance. The same conflicted public defender will carry on to negotiate pleas with the prosecution on their behalf, but with only minimal information on each client’s case. And conflict defendants will still fail to get an actual trial lawyer working in earnest on their cases, launching investigation, interviewing witnesses, and developing a theory of the case until weeks after the incident.

And even then, true advocacy may not begin right away. Many attorneys avoid direct communications with the client. After all, as one conflict attorney said, “unless I have discovery, there’s nothing to talk about.”

## ONGOING REPRESENTATION IN FAMILY COURT

By all observations, the lawyers appointed to represent children in Delaware, both from the public defender’s office and from the conflict panel, are dedicated attorneys. They treat their clients with respect and care, and they work tirelessly for their clients’ interests in the courtroom. For those children who have not already pleaded guilty at arraignment, their good fortune will be in having one of these attorneys appointed to represent them. The child’s misfortune comes from his attorney’s lack of time and resources necessary to advocate zealously in every case.

“The Court has placed time-limits that put attorneys on a short lead in terms of case preparation, interviews, and reviewing discovery,” said one of the Family Court commissioners in Kent County. From the date of arrest, the arraignment generally is scheduled two weeks out. From arraignment, the trial is set another three weeks after that. So from arrest to final disposition, a Family Court case is supposed to take a maximum of five weeks. “We’re frequently requesting continuances because we aren’t prepared for trial,” said one of the public defenders.

By rule, the prosecution is required to provide the defense with discovery within 20 days after it is requested.<sup>183</sup> According to judges, however, the trial date is to be set within 21 days of the arraignment. As detailed in the previous chapter, the public defenders are appointed in most cases on the day of arraignment, meaning even if they request

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<sup>183</sup> Rule 16(d) of the Family Court *Rules of Criminal Procedure*.

discovery the moment they are appointed, they will have but one day available to review its contents. And this assumes the defendants are represented by the public defender's office. If a conflict attorney is appointed to their case, the lawyer does not begin working on the case until after arraignment. For some, he may not speak with them until the day of trial.<sup>184</sup> Of course, as one commissioner in Kent County noted, "A lot of our kids take pleas on the date of arraignment, and so a lot of cases get disposed of way before discovery is available."

"The individual public defenders take their individual clients' representation needs seriously," said a Sussex County Family Court commissioner. "They're giving them a good defense." The problem comes with most defendants not getting interviewed for a public defender assignment in advance of the first appearance in court. "The lawyers need time to prepare, review discovery, and interview their clients," the commissioner said, "and all that is hampered by their clientele."

Judges and commissioners across the state listed courtroom coverage as a major concern. One Family Court commissioner in Kent County pointed to the volume of defendants requiring conflict representation as his primary concern for the health of the system. "It's an even bigger concern, [because the conflict attorney also has cases he handles in the Court of Common Pleas]. We end up waiting around for the contract attorney to show up."

Not all prosecutions of children are handled in Family Court. The prosecution has statutory authority to appeal to the Family Court to have certain cases transferred to the Superior Court for the child to be tried under the same procedures as an adult prosecution. The types of delinquency matters the state may transfer to adult court for prosecution include those where the child has already been found delinquent of a number of acts, and of an increasingly dangerous or violent nature, such as rape or drug trafficking. But before doing so, the state must show in a hearing before the Family Court, as mandated by the U.S. Supreme Court,<sup>185</sup> that the child in question is no longer "amenable" to the treatment and rehabilitative services available to the Court. In Delaware, this is called an "amenability hearing."<sup>186</sup>

The legislature gives the Superior Court original jurisdiction over a number of offenses involving child defendants, including murder or robbery in the 1st degree with a deadly weapon.<sup>187</sup> In these cases, the Family Court handles the preliminary hearing for the child, in much the same way that the Court of Common Pleas handles the preliminary

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<sup>184</sup> The attorney holding the Family Court contract in Kent County did not respond to our requests for an interview.

<sup>185</sup> *Kent v. United States*, 383 U.S. 541 (1966).

<sup>186</sup> Title 10 Delaware Code, Sec. 1010.

<sup>187</sup> Title 10 Delaware Code, Sec. 1010(a)(1).

hearing for an adult accused of a felony offense. If probable cause is determined, the case is bound over to the Superior Court for trial as though it were the prosecution of an adult.

That does not mean that the case will stay in Superior Court. The case can in fact be sent to Family Court unilaterally by the prosecution, or through a plea agreement between the prosecution and the defense to have the case disposed of in Family Court.<sup>188</sup> Or, within 30 days of the arraignment, the defense can make its own motion for a hearing for the Superior Court judge to consider whether “the interests of justice would be best served” by transferring jurisdiction over the case back to Family Court for trial as a regular juvenile matter.<sup>189</sup> In essence, the judge is considering, based on the nature of the alleged offense and child’s prior history of receiving court- or state-supervised treatment, whether the child is in fact amenable to the continued efforts at rehabilitation that are so central to the juvenile justice model. And, as this is essentially the opposite of the “amenability hearing” described above, the hearing in Superior Court to consider sending the case back to Family Court is universally referred to in Delaware as a “reverse amenability hearing.”

The number of cases involving children each year that are bound over to Superior Court for prosecution as an adult is small. In FY 2012, for example, the public defenders had 30 such clients statewide, and those included cases sent up to Superior Court from all avenues described above. The public defenders did not have specific numbers available, but even after the reverse amenability hearing they estimated that most of their clients’ cases remained in Superior Court for trial.

As juvenile clients’ cases are passed from one court to the next and back again, the staffing of those proceedings is generally handled horizontally by the public defender’s office, with some exceptions. In New Castle County, for example, the public defender’s Family Court unit provides representation for the preliminary hearing in Family Court, but if the case is bound over to Superior Court, the attorney who handled the preliminary hearing does not follow the client going forward. Instead, a public defender with the Superior Court team is assigned to the case, and files the motion for a reverse amenability hearing in Superior Court. If successful, and the case is sent back to Family Court, the newly assigned attorney likewise does not continue on with the client’s case. Instead, the public defender office’s Family Court unit handles the case once more.

“It’s not ideal,” said a senior public defender, explaining that this horizontal staffing arrangement is in large part attributable to the physical separation of the various public defender teams within New Castle County. The Family Court team’s office space is located on the second floor of the New Castle County Courthouse. The Court of

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<sup>188</sup> Title 10 Delaware Code, Sec. 1011(a).

<sup>189</sup> Title 10 Delaware Code, Sec. 1011(b).

Common Pleas team is located in a suite of offices in the old Family Court building a few blocks away. And the Superior Court team is located at the public defender office's headquarters in the Carvel Office Building.

The conflict defender system follows this same horizontal model across the state, for any juvenile case bound over to Superior Court. The contract attorney handling Family Court appointments covers the preliminary hearing, but if the case is sent to Superior Court then a Superior Court contract attorney covers the trial phase. And if it is sent back to Family Court on reverse amenability, then the case returns once more to the Family Court contract attorney. The conflict system for Family Court in New Castle County is a notable exception in that many of the same attorneys who accept juvenile delinquency appointments on an hourly basis also hold contracts for Superior Court case assignments. In the event one of those attorneys happens to cover the child's preliminary hearing in Family Court, the case remains with that attorney through trial in either Superior Court or returning once more to Family Court following reverse amenability.

Many stakeholders expressed the belief that children require the utmost care and attention, and that providing wayward youths with access to treatment and rehabilitative services are an investment in the community's future health and safety. However, these professional opinions have not translated into sustained systematic support for the defense of children accused of wrongdoing.

While there are too few lawyers trying to represent too many clients, access to resources in juvenile cases is also seriously lacking. The public defenders triage what non-attorney support they have available. "We are short on investigators," said one Kent County juvenile defender, "and so unless it's a really serious case I'm not going to request an investigator."

"There is no investigation at all in misdemeanors," a commissioner told us, speaking of both the primary

There are already too few lawyers trying to handle too many delinquency cases. But access to resources and substantive support services is also seriously lacking.

and conflict defender functions. “There are no [psycho-forensic evaluators] either, or at least I’m not seeing them.” If true, this means children accused of less-serious acts receive no additional assistance on their cases than the time their attorneys can offer.<sup>190</sup> But sufficient time, as we will discuss more in Chapter 6, is the thing Delaware attorneys lack the most.

Furthermore, the distinction between a “serious” delinquency case and a less-serious delinquency case is commonly used in Delaware, but it is a distinction without a difference the more one focuses on it.

By nature of its therapeutic mission, the Family Court has broad discretion to sentence as the commissioner or judge deems appropriate. The penalties available to the court in a misdemeanor case are the same as the penalties for a felony because, as one commissioner explained it, “we don’t have determinative sentencing.” The court can attach a host of treatment or rehabilitative programs as conditions of any probation period, and can extend its jurisdiction over the child until well past his 18th birthday. “The prosecutors know we’re going to sentence a misdemeanor the same as we would a felony, so they are offering more lenient pleas [by dropping many felonies down to misdemeanor charges].”

Perhaps. From the child’s point of view, however, the potential penalty for smoking cigarettes outside of school is just as severe as for committing armed robbery. Once guilt is established, the distinction between guilt on a misdemeanor versus guilt on a felony is blurred.

The U.S. Supreme Court made this observation in *In re Gault*, establishing that access to counsel for children in delinquency matters is “fundamental and essential” to fair trials, specifically because children were subject to “the awesome prospect of incarceration in a state institution until . . . the age of 21.” The Supreme Court determined that juvenile delinquency matters are “comparable in seriousness to a felony prosecution.”<sup>191</sup> After all, Gerald Gault, the teenager who was the subject of that famous 1967 decision, had been arrested for making prank phone calls.

Leniency is established, therefore, not in the parameters of guilt and innocence, but in the sentencing decisions of the judge over the individual child. “The state has the deputy attorney general, and the state is the custodian,” said one commissioner. “So the system needs to have a strong public defender on the other side.” Advocacy at sentencing, therefore, is as critical as any pretrial stage of the case.<sup>192</sup>

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<sup>190</sup> We have been assured that there are 2.5 FTE psycho-forensic evaluators in Kent County and in Sussex County available for Family Court matters, even though the judges and commissioners may not see them in court.

<sup>191</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>192</sup> See *Lafler v. Cooper*, 566 U.S. \_\_\_\_ (2012): “The precedents also establish that there exists a right to counsel during sentencing in both noncapital, see *Glover v. United States*, 531 U.S. 198, 203–204 (2001); *Mempa v. Rhay*, 389 U.S. 128 (1967), and capital cases, see *Wiggins v. Smith*, 539 U.S. 510, 538 (2003).

For example, a 17-year-old in state custody at one of the semi-secure post-adjudication Youth Rehabilitative Service (YRS) facilities was accused of breach of release. Breach of release is, literally, failing to comply with a judge's order by picking up new delinquency charges – the juvenile court equivalent of violating the terms of probation.

The deputy attorney general introduced the matter: “Your Honor, [the boy's name] is charged with one count of criminal mischief. *Nolle pros* the additional charges. I did address the right to have an attorney with him, and he would like to go ahead and plead guilty.”

The commissioner turned to the defendant: “How do you plead to the charge of criminal mischief?”

“Guilty.”

“And are you sure you want to enter this plea without talking to a public defender?”

“Yes.”

“Why don't you tell me what happened?”

The defendant then explained that, while on a field trip, his YRS program brought the kids to a bowling alley. There, he threw a bowling ball into a toy-dispensing machine, shattering the glass and breaking the machine. “Well, that'll do it I guess,” said the commissioner. The boy chuckled: the box holding the toy he was after was in fact empty. “Whoops,” said the commissioner, before turning to his parents who were seated in the gallery. “Mom and Dad, are you okay with letting your son proceed without a lawyer?”

“Yes,” they replied.

The commissioner transitioned to sentencing. “Twelve months at Level 5, suspended for Level 3. . . . What were the other charges involved here – the one's you're *nolle prosequing*?” she asked, as she was writing up the court order.

“Offensive touching and possession of marijuana,” the prosecutor replied.

“Right, that explains why you're seeking drug counseling in addition to community service,” she said, adding drug counseling to the conditions of the defendant's Level 3 probation.

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Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because ‘any amount of [additional] jail time has Sixth Amendment significance.’ *Glover*, supra, at 203.”

In other words, without a lawyer there to protect his rights, the child's sentence incorporated punishment for charges that the state, in its leniency, had decided to drop. And we are careful to use the term "punishment" here, because although drug counseling is a treatment program intended to rehabilitate the child, should he fail to satisfactorily complete the treatment program he will be subject to further sanctions for having violated the terms of the Court's order.

## ONGOING REPRESENTATION IN THE COURT OF COMMON PLEAS

Public defenders manage misdemeanor cases in the Court of Common Pleas entirely by horizontal representation. The CCP unit in the New Castle County public defender's office staffs arraignment hearings by rotation. Cases can come in that morning, or defendants can get screened for public representation in advance. However the cases arrive, a non-attorney staff member opens the case for CCP, printing out relevant information on the client from DELJIS, and then the newly opened case is assigned to one of the CCP lawyers.<sup>193</sup>

The assigned attorney is the person responsible for the management of the cases between court appearances. So, if a client calls the office in advance of his trial date and asks to speak to his lawyer about his case, he is placed in contact with whichever attorney is technically assigned to the case. But in truth, there is no guarantee that the lawyer this client speaks with will be his courtroom advocate on the day of trial.

The conflict panel in New Castle County does not have enough lawyers to contemplate the horizontal model used by the primary system for misdemeanor representation. In fact, the conflict lawyers in CCP are not able to appear at their clients' arraignments, even when they have already been appointed in advance. (See page 42.) The client has the assistance of conflict counsel on the day of trial (or at the case review if it is a DUI charge) and that is it.

Perhaps because of this, the public defender's office in New Castle County is hesitant to actually declare some misdemeanor conflicts that its intake unit has already identified. "They play a bit of a waiting game," as the staff with the Office of Conflicts Counsel

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<sup>193</sup> When making the actual assignment of an individual case to an individual attorney, this staff person first looks at the case for a number of variables. If the client is already represented by a CCP attorney on a different case, then that same attorney gets the client's new case with the new set of charges. The remaining cases are split into two categories: criminal (Title 11) and traffic (Title 21). All of the Title 11 cases are easy – they are all equally distributed among the CCP attorneys. Title 21 cases involving DUI charges are handled the same way – every attorney gets one. But with the rest of the Title 21 cases, those not involving DUI charges, then it depends. Title 21 cases where statute calls for mandatory jail time, or where the client remains in custody, are handled just like all others – they are distributed equally among the attorneys. But if the client on a traffic case is out-of-custody, the case is not assigned to any attorney. This is the only circumstance in which technically no attorney is "assigned" and the client is represented instead by the CCP unit collectively.

described it. Instead of sending those cases directly to the conflict lawyers, the CCP unit public defenders will often hang on to the conflict cases. If the source of conflict is resolved early on, then the public defender's office will retain the case.<sup>194</sup>

Failing that, the public defender's office goes ahead and declares the conflict, the defendant goes unrepresented at his arraignment, and the case is sent over to the conflict system to handle at the trial date. The CCP contract lawyers get emailed a list of conflict clients from the public defender's office, and then they simply divide the list by last name, with one attorney taking A through M and the other taking N through Z.

We watched as defendants checked in for a misdemeanor trial calendar in New Castle County's Court of Common Pleas. The bailiff asked each of the defendants if they had counsel, and if they did not the bailiff instructed them to have a seat and wait to talk to the prosecutor. Most people appeared without representation.

One gentleman told the bailiff as he checked in that he wanted a continuance to have time to talk to the public defender. "Well, the judge is the only one who can grant you a continuance," the bailiff replied. The judge meanwhile had yet to take the bench. "In the meantime, hear what the prosecutor has to offer. If you don't like what he has to say, then you can talk to the judge about a continuance."

One by one, the prosecutor then called defendants up to discuss plea offers. With each new agreement, the prosecutor asked each defendant to fill out a triplicate Guilty Plea Form. Once they had done so, the prosecutor tore off the bottom, pink copy and handed it back to the defendant. "Wait for the judge, and when your name is called come on up to the podium and hand in your form."

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<sup>194</sup> We received differing information from OPD of the types of scenarios in which the CCP unit holds on to a conflict case. But, in the end, the impact on such clients is the same.

Take, as one example, a case with two co-defendants: Defendant A and Defendant B. The public defender's office cannot represent Defendant B if it has already taken Defendant A's case. But rather than immediately declaring a conflict on Defendant B's case – especially when the CCP lawyers know the defendant will have no conflict lawyer available to him at the arraignment if they were to do so – the CCP unit sits on the case in order to see what happens with Defendant A's case. If the prosecution drops the charges altogether, then the source of the conflict is resolved too.

OPD also gave another scenario, a case involving a prior client. The public defender's office cannot represent Defendant X because it previously represented, for example, a potential witness to the alleged incident (Mr. Y) on a previous matter. Rather than immediately declaring a conflict on the defendant's case, the CCP unit sits on the case in order to see if the state does not identify Mr. Y as a witness. If so, then the conflict is resolved and the CCP lawyers can begin working on the Defendant X's case.

In both scenarios, the intent in holding onto the case is benevolent. OPD believes the client will get faster and better representation by doing so. And, that may be true given that the conflict system, as currently structured, does not provide an attorney to the defendant at arraignment. However, it is belied by the fact that each and every defendant is entitled to have a lawyer immediately. In the first example, both Defendants A and B should have competent counsel working to dismiss charges or resolve the charges judiciously from the first appearance forward. Likewise, Defendant X from the second example is entitled to have someone working on his case immediately, regardless of Mr. Y's status. A deficient conflict system does not absolve the primary system from delaying a meaningful right to counsel.

Defendants who had counsel were also instructed to wait inside the courtroom. When they arrived, the public defender and the conflict attorney called their respective clients up to the table to discuss the charges. Then, they stepped over to the prosecutor's table to discuss plea offers for a minute or two, before returning to the defense counsel's table to discuss the state's offer with the client. It was day of trial, and yet it was clear that few, if any, of these defendants had ever spoken to their lawyers about their cases. Minutes after meeting the lawyer, many were filling out Guilty Plea Forms.

The conflict attorneys handling CCP cases manage little by way of case preparation in advance of the trial calendars. "Here's my morning routine," explained one of the conflict attorneys. "I show up and grab the case files for any conflicts off of the table [in the courtroom]. Then I go and talk to the prosecutors to see what pleas they're offering. They don't want to go to trial so they're always pleading out cases. Then I go meet with my clients. I introduce myself, and then I'll say, 'Here's the plea the prosecutor's offering.' Inevitably, some of my clients will jump right in saying, 'I'm not guilty' or 'I didn't do anything.' I'll just say, 'Okay. That's fine. So, do you want to hear the plea offer?'"

For most of the conflict clients, the conversation the contract attorney described is the very first time they speak with the lawyer – at the day of their trial.

As discussed on page 42, both of the contract attorneys handle caseloads in excess of the accepted national maximum, when considering their private practices in addition to their conflict case assignments. "I don't investigate cases, because I don't have the time," said one. We asked about time for communications with the client about the case. This attorney estimated that 0% of his clients appear at his office for an interview in advance of the trial date. Another 25% call in advance to discuss the case by phone. The remaining 75% will speak to his lawyer for maybe five minutes on the day of trial, before deciding whether or not to accept the state's plea or go to trial. "But you've got to understand that 60% of the caseload is going to be resolved by dismissal because the victim didn't show." In other words, this game of chance is all the conflict lawyers can offer to their clients.

As one public defender described it: "CCP is the 'conveyor belt' court." The judges of the Court of Common Pleas that we spoke with across the state do not seem to be overly proud of that reputation. "Over the years the public defender's office has attempted to put more resources in the Court of Common Pleas," said one Sussex County judge. "Two attorneys is not enough, by the way. These guys are dealing with 15, 20, 30 cases a day."

The Court of Common Pleas in Sussex County holds misdemeanor jury trials every other week, on Wednesdays. On those "off" Wednesdays where jury trials are not scheduled, the Court of Common Pleas holds an extra bench trial docket. The Court of Common Pleas for Sussex County usually sets a maximum of 50 bench trials per bench trial calendar. The average week sees 50 bench trials set for Monday morning, 50 bench trials set for Tuesday morning, plus another 50 set for Tuesday afternoon, and

another 50 set for Wednesday mornings on those “off” weeks. And the public defenders have to be available to the court for each of these calendars.

“Look, these guys have only two weeks a month when they have two days out of court, and the other two weeks that month they only have one day out of court,” said the judge. “So when do they have time to get their cases prepared like they should? When do they have time to think about bringing in an investigator?”

To put this into the context of an average month, the 2.5 public defenders staffing CCP<sup>195</sup> have a grand total of six days when they are not spending all of the day (or even most of the day) over at the courthouse staffing CCP proceedings. Likewise, the contract attorney who splits her time between Family Court and CCP has to be available for any CCP calendars that have conflict cases scheduled.

When we asked whether there was a notable impact such a heavy court schedule has on the level of advocacy provided on behalf of misdemeanor defendants, one judge said: “It means [the defense attorneys] don’t have time to develop their cases. They get so overwhelmed that they don’t see the obvious. Sometimes I’m sitting on the bench just scratching my head. Why are you pleading this client to this charge? Try the case!”

Many misdemeanor cases are resolved at the case review in the Kent County Court of Common Pleas. For defendants who were screened for appointed counsel at or before their arraignment in CCP, their public defender most likely filed a written waiver of the arraignment.<sup>196</sup> Having waived the arraignment, most defendants who have counsel can go home right away. The case review, therefore, is for many the first opportunity to meet with counsel and for counsel, in turn, to meet with the prosecution to discuss the charges.

<sup>195</sup> One of the CCP attorneys with the Sussex County public defender’s office splits half of his time handling Family Court cases.

<sup>196</sup> The written waiver of arraignment is called a “10(c) form,” termed after Rule 10(c) of the *Criminal Rules Governing the Court of Common Pleas*. Available here: <http://courts.delaware.gov/forms/download.aspx?id=39298>.

“Sometimes I’m sitting on the bench just scratching my head,” one Court of Common Pleas judge said of the level of advocacy demonstrated by public counsel in misdemeanor cases. “Why are you pleading this client to this charge? Try the case!”

Unlike in New Castle County CCP, where case reviews are only held for misdemeanors involving DUI charges, “to manage the discovery process” that can be more complicated in those types of cases, all misdemeanor defendants in Kent County that exercise the right to a jury trial have a case review a few weeks after the arraignment. And the trial date is scheduled a month or so after the case review. For a case where the defendant elects during his or her arraignment to have a bench trial instead, the case is set directly for trial, skipping the case review entirely.

At the case review calendar in Kent County CCP, prior to the judge taking the bench, the prosecutors meet with defense attorneys to discuss pleas. The defense attorneys then call their clients out into the hallway to discuss their options quietly on one of the benches outside. Some defendants have gone to their attorney’s or public defender’s offices in advance of the case review to discuss the charges. For others, this is the first time they have a substantive conversation with counsel – and many plead guilty just moments later. Not every defendant even has counsel at that hearing. Instead, lawless defendants sit in a row along a bench behind the prosecutor’s table waiting to discuss plea deals directly with a prosecuting attorney.

We observed a *capias* calendar in Kent County’s Court of Common Pleas. Not every defendant on a *capias* calendar is held in the state’s custody. Many defendants learn of the *capias* and appear in court on their own to address the matter. The particular *capias* calendar we observed in Kent County was split evenly between in-custody and out-of-custody defendants. A lone prosecutor sat at one of the counselor’s tables. The other table sat vacant – there were no defense lawyers in the room. Instead, we watched as unrepresented defendant after unrepresented defendant was brought before the judge.

“You’ve had a chance to discuss the plea offer with the prosecutor?” the judge asked one.

“Yes,” the defendant replied. He was in his early 30s and, having failed to appear at his court appearance (either his case review or his trial date) for an offensive touching charge, he was eventually picked up on a *capias* issued from that missed appearance.

“And you’d like to go ahead and accept that plea offer?” the judge continued.

“Yes.”

“Now, I see that you don’t have your attorney here with you. You’re already represented by the public defender’s office, but they’re not here. But you’re okay to go ahead without them, right?”

“Yes.”

Another defendant was brought before the judge on a capias return. Previously, he failed to appear at his arraignment for number of misdemeanor driving charges. Like the earlier defendant, this gentleman was approved as a client of the public defender's office.

"Do you want to wait to talk to your public defender?" the judge asked, pointing to the door at the side of the courtroom – the door that leads back downstairs to the cell block. "Or do you want to talk to the attorney general to see what he has to offer you?"

A significant number of incarcerated defendants were, in fact, clients of the public defender's office. They had already been referred to the public defender's office by the court, been screened and approved for appointed counsel. Where then was their lawyer?

Later that day, we had the chance to ask that question of the supervising attorney of the public defender's office. Expressing surprise, he asked: "What courtroom was this in?" He had no idea that any of his office's clients had been picked up. The court made no effort to inform the public defenders. And so, the public defender's office could not advise its clients against entering into plea negotiations without one of their lawyers involved, because they simply did not know.

## INTAKE SCREENING AND IDENTIFYING CONFLICTS

Although the public defender's office and the conflict program were created as distinct entities, one remains the gateway to the other. As Stephanie Volturo, the Office of Conflicts Counsel's chief attorney, explained it to us, "Anybody who we get, it is because they have interviewed with the public defender's office."

By statute, the state's chief public defender is appointed to represent "each indigent person who is under arrest or charged with a crime."<sup>i</sup> The chief then delegates the actual case-related duties to one of the lawyers employed within the Office of the Public Defender. This appointment can occur by the defendant's request or by the motion of a judge.<sup>ii</sup>

But before the chief public defender accepts the appointment, he is required to determine whether or not the defendant is financially eligible to receive the assistance of public counsel at taxpayer expense, but only until arraignment. After arraignment, the obligation to determine indigency passes to the courts.<sup>iii</sup> The Office of the Public Defender is also required, by the state *Rules of Professional Conduct*,<sup>iv</sup> to establish an internal definition for a conflict of interest

in criminal cases, and a set of procedures by which its staff determines whether a conflict exists for each new case that comes in.

The Office of the Public Defender has merged both requirements – indigency and conflict screening – into a single intake process for each defendant. The agency has also established uniform criteria to be followed across the state for determining whether a defendant has satisfied the financial requirements to receive appointed counsel, and for determining whether a conflict exists. But, even while the criteria have been standardized, the process or (more importantly) the people who apply that process may vary from one county to the next.

Most often, the intake interview occurs in-person at the public defender's office in one of the three counties, but it can also occur by videophone (particularly if the potential client is incarcerated at one of the state's detention facilities), or in rare circumstances by old-fashioned phone call. The public defender's office has promulgated a set procedure – a form connected to its internal database – that each interviewer is to follow with each potential client.

<sup>i</sup> Title 29 Del. Code § 4602(a): "The Public Defender shall be a qualified attorney licensed to practice in this State selected by the Governor. The Public Defender shall represent, without charge, each indigent person who is under arrest or charged with a crime..."

<sup>ii</sup> Title 29 Del. Code § 4602(a)(1) and (2).

<sup>iii</sup> Title 29 Del. Code § 4602(b).

<sup>iv</sup> See Comment to Rule 1.7, *Rules of Professional Conduct*, Comment 3: "To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved." Available at: <http://courts.delaware.gov/rules/DLRPCwithCommentsFeb2010.pdf>.

The screening interview begins first with indigency determination.<sup>v</sup> If the intake screener determines the defendant is ineligible, the screening interview ends then and there.<sup>vi</sup> Following indigency screening, the intake interview moves next to determining whether a conflict exists.<sup>vii</sup> This portion of the interview is based upon the conflicts policy listed in the agency's policy manual, which touches upon prevailing state case law and ethical rules to guide the staff's practices. If a conflict is found, the interview ends; the conflict is declared and conflict counsel is appointed.

If, however, no conflict is found, the interview transitions directly into substantive topics regarding the client and the client's case. In many ways, the Office of the Public Defender sees the substantive portion of the intake process as giving its attorneys who will represent those clients a head start on their cases. Because of this relationship between the intake process and the direct advocacy of the OPD trial units, the non-attorney intake screeners are commonly referred to as "investigators."

We observed an intake interviewer in Sussex County, for example, ask specific questions of a potential client about his drug use and addiction. We also viewed the intake specialist asking specific questions about facts of the alleged incident, including potential eye

witnesses, etc. The investigator then entered each of the client's responses into a form on the office's internal database.

The intake interviews of incarcerated defendants in Sussex County are, in fact, conducted by true investigators who are available to trial lawyers to perform substantive investigative tasks on their cases, like taking witness statements or analyzing discovery, in addition to the initial interviews with clients. The particular investigator conducting the interviews the day we observed was a retired law enforcement officer. The same process is followed in the Kent County public defender's office as in Sussex County's.

But in New Castle County, the intake unit is staffed by a mixture of young professionals and veteran administrative personnel. These individuals receive a quick how-to on the overall intake process, but no detailed specialty or exhaustive immersion training, nor are they required to receive any form of certification on examining clients for potential mental health or substance abuse issues. To similar extent as national standards require public defense agencies to provide ongoing training opportunities for its attorneys, defender systems must also providing training for non-attorney staff, such as investigators or social workers.<sup>viii</sup>

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<sup>v</sup> A defendant is presumed eligible for public counsel (automatically qualifies) if he is currently incarcerated, unemployed, receiving some form of public assistance (such as social security or disability), is bankrupt, or is a child. Beyond this presumptive threshold, a potential client is financially eligible for public counsel if his net income is \$500 per week or less.

<sup>vi</sup> The defendant is given a form that he can fill out and submit to the court in order to appeal the screener's determination, if he so chooses.

<sup>vii</sup> The computer form used in screening for conflicts asks the interviewer to answer a set of questions, including: whether there are any co-defendants (sometimes, of course, the interviewer knows a case involves co-defendants and that there will be a conflict with one or more defendants even before the interview starts); whether the client has any other open cases (previous charges); whether any witnesses have been identified; whether the potential client is a witness in a different case; and whether the public defender's office has previously represented or currently represents the alleged victims or witnesses in the current case.

<sup>viii</sup> See, for example, NLADA's *Defender Training and Development Standards*: "For any organization, continuous improvement through constant training for staff is essential. In defender organizations this includes not only attorneys but also investigators, secretaries, paralegals, social workers, sentencing specialists, managers, computer systems personnel and other employees." (From the Preface.)

We watched as an incarcerated 16-year-old boy was interviewed by videophone from New Castle County. The intake investigator followed OPD's "Juvenile Medical/Psychological History" form directly, on which the first question reads: "Do you presently use or have you ever used drugs or alcohol? (List Substances.)" And at the bottom of that screen of questions, the form asks the intake investigator: "Do you recommend a Psycho-Forensic Evaluation? If ASAP, Why? If Yes, Explain." The interviewer's only qualification for performing that duty was a college degree.

There are several problems with this. Most notably, the direction of any investigative tasks on behalf of a client must be the responsibility of the individual attorney handling that client's case. At the end of the day, it is the lawyer who is the advocate on behalf of the client before the court. In Delaware's horizontal system, the intake screening process serves to set advocacy in motion as early as possible. But the analysis of a non-attorney, let alone one who has

received no advanced training of any sort, can never be a substitute for the training and skill a trial lawyer brings.

In the best-case scenario, the substantive information gathered at the initial interview involves a defendant who will be represented by the public defender's office until the conclusion of his case. But, of course, not all conflicts are so obvious as a case with co-defendants. (See side bar on conflicts, page 39.) In fact, some conflicts cannot be identified until days, weeks, or even months following the initial interview (e.g., attorneys often do not know who the prosecution plans to call as witnesses until late in a case and therefore cannot screen to see if the office has represented that person on another case). For those, the initial screening interview inevitably touches upon the substantive issues. Yet none of that potentially critical information is forwarded to conflict counsel. Instead, it is treated as the work product of the primary system.

# CHAPTER 6

## SUFFICIENT TIME TO ENSURE QUALITY REPRESENTATION

Thus far, the report details how Delaware’s systems for providing right to counsel services fail in two critical areas. First, the accused is not provided with access to counsel early in the case, causing him to face the prospect of waiving constitutional rights on his own or entering a plea without the advice of a lawyer. Second, once the accused finally gets a lawyer, that same lawyer is systemically impaired from continuously representing the client through until the conclusion of his case. As a result, indigent defendants face long periods of time where they have representation but in name only. Though they have a right to a zealous advocate, no true advocacy is happening on their cases.

This next section examines how excessive caseloads leave public defenders and conflict attorneys with insufficient time to properly work on all of their cases.

## WORKLOAD CONTROLS AND THE RIGHT TO EFFECTIVE REPRESENTATION

As we noted in this report’s Introduction, the right to the assistance of counsel is the right to “effective” representation.<sup>197</sup> But how is “effective” representation defined?

The U.S. Supreme Court establishes that “prevailing professional norms” (such as the *ABA Standards for Criminal Justice* and the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, among others) represent the proper baseline measure in ineffective assistance of counsel claims raised on appeal.<sup>198</sup> Other minimum standards of attorney performance include the National Legal Aid & Defender Association’s *Performance Guidelines for Criminal Defense Representation*,<sup>199</sup> and the National Juvenile Defender Center’s *The Role of Juvenile Defense Counsel in Delinquency Court*.<sup>200</sup>

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<sup>197</sup> *McMann v. Richardson*, 397 U.S. 759 (1970).

<sup>198</sup> See generally, *Strickland v. Washington*, 466 U.S. 668 (1984). See also: *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Rompilla v. Beard*, 545 U. S. \_\_\_\_ (2005).

<sup>199</sup> Available at: [http://www.nlada.org/Defender/Defender\\_Standards/Performance\\_Guidelines](http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines).

<sup>200</sup> Available at: [http://njdc.info/pdf/njdc\\_role\\_of\\_counsel\\_book.pdf](http://njdc.info/pdf/njdc_role_of_counsel_book.pdf).

The ABA *Ten Principles* require indigent defense systems to promulgate attorney performance standards based on these guidelines, but made specific to state laws and the requirements of local practice.<sup>201</sup> Many public defense delivery systems and state bar associations have done just that. The Louisiana Public Defender Board, for example, has promulgated specific standards for all attorneys representing clients in adult criminal trials,<sup>202</sup> juvenile delinquency cases,<sup>203</sup> child in need of care (CINC) matters,<sup>204</sup> capital trials,<sup>205</sup> and other right to counsel matters. Similar requirements have been adopted for attorneys handling public cases in Arizona,<sup>206</sup> Colorado,<sup>207</sup> Connecticut,<sup>208</sup> Indiana,<sup>209</sup> Maine,<sup>210</sup> Massachusetts,<sup>211</sup> Montana,<sup>212</sup> Nevada,<sup>213</sup> North Carolina,<sup>214</sup> North Dakota,<sup>215</sup>

<sup>201</sup> See ABA *Principle 10*: “Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.”

<sup>202</sup> Available at: <http://lpdb.la.gov/Supporting%20Practitioners/Standards/LPDB%20Trial%20Court%20Performance%20Standards.php>.

<sup>203</sup> Available at: <http://lpdb.la.gov/Supporting%20Practitioners/Standards/LPDB%20Trial%20Court%20Performance%20Standards%20for%20Delinquency%20Representation.php>.

<sup>204</sup> Available at: <http://lpdb.la.gov/Supporting%20Practitioners/Standards/LPDB%20Trial%20Court%20Performance%20Standards%20for%20CINC%20Representation.php>.

<sup>205</sup> Available at: <http://lpdb.la.gov/Supporting%20Practitioners/Capital%20Defense/LPDB%20Guidelines%20for%20Capital%20Defense.php>.

<sup>206</sup> Arizona Public Defender Association, *Performance Standards for Indigent Defense Counsel* (2011). [http://www.apda.us/forms/Attorney\\_Performance\\_2011.pdf](http://www.apda.us/forms/Attorney_Performance_2011.pdf).

<sup>207</sup> Alternate Defense Counsel of the State of Colorado, *Guidelines on Indigent Defense*. <http://www.coloradoadc.org/docs/GuidelinesIndigentDefense.pdf>.

<sup>208</sup> Connecticut Public Defender Services Commission, *Guidelines on Indigent Defense*. [http://www.ct.gov/ocpd/lib/ocpd/PDF\\_Graphics/PD\\_Guidelines.pdf](http://www.ct.gov/ocpd/lib/ocpd/PDF_Graphics/PD_Guidelines.pdf).

<sup>209</sup> Indiana Public Defender Commission, *Standards for Indigent Defense Services in Non-Capital Cases*. Other standards also available at: <http://www.in.gov/judiciary/pdc/2355.htm>.

<sup>210</sup> Maine Commission on Indigent Legal Services, *Standards of Practice for Attorneys who Represent Adults in Criminal Proceedings*. Other standards also available at: <http://www.maine.gov/mcils/rules/adopted.html>.

<sup>211</sup> Massachusetts Committee for Public Counsel Services, *Certification Requirements*. [http://www.publiccounsel.net/certification\\_requirements/certification.html](http://www.publiccounsel.net/certification_requirements/certification.html).

<sup>212</sup> Montana Public Defender, *Standards for Counsel Representing Individuals Pursuant to the Montana Public Defender Act (2012)*. <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>.

<sup>213</sup> Nevada Supreme Court, *Administrative Docket 411 Order Adopting Performance Standards (2009)*. Available at: <http://www.nevadajudiciary.us/index.php/idccommission-news/125-nevada-supreme-court-adopts-performance-standards-for-indigent-defense->

<sup>214</sup> North Carolina Office of Indigent Defense Services, *Performance Guidelines for Non-Capital Criminal Cases at the Trial Level (2004)*. Other standards also available at: [http://www.ncids.org/Attorney/Standards\\_Guidelines.html?c=Information%20for%20Counsel,%20Standards%20And%20Performance%20Guidelines](http://www.ncids.org/Attorney/Standards_Guidelines.html?c=Information%20for%20Counsel,%20Standards%20And%20Performance%20Guidelines).

<sup>215</sup> North Dakota Commission on Legal Counsel for Indigents, *Minimum Attorney Performance Standards*. Available at: <http://www.nd.gov/indigents/standards/>.

Oregon,<sup>216</sup> Pennsylvania,<sup>217</sup> Texas,<sup>218</sup> Virginia,<sup>219</sup> Washington,<sup>220</sup> and elsewhere. But, even where such mandatory performance standards do not yet exist for the defense function, as is the case in Delaware, each attorney is required to adhere to ethical standards of practice as required by the state court in order to maintain his or her license to practice law. This means that the appointed lawyer – in any state – must have sufficient time, resources, training and expertise to handle the individual’s case. These are the minimum ethical obligations all attorneys owe to their clients.

The U.S. Supreme Court reflects on this right to effective representation in *United States v. Cronin*, and further concludes:

“The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.”<sup>221</sup> (See discussion of our adversarial system of justice, page 17.)

The role of the indigent defense *system*, therefore, is to ensure that the individual attorneys have access to ongoing training, are properly supervised, are provided with sufficient resources, and have enough time to effectively represent every single client. Where a defendant is represented by an attorney who lacks the time necessary to properly investigate the case, to meet with the defendant, to file pre-trial motions, to study the prosecution’s plea offer, etc. – essentially, where the attorney is forced to triage services in favor of one client over another – then both the system and the attorney are in breach of their ethical and constitutional obligations to that defendant.

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<sup>216</sup> Oregon State Bar, *Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases* (2006). Available at: [http://www.osbar.org/surveys\\_research/performance-standard/index.html](http://www.osbar.org/surveys_research/performance-standard/index.html).

<sup>217</sup> Juvenile Defenders Association of Pennsylvania, *Performance Guidelines for Quality and Effective Juvenile Delinquency Representation*. Available at: <http://www.pabar.org/weblinks/resources/Performance%20Guidelines%20for%20Quality%20and%20Effective%20Juvenile%20Delinquency%20Representation.pdf>.

<sup>218</sup> State Bar of Texas, *Performance Guidelines for Non-Capital Criminal Defense Representation* (2011). Available at: [http://www.texasbar.com/AM/Template.cfm?Section=Texas\\_Bar\\_Journal&Template=/CM/ContentDisplay.cfm&ContentID=14703](http://www.texasbar.com/AM/Template.cfm?Section=Texas_Bar_Journal&Template=/CM/ContentDisplay.cfm&ContentID=14703).

<sup>219</sup> Virginia Indigent Defense Commission, *Commonwealth of Virginia Standards of Practice for Indigent Defense Counsel* (2012). Available at: <http://www.indigentdefense.virginia.gov/PDF%20documents/Standards%20of%20Practice%20120315.pdf>.

<sup>220</sup> Washington State Bar Association, *Standards for Indigent Defense Services* (2011). Available at: [http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/~/\\_media/Files/Legal%20Community/Committees\\_Boards\\_Panels/Council%20on%20Public%20Defense/Standards%20for%20Indigent%20Defense%20Services%20\(2011\).ashx](http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/~/_media/Files/Legal%20Community/Committees_Boards_Panels/Council%20on%20Public%20Defense/Standards%20for%20Indigent%20Defense%20Services%20(2011).ashx).

<sup>221</sup> *United States v. Cronin*, 466 U.S. 648 (1984).

Consider the types of conflicts that exist for right to counsel service providers. (See side bar, page 39.) One type of conflict in particular – where the attorney’s personal interests are in direct conflict with the client’s case-related interests – is a bit more complex when applied to indigent defense. The “personal interest” rule is most frequently applied to business law,<sup>222</sup> but in reality there are clear everyday examples of this type of conflict in public defense delivery systems across the country.

Take, for example, Delaware’s conflict defender system. In all parts of the state, private attorneys are appointed to conflict cases under annual contracts with the Office of Conflicts Counsel, and in return those attorneys are paid an annual fee. Each attorney is paid the same flat fee each year, no matter how few or how many cases he is assigned. Such flat fee systems are rife with financial incentives for attorneys to do as little work as possible on their appointed cases – and are therefore prohibited under national standards, including the ABA *Ten Principles*. (See side bar on Parity and *Principle 8*, page 146.) The more effort an attorney expends on the appointed client’s case, the less money he takes home on his private paying clients’ cases. The contract itself places the attorney’s “personal interests” in direct conflict with each of his appointed clients’ case-related interests.<sup>223</sup>

But the contract also creates a new conflict between the attorney’s clients. As Professor Norman Lefstein, Dean Emeritus of Indiana University Law School, details in his seminal book, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*:

“Excessive caseloads among lawyers representing indigent criminal and juvenile clients implicate a number of state rules of professional conduct. The most important of these are the requirements to be ‘competent’ pursuant to [ABA *Model Rules*] Rule 1.1 (‘provide ... the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation’) and ‘diligent’ pursuant to Rule 1.3 (‘act with reasonable diligence and promptness in representing a client’). The comment to Rule 1.3 contains an explicit admonition: ‘A lawyer’s work load must be controlled so that each matter can be handled competently.’”<sup>224</sup>

In other words, an individual attorney cannot provide “competent” and “diligent” representation to a limitless number of clients. Eventually, the attorney will reach a point whereby the addition of one more client will cause the attorney to breach his ethical duties. The result places the attorney in conflict with his newly assigned client: the client’s

<sup>222</sup> See Commentary to Rule 1.7, *Rules of Professional Conduct*, Comment 10. Available at: <http://courts.delaware.gov/rules/DLRPCwithCommentsFeb2010.pdf>.

<sup>223</sup> We note here that the Superior Court contract for Kent County includes monthly caps on new case assignments. Nevertheless, as discussed in the side bar on parity of resources, page 144, these monthly caps do not fully meet this standard in any event.

<sup>224</sup> Professor Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense* (2011), at 27. Available at: [http://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/initiatives/indigent\\_defense\\_systems\\_improvement/case\\_guidebook.html](http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/case_guidebook.html). The *Model Rules* he cites throughout this passage mirror those contained in the Delaware *Rules of Professional Conduct*.

case-related interests versus the attorney's professional interests (i.e., retention of his job or ability to practice law).

Recall here the first type of conflict, where the attorney already represents another individual whose interests are in opposition to the newly appointed defendant:

“when a lawyer has too many clients to represent simultaneously, a ‘concurrent conflict of interest exists’ because ‘there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client . . . .”<sup>225</sup>

In other words, if the addition of one more client will cause the attorney to no longer provide effective representation to his existing clients or to the newly appointed client, then the attorney's code of ethics requires he not take that next client's case.<sup>226</sup> Instead, he must “either decline the representation or seek to withdraw from the representation.”<sup>227</sup>

For these reasons, all national standards – including ABA *Principle 5* – require that “[d]efense counsel's workload is controlled to permit the rendering of quality representation.” Wherever Delaware's attorneys are allowed – or worse, are compelled – to accept a limitless number of appointed cases, then “the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing” inevitably will be violated.

## MEASURING DELAWARE'S RIGHT TO COUNSEL SERVICES AGAINST NATIONAL WORKLOAD STANDARDS

“I would hope they have put caseload limits on these contracts by now,” said one judge who had previously held a conflict contract in his days as a private attorney. “The caseload was so heavy, it impacted my health. It impacted my ability to do the job. It almost bankrupted my practice.”

The conflict program the judge described was back when Kent and Sussex counties only had one contract attorney apiece handling every conflict case. As we explain later in Chapter 8, those contracts were eventually split into smaller components requiring the participation of more and more attorneys. Today, the state's conflict program is basically a system of nine independent parts, with separate structures for each trial court in

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<sup>225</sup> *Ibid.* at 27.

<sup>226</sup> *Rules of Professional Conduct*, Rule 1.16(a), states: “a lawyer shall not represent a client . . . if (1) the representation will result in violation of the rules of professional conduct or other law”. Available at: <http://courts.delaware.gov/rules/DLRPCFebruary2010.pdf>.

<sup>227</sup> Lefstein, at 27.

## NATIONAL WORKLOAD STANDARDS

National standards point to the caseload maximums prescribed by the National Advisory Commission on Criminal Justice Standards and Goals (NAC), a 1973 U.S. Department of Justice-funded initiative, and which the ABA *Ten Principles* state “should in no event be exceeded.” NAC Standard 13.12 prescribes numerical caseload limits of:

- 150 felonies per attorney per year
- 400 misdemeanors per attorney per year
- 200 juvenile per attorney per year
- 200 mental health per attorney per year
- 25 appeals per attorney per year.

This means a lawyer handling felony cases should handle no more than 150 felonies in a given year, assuming the lawyer has no additional duties. That is, he does not have any supervisory responsibilities, nor handles misdemeanors (or other case types), nor engages in any private practice on the side.

Footnotes to ABA *Principle 5* on workload further states: “The workload demands of capital cases are unique: the duty to investigate, prepare, and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea.” Because of this, most standards require capital litigation attorneys handle no more than 3 such cases in a year. (See *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998) and also ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989).)

The U.S. Department of Justice recently cautioned, however, that “caseload limits alone cannot keep public defenders from being overworked into ineffectiveness; two additional protections are required. First, a public defender must have the authority to decline appointments over the caseload limit. Second, caseload limits are no replacement of a careful analysis of a public defender’s *workload*, a concept that takes into account all of the factors affecting a public defender’s ability to adequately represent clients, such as the complexity of cases on a defender’s docket, the defender’s skill and experience, the support services available to the defender, and the defender’s other duties.” (Emphasis original. *Statement of Interest of the United States re: Wilbur v. City of Mount Vernon* (United States District Court of the Western District of Washington, Case 2:11-cv-01100-RSL).)

We agree. Workload maximums, therefore, are not some arbitrary number to be chased after by policymakers in budget debates. They are a mechanism to ensure that the minimum obligations owed by the attorney to the accused can be met in equal measure for each of his clients. And if the addition of one more case will mean he can no longer provide effective services to each of his clients, then the attorney must not take that next case.

each county (three courts multiplied by three counties equals nine contract systems). Of those nine conflict programs, only one – Kent County’s Superior Court contract program – has anything close to the type of workload controls required by national standards. Even then, it is not enough.

Here is what we know about the workloads of the contract lawyers handling felony cases in Kent County Superior Court. From July 2011 to June 2012, the Office of Conflicts Counsel had contracts with two attorneys for Superior Court work in Kent County. Both were considered “full” contracts (see page 53) but, in reality, the two contracts were not equal to each other. One of the attorneys could take up to ten Superior Court case-assignments per month, or 120 per year, under his flat annual fee, and the other up to 15 cases per month, or 180 per year.<sup>228</sup> But after reaching the capped amount each month, the contract lawyers become just like any other private lawyer available for conflict assignments, in which case they would be paid at a rate of \$60 per hour.

During that 2011-12 fiscal year, one of the contract attorneys was assigned a total of 156 Superior Court cases.<sup>229</sup> When compared against the maximum 150 felonies allowed by national caseload standards, he was operating at what might appear to be a “reasonable” 104% of the national limit. (See side bar, previous page.) The following year, however, in FY2012-13 his appointed caseload increased to 205 Superior Court cases. We can presume this means he reached his maximum of 15 contract cases each month, and was then appointed to an additional 25 “hourly cases” over the course of the year. Despite the caseload caps in place under the Kent County contract system, this attorney

<sup>228</sup> Not all Superior Court cases are felonies, as the court has jurisdiction over a small number of more serious misdemeanors as well. Nevertheless, such misdemeanors are treated procedurally as though they are felonies (for example, they are first set for preliminary hearing in CCP, before being bound over to Superior Court for trial) and so, for workload purposes, they are considered here as felonies.

<sup>229</sup> These caseload figures were provided to us by the Office of Conflicts Counsel, which were in turn provided to them directly by the Kent County Superior Court.

**ABA Principle 5: Defense counsel’s workload is controlled to permit the rendering of quality representation.**

Counsel’s workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement.

was now working at 137% of the allowable national maximum.<sup>230</sup> Put another way, this one attorney was doing what 1.3 full time attorneys could reasonably be expected to handle. But none of these contract lawyers are considered full time employees of the state – they all have private practices on the side. And so the outlook for this attorney only gets worse from here.

None of the caseload figures provided to us account for the workload of the attorney's private clients' cases, so it is difficult to quantify each attorneys' true figures. Most conflict attorneys estimated their private work accounted for 40% of their total caseload (the other 60% being conflict appointments). This particular attorney, however, reported that he takes a significantly lower number of private cases – around 50 private cases per year. Nevertheless, the addition of even this small private caseload means the attorney is in fact operating well above the national caseload standards – perhaps 150%, if not higher.<sup>231</sup>

National standards point to the caseload maximums prescribed by the National Advisory Commission (NAC) in 1973, which the ABA *Ten Principles* state “should in no event be exceeded.” (See side bar on national caseload standards, page 136.) But, while the NAC caseload limits were established as absolute maximums, policymakers in many states have since recognized the need to set local workload standards at the state and county level that take into account factors impacting attorney performance (such as time traveling between the court and the local jail to meet with clients, or the prosecution's charging practices, among others), as well as additional obligations placed upon public defense attorneys through evolving U.S. Supreme Court case law, and improvements in forensic sciences and criminal justice technologies – all of which increases the time needed to render effective representation beyond what was established in 1973.<sup>232</sup>

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<sup>230</sup> All Superior Court cases are treated as felonies for conflict attorneys' workload analysis. See note 228 above for explanation. More to the point, we have insufficient information to know precisely how many of this attorney's Superior Court cases were felonies, and how many were misdemeanors. This particular attorney, however, estimated that 25% of his Superior Court cases are misdemeanors. Other attorneys suggested this estimate is high. In fact, even the felony case assignments appear more severe. “Now we're getting saddled with the worst cases,” said one, estimating that he often has five or six attempted murder cases open at any one time. Nevertheless, of this attorney's 205 total cases, we might assume then that 154 (75%) were felonies and 51 (25%) were misdemeanors. That would still place the attorney's workload above the maximum allowable, at 115% of national standards.

To find the felony-equivalent workload for any attorney handling a mixture of case-types, first prorate misdemeanor cases at 0.375 of 1.0 felony case (150 felonies / 400 misdemeanors = 0.375): 51 misdemeanors X 0.375 = 19 felony-equivalent cases. Add to current number of felonies and divide by NAC maximum: (19+154) / 150 = 115% the allowable maximum for combined felonies and misdemeanors.

<sup>231</sup> According to this attorney, the work for his private clients involves mostly low-level misdemeanors, DUI's, and first time offender cases. If we treat his estimated 50 private cases as misdemeanors, that is the equivalent of 19 felonies. (See note 230 above, for conversion explanation.) (205 Superior Court cases + 19 felonies) / 150 max = 149% of NAC standard. This estimate increases to 170% of NAC standards if the attorney's private caseload involves more complexity than misdemeanors alone.

<sup>232</sup> For exactly this reason, Professor Lefstein and several other authorities argue that the NAC standards are far too high, and that the actual maximum, for felony cases in particular, should be adjusted to well below 150 cases per attorney per year. See, Lefstein, at 48 (although the full discussion of NAC standards begins at 43).

If the attorney in the above example is practicing at more than 150% the maximum allowable by 1973 standards, just imagine how crushing his workload truly is given the standard of practice now 40 years later.

“It’ll kill you, to be honest,” said another Kent County conflict attorney. “It’ll burn you out.” This lawyer handled 108 Superior Court cases in FY2011-12. Like his colleague, at first glance, his caseload may not appear to be particularly overwhelming. Not only was that well below the maximum 120 cases he could have expected under his contract, far less than the 156 cases his colleague handled that same year, but it was also only 72% of the maximum 150 felonies allowed by the NAC standards. Nevertheless, so frustrated at the substandard quality of work he was producing each year, this attorney opted to “scale back” his contract the following fiscal year, taking instead a “half” contract in FY2012-13 (meaning a maximum of 5 case assignments per month).

It is important to note, however, that despite the attorneys’ difficulty in juggling the workload demands of their public and private clients’ cases, the Kent County Superior Court conflict program has the best chance of any statewide in complying with national workload standards from year to year. The conflict attorney contracts throughout the rest of the state have no such monthly caseload limits.

Superior Court contract lawyers in Sussex County can expect to handle between 90 and 110 cases apiece in a given year, or 60% to 73% of national standards.<sup>233</sup> In New Castle County, contract attorneys can likewise expect about 90 Superior Court conflict case-assignments per year (60% of NAC).<sup>234</sup> As most attorneys estimate that their appointed caseloads are 60% to 70% of their combined public and private work, this puts the attorneys on track to comply with the NAC standards. But, as the Office of Conflicts Counsel does not currently require attorneys to report their private caseload statistics as a condition of their contracts, there is no way to know with certainty what each attorney’s actual caseloads truly are.

The conflict attorney workloads in the New Castle County Court of Common Pleas are far worse. Prior to adding another contract attorney in FY2012-13,<sup>235</sup> a lone attorney

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<sup>233</sup> FY2011-12 caseload figures provided to OCC directly from the attorneys in Sussex County listed annual workloads of 87 and 94 Superior Court cases for two “full” contract attorneys, and an additional 53 and 64 cases for two “half” contractors (the latter contract being shared between two attorneys who only worked six months apiece) which would be the equivalent of 117 cases if handled by a single attorney.

<sup>234</sup> According to caseload figures provided by the Office of the Public Defender’s IT staff, from FY2006 to FY2012, court appointed counsel received an average of 88.6 felony cases per attorney per year. (This figure accounts for misdemeanor cases in Superior Court, converted to felony-equivalent.) According to the Office of Conflicts Counsel, Superior Court attorneys can expect to be assigned between 64 and 120 cases per year (10-15 new cases at each preliminary hearing, yielding 40-60 cases assigned at prelims per year, plus another 2-5 direct assignments each month, yielding another 34-60 direct appointments per year), for an average of 92 conflict cases per attorney per year.

<sup>235</sup> Some may argue that it is unfair to assess Delaware’s system using caseload figures from a prior fiscal year. However, it was the most recent year for which complete data was available. The 6AC understands

## THE OREGON SYSTEM: USING CONTRACTS TO CONTROL ATTORNEY WORKLOAD

The Oregon Public Defender Services Commission was established in 2001 as an independent body responsible for overseeing and administering the delivery of right to counsel services in each of Oregon's counties. The commission is statutorily responsible for promulgating standards regarding the quality, effectiveness, and efficiency by which public counsel services are provided. With all funding for direct services provided by the state, the commission's central Office of Public Defense Services handles the day-to-day management of the system.

Oregon's is the only system in the country that relies entirely on contracts for the delivery of public defense services. The statewide office lets individual contracts with private not-for-profit law firms (which look and operate much like the public defender agencies of many counties across the nation, with full time attorneys and substantive support personnel on staff), smaller local law firms, individual private attorneys, and consortia of private attorneys working together. The actual contracts are the enforcement mechanism for the state's standards, with specific performance criteria written directly into the contracts. Should any non-profit firm or group of attorneys fail to comply with their contractual obligations, the contract simply will not be renewed.

Importantly, the contracts also set a precise total number of cases each contractor will handle during the contracting period, thereby ensuring that attorneys have sufficient time to fulfill the state's performance criteria. But more than that alone, the contracts safe-

guard the local service providers by allocating cases among that annual total across case types according to the number of hours generally required to meet the performance demands of each type of case. In other words, rather than controlling attorney case-loads, the Oregon system is built around the concept of "workload" by assigning "weights" to specific types of cases, adjusted for availability of non-attorney support staff and other non-representational duties (such as travel or attending CLE).

Each service provider's workload is tracked on an ongoing basis, down to the week in fact, enabling the contract defenders to accurately predict when they will reach their workload maximums for a given month, all the while keeping the local court informed. In practice, a service provider can project that it will reach its maximum allowed under the contract on a Wednesday and can inform the court right away that it will be declaring unavailability starting Thursday and onward through the end of week. With all stakeholders kept informed, there are no surprises – the extra cases are simply assigned to one of the other service providers available in that county under contract with the Office of Public Defense Services.

was expected to handle every case. With an average of 860 misdemeanor cases every year,<sup>236</sup> the attorney was operating at 215% of national maximums. Now having two contract attorneys handling the CCP caseload in New Castle County, each attorney can anticipate an average of 430 misdemeanors per attorney per year (108% of NAC). But, recall once again, the 1973 NAC standards must be adjusted downward to reflect current performance demands. If a caseload of 108% of NAC seems reasonable, it is artificially so, being based on what would have been acceptable 40 years ago. Furthermore, these caseloads of course do not account for either attorney's private caseload. And with the attorneys unavailable to meet with their conflict clients outside of court (see pages 44 and 124), and entirely absent from their client's arraignments (see page 42), the CCP lawyers do not have adequate time available for all of their clients. What quality they can provide, if any, is the result of triaging on behalf of some clients and to the detriment of the rest.<sup>237</sup>

Based on the information available, the conflict system is already beyond capacity. But as we noted at the beginning of this chapter, achieving the national caseload maximums is not an end unto itself. The purpose of limiting workloads is to permit the rendering of quality representation to all clients. As has been shown throughout this report, the conflict system falls short of this minimum standard of quality. The lack of early appointment of counsel and the lack of ongoing representation leaves clients with too little advocacy provided too late in the case. Without accurate reporting of each attorney's total workload, it is difficult to know with certainty how overwhelmed the conflict system truly is.

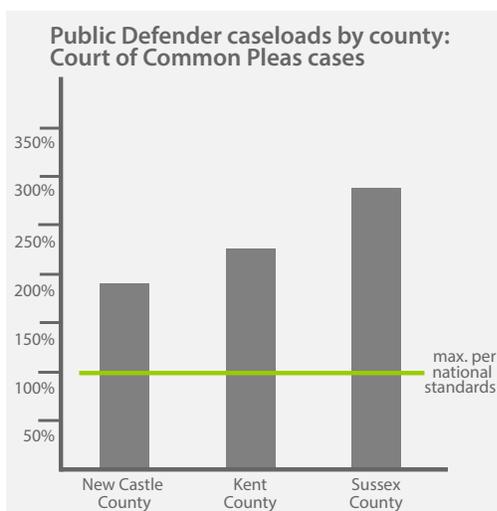
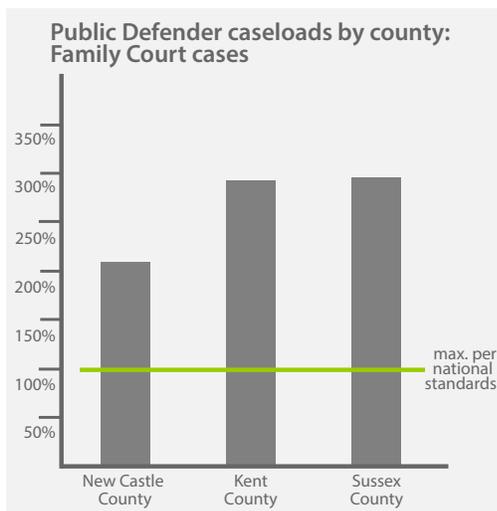
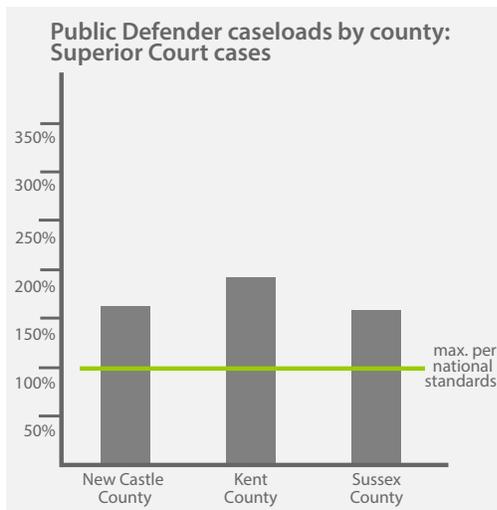
Beyond the individual caseloads of specific attorneys, there are larger systemic concerns for the state's entire right to counsel system. In fact, all of the information we have available points to an escalating crisis.

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that the Delaware Public Defender added resources to address some of the more glaring case overload issues, but the overall finding remains true: Delaware attorneys are struggling under excessive caseloads and there is no systematic way to measure, review and address case overload.

<sup>236</sup> This average of 860 misdemeanors per year is from figures provided by the Office of the Public Defender. According to figures provided by the Office of Conflicts Counsel, the CCP caseload could be much higher: the attorney was assigned 817 cases in FY2011 and 1,054 cases in FY2012, or a two-year average of 935 misdemeanor cases per year. Due to the small sample size, however, we elect to use the more conservative figures provided by OPD.

<sup>237</sup> Upon review of a draft version of this report, the OCC's chief counsel reported that she absolutely will not force an attorney to take on an additional case if that attorney tells her that he/she just cannot do it. We have no reason to doubt that this is indeed true. However, relying on an attorney to self-report excessive caseloads is not a method that works for a number of reasons. First, the attorney wants to get the next contract and he may perceive (rightly or wrongly) that refusing cases from OCC will result in a loss of income in future years. Second, the excessive caseload could be a result of his private work. The attorney may not want to appear to be offloading public cases in favor of more profitable private work, again at the risk to his potential future earnings from public cases. If attorneys always did what their ethics require of them, there would be no need for institutionalized supervisory and evaluation structures. The point is that some percentage of attorneys create conflicts because they take into consideration what they must do to please the contracting agent rather than zealously advocating on behalf of a defendant.



Consider first the primary system. In each of the three counties, based on the level of advocacy observed in the trial courts, we anticipated the caseloads of the public defenders handling Superior Court cases to be the lowest among the public defender office's trial units. OPD's internal data confirmed this.

From FY2006 to FY2012, Superior Court attorneys across the state handled an average of 252.7 felony cases per year,<sup>238</sup> or 168.5% of the national limits. Put another way, the agency's felony lawyers are each handling on average what 1.5 attorneys could be expected to handle under the NAC standard. The office needs more lawyers to meet the demands of its current felony workload. The agency's current crop of lawyers show signs of quality on behalf of many of their clients, but with caseloads that high they cannot provide quality for all.

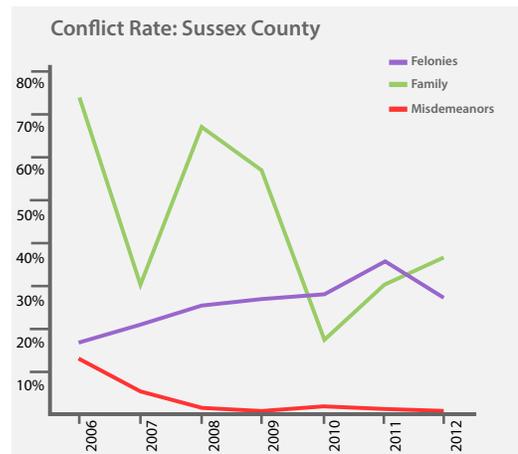
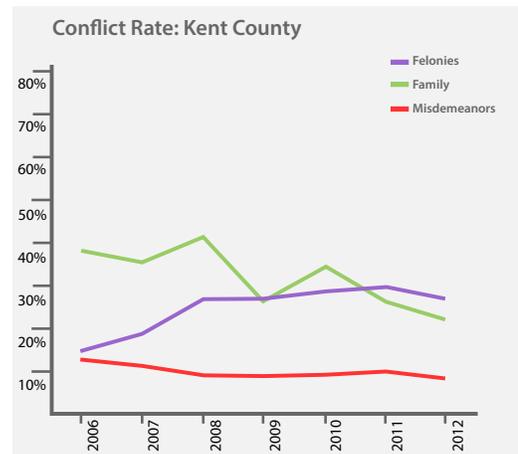
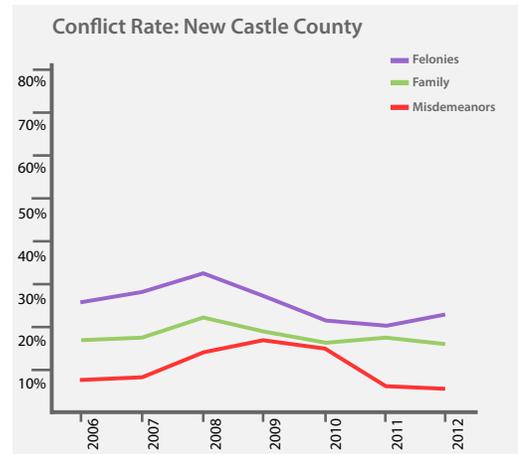
The situation is far worse for the public defenders working in the agency's Court of Common Pleas and Family Court teams. Trial lawyers handling misdemeanors and delinquency cases, in Sussex County and Kent County in particular, are each carrying the caseload three full time attorneys should handle per NAC standards.<sup>239</sup>

<sup>238</sup> This figure accounts for all types of cases each attorney handled (appeals, felonies, misdemeanors, etc.) as converted to felony-equivalent weights. Sussex County Superior Court 243.7 felony-equivalent cases, or 162.5% NAC (across a seven-year average). New Castle County Superior Court 245.1 felony-equivalent cases, or 163.4% NAC (across a seven-year average). Kent County Superior Court 281.6 felony-equivalent cases, or 187.8% NAC (across a seven-year average).

<sup>239</sup> Specifically, in Sussex County Family Court, attorneys are handling the equivalent of 594.2 delinquency cases per year (across a seven-year average, and with non-Family Court cases each attorney handled weighted as delinquency-equivalent cases), or 295.6% NAC. New Castle County Family Court: equivalent of 417.6 delinquency cases per attorney per year, or 207.8% NAC. Kent County Family Court: equivalent of 591.2 delinquency cases per attorney per year, or 294.1% NAC. Sussex

Next, consider the rate at which conflicts are declared. It seems likely the public defender’s office in each county is not declaring conflicts in misdemeanor or Family Court cases as often as it should. From FY2006 to FY2012, the agency declared conflicts in 25.4% of all felony cases – a conflict rate that was consistent across its branch offices in all three counties.<sup>240</sup> But there was no such consistency in Family Court cases, as the office in New Castle County declares conflicts in 18.0% of cases, compared to 32.1% in Kent County and 44.7% in Sussex County. Much of this may be attributable to the nature of cases involving children, with the court often maintaining jurisdiction over the child’s case until his 18th birthday. But it is hard to find similar justification for the disproportionately low rate at which conflicts are declared in misdemeanor cases, from the high in New Castle County with a 10.6% rate to Sussex County’s low of 3.5%. Nationally, about 15% of all cases have conflicts.

There are a few possibilities as to why this disparity occurs in Delaware. Perhaps the public defender’s office is not taking the time to properly screen misdemeanor clients for potential conflicts, or perhaps policies are not applied uniformly across case types. While these are possible explanations, and OPD should examine its policies in this area to ensure they are being effectively implemented, we believe the




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County Court of Common Pleas: equivalent of 1,156.3 misdemeanor cases per attorney per year, or 287.2% NAC. New Castle County Court of Common Pleas: equivalent of 764.4 misdemeanor cases per attorney per year, or 189.9% NAC. Kent County Court of Common Pleas: equivalent of 914.2 misdemeanor cases per attorney per year, or 227.4% NAC.

<sup>240</sup> Kent County conflict rate (seven-year average): 24.7%. New Castle County conflict rate (seven-year average): 25.7%. Sussex County conflict rate (seven-year average): 25.9%.

source of the disparity most likely is that so many of the would-be conflict cases are cleared out before public counsel is ever appointed.

Each year, Delaware's trial courts see approximately 10,500 new felony prosecutions. Of that total, a public defender or a conflict lawyer is appointed to represent around 8,900 (or 85%) of felony defendants.<sup>241</sup> (See chart on the percentage of cases in which public counsel was appointed, next page.) Delaware, therefore, follows the national trend, which suggests that public counsel should be appointed to represent defendants in approximately 85% of all criminal cases.<sup>242</sup>

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<sup>241</sup> We compiled all of the caseload statistics for each level of trial court to find the total number of felonies, misdemeanors, and Family Court cases introduced each fiscal year. (We used the courts' annual reports for each fiscal year, here: <http://courts.delaware.gov/AOC/publications.stm>.) And then we looked at the total system-wide caseload figures (for all public attorneys combined) and matched them against the court's statistics to find the annual rate at which public attorneys are assigned in felonies, misdemeanors, and Family Court cases.

To do so, we made some assumptions regarding the court's statistics. (1) *All Superior Court cases are felonies*. We make this assumption because, where the Superior Court has jurisdiction over a misdemeanor case, it is treated procedurally like all other felony cases. The indigent defense function appoints counsel in much the same way. We call all such cases "felonies" as shorthand to differentiate them from all other misdemeanors being the jurisdiction of CCP, which are treated in a significantly different manner. (2) *TOTAL FELONIES = CCP Prelims + Superior Rule 9 Warrants*. To avoid double counting, we assume all cases that proceed to Superior Court by indictment or information first appeared in CCP for preliminary hearing. Not all cases at preliminary hearing continue to Superior Court for trial (because of a plea, *nolle pros*, etc.). Because of this, we took the "criminal preliminary hearing case filings" reported in the CCP's annual statistics as the relevant figure to account for all of these cases. To this we added all cases that proceeded to Superior Court by way of Rule 9 indictment (did not first appear in CCP for preliminary hearing) to find TOTAL FELONIES. (3) *TOTAL FAMILY = Family Adult Criminal Case Filings + Family Juvenile Delinquency Case Filings*. We combine the two because the indigent defense function does not differentiate from an adult client in Family Court and a juvenile client in Family Court – the method of appointment is the same. (4) *TOTAL MISDEMEANORS = CCP Criminal Misdemeanor Case Filings*. We did not count CCP preliminary hearings, as those are already accounted for under TOTAL FELONIES. We also did not include contempt of court proceedings in our count of misdemeanor cases. (We received correct figures directly from the Administrative Office of Courts.)

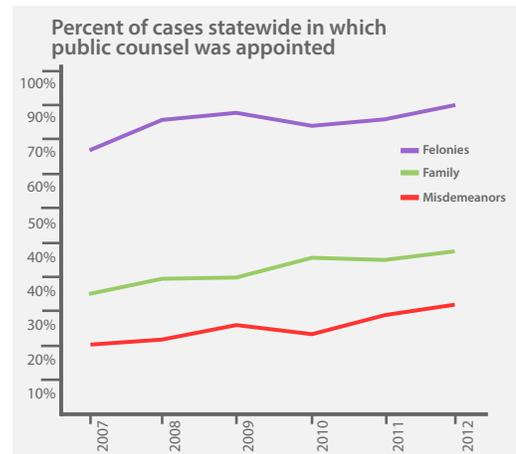
Then we took the caseload figures provided to us by the Office of the Public Defender. These statistics represent all public case assignments for the primary and conflict systems combined. We then sorted these statistics to find the total number of felonies, misdemeanors, and Family Court cases assigned to public counsel in each fiscal year. To do so, we made some further assumptions. (5) *TOTAL FELONIES = Lower Court preliminary hearings + Total Superior*. (6) *TOTAL FAMILY = all Family Court case assignments*. (7) *TOTAL MISDEMEANORS = Lower Court case assignments not including preliminary hearings*.

Lastly, for each year and for each type of case, we divided the total number of assignments by the total number of court cases to find the rate of appointment. So, in 2012 for example, public attorneys represented indigent clients in 9,259 felonies statewide. In that same year, there were a total of 10,236 felony court cases. That means public counsel was appointed in felony cases at a rate of 90.5%.

<sup>242</sup> The Bureau of Justice Statistics in 1996 set the rate of appointments at 80%. See: Carol J. DeFrances, Ph.D., Steven K. Smith. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Indigent Defense* (February 1996, NCJ-158909), available at: <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=995>. That number had increased to 82% by 2000. See Caroline Wolf Harlow, Ph.D. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Defense Counsel in Criminal Cases* (November 2000, NCJ 179023), available at: <http://www.bjs.gov/content/pub/pdf/dccc.pdf>. Some state reports suggest the rate of indigency is closer to 90% today. See: U.S. Department of Justice, Bureau of Justice Assistance, *National Symposium on Indigent Defense 2000: Redefining Leadership for Equal Justice*

The rate at which counsel is appointed in misdemeanor cases, however, drops from this national average by an alarming margin. Only 24.9% of defendants facing misdemeanor charges in Delaware's Court of Common Pleas have the assistance of a public defender or a conflict attorney.<sup>243</sup>

Presume for a moment that for every defendant who is appointed a public attorney, an equal number of defendants hire a private attorney. This would still mean that, despite having the constitutional right to the assistance of counsel, more than 50% of all misdemeanor defendants remain unrepresented each year.<sup>244</sup> Even in this best-case scenario, this is still far too many. In all likelihood, it is far worse.<sup>245</sup>



– *Final Report*, available at: <https://www.ncjrs.gov/pdffiles1/Digitization/187491NCJRS.pdf>; Washington State Office of Public Defense, *Update on Criteria and Standards for Determining and Verifying Indigency* (October 2007), available at: <http://www.opd.wa.gov/reports/other%20reports/080228%2010-22-07%20indigency%20report%20-%20revised.pdf>; and Lorenda Stern, California Western School of Law, *Analysis of Indigent Defense and Prosecution Budgets for California Counties*, available at: <http://www.ccfaj.org/documents/reports/prosecutorial/expert/Stern%20Presentation.pdf>.

<sup>243</sup> Using the same method to find the rate of public counsel appointments in misdemeanor cases as we used for felony cases (see note 241 above), there are on average 57,163 new misdemeanor prosecutions each year across the state. (This figure is based on data provided by the Administrative Office of Courts, and does not include contempt of court cases in the count of misdemeanors.) Meanwhile the public defenders and conflict attorneys annually represent a combined 14,205 misdemeanor defendants, or 24.9%.

<sup>244</sup> If the defense function handles 14,205 misdemeanors every year, and the private bar handles an equal number of retained misdemeanor cases, then a total of 28,410 misdemeanor defendants have counsel of some type every year. But that is only 49.7% of the 57,163 yearly total. That means 50.3% of that total is entirely unrepresented.

<sup>245</sup> We believe it is reasonable to estimate that 60% of misdemeanor defendants appear at court proceedings without the assistance of counsel. Certainly, 60% is far

# PARITY

**“There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.** There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense. Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services. No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system. This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.” (ABA *Principle 8*.)

The Office of the Public Defender meets some of the requirements of *Principle 8*. For example, the agency’s employees have complete salary-parity with the employees of the Department of Justice. In addition, the office’s chief executive is seen as an “equal partner within the justice system.”

In fact, the chief defender is a member of the state’s Criminal Justice Council (CJC), and even chairs a CJC subcommittee which meets periodically in part to determine how federal dollars should best be disbursed to state and local justice functions. This alone is highly important to the office’s client base, as the defense function in many other states is excluded from such discussions or similar processes. Further, having a seat on the CJC has given OPD a strong voice and the requisite credibility to engage in broad policy discussions at the statehouse. For example, OPD has spearheaded legislative initiatives including, among other efforts: modifying

state sentencing statutes to afford Family Court judges more discretion in determining whether or not a child should be registered as a sex offender; crafting a new statutory definition of juvenile competency; improving expungement laws; and repealing the death penalty.

Unfortunately, as close as the primary system comes to meeting *Principle 8*’s call for parity with the prosecution, the conflict system fails the *Principle*. By not being held as an equal partner within the indigent defense function, the interests of the conflict clients will not be considered along side those of the primary system.

To see the impact of this disparity, one need only look at the access the clients of the public defender’s office have to resources like staff investigators and psycho-forensic evaluators, which (although are certainly not enough for the primary system) dwarf the

resources available to conflict attorneys. Or how public defenders have access to state databases, while conflict attorneys do not, meaning the public defenders have access to their clients' criminal histories, can pull arrest warrants, learn who the DAG handling the state's prosecution is, etc. Conflict lawyers have access to none of this. But when it comes to the manner in which conflict counsel is compensated, the system violates the *Principle* most directly.

Private attorneys who take cases on an hourly basis are paid a rate of \$60 per hour. Hardly the "reasonable fee" required by *Principle 8*, many judges pointed to the rate of pay for assigned counsel as a clear issue requiring the government's attention. In comparison, in capital cases for example, investigators are paid up to \$90 per hour. "We're the least paid," one conflict attorney complained. "The least paid should not be the person with 100% of the responsibility [for the success of the case]." The hourly fee is so low, the work of assigned counsel is frequently referred to by members of the criminal justice system as "volunteer work." Many lawyers, in fact, do not bother billing the government for their appointed work.

There is also the issue of the contracts themselves. Where *Principle 8* bans the use of flat-fee contracts for right to counsel services, eight of the state's nine conflict systems make use of such contracts. The ninth, the Family Court in New Castle County, has no contract system. And only the contracts for Superior Court services in Kent County purport to have monthly caseload caps. But even then the attorneys are permitted to exceed those monthly caseload limits, so long as they are paid by the hour, and without any concern for each attorney's overall workload.

Such flat fee systems are rife with financial incentives for attorneys to do as little work as possible on their appointed cases. The more effort an attorney expends on the

appointed client's case, the less money he takes home on his private paying clients' cases. The contract itself places the attorney's personal interests in direct conflict with each of his appointed clients' case-related interests.

Unfortunately, this comports with everything we have observed across the state of Delaware. Countless defendants appear in the Court of Common Pleas every day without the assistance of a lawyer. Far too many face subtle or direct pressure to forego the right to a public lawyer. In short, the ability of the defense function to provide a reasonable level of quality on behalf of some clients in certain parts of the system (in felony cases in particular) is premised on the removal of a large portion of the work the system ought to be doing but is not.

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from an outrageous estimate. It is highly improbable that an equal number of defendants hire private counsel as those who have the assistance of public counsel. Based on our observations and our experiences across the country, in all likelihood the percentage of misdemeanor defendants who have private counsel is low. We cannot know with certainty what that percentage is in Delaware, but 15% would be a generous guess. If the private bar handles 8,574 retained cases ( $57,163 \times 15\% = 8,574$ ) and the defense function another 14,205, the defendants in the remaining 34,383 misdemeanor cases do not have counsel representing them. ( $34,383 / 57,163 = 60.1\%$ )

Even if we assume the private bar handles a greater percentage of retained cases, the number of people appearing without counsel is still far too high. For example, adjusting the private bar to 20% of all misdemeanor cases still means that 55.1% of defendants remain unrepresented.

# PART THREE

## ACCOUNTABILITY

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During a misdemeanor trial calendar in the Court of Common Pleas for Sussex County, a public defender stood at the podium in the center of the courtroom. Next to him stood a 20-something male who was charged with reckless driving. The public defender informed the judge of the plea deal his client was taking, in which the defendant was pleading guilty to the lesser charges of reckless endangerment and destruction of property (the prosecution in turn was dropping all remaining charges).

After hearing the plea agreement, the judge began the colloquy by explaining all of the trial rights the defendant was giving up by pleading guilty, and then asked: "Do you admit to the charge of reckless endangerment?"

The defendant did not respond to the judge's question right away. Instead he stood silent and appeared a bit confused. The public defender, still standing next to him at the podium, exclaimed: "You tore up the guy's yard!"

"Oh," the defendant muttered, "yeah."

"Do you admit to the charge of destruction of property?" the judge continued. But again the defendant stood silent.

The public defender interjected again: "You drove off the road and left tracks everywhere!"

"Okay," the judge interrupted. "Why don't you tell me what happened?"

"Well I can't," the defendant said, "because I wasn't there."

"You weren't? Well, where were you?"

"I was at home. I let someone else drive my car. But whatever, I'm just taking the plea deal that's offered, so..."

"Well, this is the first I'm hearing of this, Your Honor," the public defender interjected.

"It doesn't matter," the judge said to the public defender. "I can't take this plea. He's telling me he wasn't even there."

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# CHAPTER 7

## ATTORNEY QUALIFICATION AND TRAINING

The state's *Rules of Professional Conduct* requires lawyers to provide “competent” representation to their clients.<sup>246</sup> Importantly, there is no exception to this rule. Attorneys first need to know what legal tasks need to be performed in each case and for each client, and then how to do them.

Attorneys graduate from law school with a strong understanding of the principles of law, legal theory, and generally how to think like a lawyer. But no graduate enters the legal profession automatically knowing how to be an intellectual property lawyer, a consumer protection lawyer, or an attorney specializing in estates and trusts, mergers and acquisitions, or bankruptcy.<sup>247</sup> Such specialties must be developed.

The specialization of the legal profession, once thought of as cause for concern,<sup>248</sup> has been embraced in recent decades.<sup>249</sup> Now, in large part, it is accepted as a necessary fact.

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<sup>246</sup> Delaware *Rules of Professional Conduct*, Rule 1.1: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

<sup>247</sup> Sabis, Christopher and Daniel Webert, “Understanding the Knowledge Requirement of Attorney Competence: A Roadmap for Novice Attorneys.” 15 *Geo. J. Legal Ethics* (2001-2002), at 915: “The American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) provide that an attorney must possess and demonstrate a certain requisite level of legal knowledge in order to be considered competent to handle a given matter. The standards are intended to protect the public as well as the image of the profession. Failure to adhere to them can result in sanctions and even disbarment. However, because legal education has long been criticized as being out of touch with the realities of legal practice and because novice attorneys often lack substantive experience, meeting the knowledge requirements of attorney competence may be particularly difficult for a lawyer who recently graduated from law school or who enters practice as a solo practitioner.”

<sup>248</sup> Munneke, Gary A. “Why Specialize?” *ABA Journal* (January 2009). “The term ‘specialization’ has a checkered past. Traditionally, upon being licensed to practice law, lawyers were presumed to be qualified to provide services to clients in any substantive legal field. Specialization was viewed as a form of attracting new clients, which was prohibited under ethical standards until 1977, when the U.S. Supreme Court held in *Bates v. State Bar of Arizona* that a blanket prohibition of lawyer advertising was unconstitutional. In 1990, the Court, in *Peel v. Attorney Registration and Disciplinary Committee*, held that the bar could not categorically prevent lawyers from making communications about their specialties.” Available at: <http://apps.americanbar.org/lpm/lpt/articles/bkr01091.shtml>.

<sup>249</sup> Reed, John W. “Specialization, Certification, and Exclusion in the Law Profession.” *Okla. L. Rev.* 27 (1974): 456-68. “[T]he bar has not been willing to recognize specialization. The fact is specialization exists in the bar. . . . Specialization has long existed at the bar, and the question is not whether it exists but whether we recognize it.”

**Principle 6: Defense counsel's ability, training, and experience match the complexity of the case.** Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.

“The reality of practicing law in the United States today is that individuals and law firms cannot do everything; they must choose to handle some legal work and decline or refer other work. As society has become more diverse, the law has become more complex. As more lawyers have chosen to concentrate their practice areas, the threshold of competence has increased in many fields. As clients have grown more sophisticated, they have increasingly sought lawyers with greater expertise in the areas of the clients’ legal problems over lawyers with general legal knowledge of the law. Generalists simply cannot compete with specialists.”<sup>250</sup>

The same goes for the criminal defense lawyer. As the American Bar Association explained more than 20 years ago, “Criminal law is a complex and difficult legal area, and the skills necessary for provision of a full range of services must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and death or the loss of liberty.”<sup>251</sup>

For this reason, all national standards, including ABA *Principle 6*, require that public defense lawyers be minimally qualified to handle any case to which they are assigned. As ABA *Principle 6* makes clear, the obligation to provide competent representation is shared equally by the attorney and by the indigent defense system.

The attorney’s ability to provide minimally effective representation is dependent upon his familiarity with the “substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction.”<sup>252</sup> If a public defender or a private attorney does not have “sufficient time, resources, knowledge

<sup>250</sup> Munneke, Gary A. “Why Specialize?” ABA Journal (January 2009). Available at: <http://apps.americanbar.org/lpm/lpt/articles/bkr01091.shtml>.

<sup>251</sup> ABA *Providing Defense Services* (1992), commentary to Standard 5-1.5.

<sup>252</sup> NLADA *Performance Guidelines for Criminal Defense Representation*, Guideline 1.2(a).

and experience to offer quality representation to a defendant in a particular matter,” then the attorney is obligated to move to withdraw from the case or, better yet, to refuse the appointment at the outset.<sup>253</sup> The attorney’s ability to continue the practice of law, after all, is most at risk for failing to comply with the *Rules of Professional Responsibility*.

A public defense system has an obligation to refrain from putting attorneys in the position of providing potentially incompetent representation to the clients in the first place. It should only appoint attorneys to specific cases for which they are sufficiently qualified.

The system’s obligation goes further still. All national standards, including ABA *Principle 9*, require that the system provides attorneys with access to a “systematic and comprehensive” training program,<sup>254</sup> at which attorney-attendance is compulsory in order to maintain competency from year to year.

The Office of the Public Defender falls short of national standards in this area. The conflict defender program, however, offers no training support or quality control at all.

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<sup>253</sup> NLADA *Performance Guidelines*, Guidelines 1.2 (b), “Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation,” and 1.3(a), “Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.”

<sup>254</sup> National Advisory Commission on Criminal Justice Standards and Goals, *Chapter 13, The Defense*, Standard 13.16: “The training of public defenders and assigned counsel panel members should be systematic and comprehensive.”

**Principle 9: Defense counsel is provided with and required to attend continuing legal education.** Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.

## THE PRIMARY SYSTEM

The public defender office's internal policy manual requires that each employee attends training in statistics and data-input, its racial and ethnic fairness policies, and its procedures regarding the representation of clients with limited proficiency in the English language.<sup>255</sup> In addition, all Delaware attorneys must obtain 24 hours of continuing legal education (CLE) credit every two years to maintain licensing with the state bar<sup>256</sup> and, of those, four hours must be in "enhanced ethics."<sup>257</sup>

In an effort to provide its attorneys with access to CLE programming relevant to criminal defense representation, the public defender's office in New Castle County provides in-house training opportunities every month. The head of the office's Forensic Services and Education unit, who is both a registered nurse and an attorney, manages the in-house CLE program. In general, each month the office brings in an outside expert to present on such topics as the latest trends in synthetic "designer" drugs,<sup>258</sup> psychological factors involved in addiction,<sup>259</sup> digital forensics,<sup>260</sup> and empirical patterns in capital trials.<sup>261</sup> In addition, internal staff members are often used as experts and presenters.<sup>262</sup>

These in-person training opportunities, however, are only available in New Castle County. Public defenders in Kent County and Sussex County participate instead by videophone connection with the main office. Failing that, the attorneys can watch a video recording of the training later, which of course does not allow for full participation.

By all accounts the content is valuable to the public defenders and the sessions are well attended. Without access to such in-house training opportunities, public defenders otherwise would be left taking CLE seminars generally irrelevant to the topical focus of their practice.<sup>263</sup> The public defender's office has also sent a number of attorneys to

<sup>255</sup> Office of the Public Defender, *Policies, Procedures & Guidelines*.

<sup>256</sup> Delaware Commission on Continuing Legal Education, *CLE Rules*, Rule 4(A)(1).

<sup>257</sup> *Id.*, Rule 4(A)(2).

<sup>258</sup> September 7, 2012. "The Newest Classes of Designer Drugs: A Survey of Synthetic Cannabinoids and Bath Salts." Presented by Thomas Meaker, Ph.D., NMS Labs. (Credit: 2 hrs.)

<sup>259</sup> October 5, 2012. "Psychological Factors in Crossing the Legal Line in Gambling and Other Addictions." Presented by Sachin Karnik, Ph.D., LCSW, CPS, Director of Prevention and Criminal Justice, Delaware Council on Gambling Problems, Inc. (Credit: 2 hrs.)

<sup>260</sup> November 2, 2012. "Digital Forensics: An Overview for Lawyers." Presented by Lars Daniels, B.A., EnCE, Guardian Digital Forensics. (Credit: 3.25 hrs.)

<sup>261</sup> January 4, 2013. "Capital Punishment in Delaware: Empirical Findings, Emerging Patterns." Presented by Valerie Hans, Ph.D., Professor of law, Cornell Law School. (Credit: 2 hrs.)

<sup>262</sup> February 1, 2013. "Hiding the Ball, Finding the Ball and Cutting the Deal: A Discussion of *Brady v. Maryland*, Discovery Practice in Criminal Cases and Cooperation Agreements with the Prosecution." Presented by Brendan O'Neill, Public Defender, Kevin O'Connell, Assistant Public Defender, and Robert Goff, Assistant Public Defender, Office of the Public Defender. (Credit: 2 hrs, including 0.5 ethics.)

<sup>263</sup> There is little by way of reliable training alternatives for criminal defense lawyers in the state of

participate in suitable training programs being offered in neighboring states. These are all important measures, and the Office of the Public Defender should be applauded for its initiative in this area. But it is not enough.

Defender training initiatives must be compulsory, and they must also be developed as a coordinated series of programs across several months, rather than isolated individual opportunities. Although OPD offers a healthy mix of training opportunities for attorneys handling complex felonies and capital cases, as well as some opportunities for those handling misdemeanors and delinquency matters, OPD's in-house CLE events are not required programming for attorney staff, and the agency has no formal process for monitoring attendance.<sup>264</sup> Instead, each attorney is responsible for monitoring her own compliance with the state bar's CLE requirements.

The standards promulgated by the National Study Commission on Defense Services (NSC) call for an "in-service training program" to ensure that "attorneys are kept abreast of developments in criminal law, criminal procedure and the forensic sciences."<sup>265</sup> By placing training as a component of the agency's forensics specialty unit, the public defender's office complies with the letter of this specific NSC standard. But not enough attention is paid to the requirements of remaining standards.

Like any lawyer, public defenders must constantly hone their advocacy skills. They must know the latest developments in law and science, but also how to apply that to the courtroom. They need to know what arguments are most effective at challenging the admissibility of which types of evidence. They have to practice the art of direct- and cross-examination. And they need to understand how the strategic awareness involved in applying the attorney's theory of the case to all stages of the trial phase must be matched by an equally deliberate approach to providing effective advocacy at sentencing. Although OPD offers programming on some of these types of performance obligations, it must take the next steps of mandating attendance, creating a coordinated training agenda, and monitoring deficient performance.

For example, it appears that sentencing advocacy training is an area that needs special attention. Each defendant has a right to the effective assistance of counsel at each

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Delaware outside of what is offered by the Office of the Public Defender. The Delaware Association of Criminal Defense Lawyers is a fairly small organization that generally advertises training opportunities of the public defender's office to its membership, rather than developing programs of its own.

<sup>264</sup> OPD's Chief of Legal Services, Lisa Minutola, explained that she often reviews the attendance lists in advance for particularly important training programs, and if a certain attorney has not yet registered she may call or send an email to more directly encourage their attendance. "Some programs we push harder than others."

<sup>265</sup> National Study Commission on Defense Services, *Guidelines for Legal Defenses Systems in the United States*, Guideline 5.7.

critical stage of the case, including plea negotiations.<sup>266</sup> But once the plea is entered, the attorney's job is not yet complete. The defendant's right to effective representation still extends to sentencing,<sup>267</sup> and so the attorney must remain a zealous advocate to ensure the defendant's rights are preserved for the duration of all proceedings.

In fact, as promising as some of the courtroom skill displayed by public defenders was, time and again, defendants were left at sentencing to face the judge's questioning alone. Although it appears this is more prevalent in Family Court and the Court of Common Pleas, we also witnessed it occasionally in Superior Court as well. However, the fact that it is less likely to happen in Superior Court does not help the defendant facing, for example, misdemeanor charges whose potential direct and collateral consequences are still great and negatively impacted by the lack of advocacy at sentencing.

We watched as a boy in his mid-teens appeared before a Family Court judge in New Castle County. He was accused of being the ringleader of a group of kids that had attacked and robbed another boy. The victim, along with his parents, was seated in the gallery behind the prosecutor. The defendant was represented by a public defender and had just finished entering a guilty plea.

The prosecutor made a passionate argument for a strict term of incarceration, and the defender countered eloquently that his client's prior record did not justify 60 days at Level 5 (24-hour confinement), and he would be more amenable to the rehabilitative treatment offered by supervised probation at Level 3, if provided after a mere 30 days at Level 5. Having heard the arguments, the judge asked the defendant to stand.

"Is there anything you would like to say before I sentence you?" the judge asked. But the defendant stood silent. The judge tried again, pointing to the other boy: "Would you like to say anything to Mr. [Smith]?"

The defendant considered for a moment, looking at his feet, and he mumbled: "No, I'm good."

"What?" the judge asked.

"I'm good," said the boy.

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<sup>266</sup> *Lafler v. Cooper*, 566 U.S. \_\_\_, No. 10-209 at 3-4 (March 21, 2012); *Padilla v. Kentucky*, 559 U.S. \_\_\_, No. 08-651 at 16 (March 31, 2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).

<sup>267</sup> *Lafler v. Cooper*, 566 U.S. \_\_\_, No. 10-209 at 6 (March 21, 2012); *Glover v. United States*, 531 U.S. 198, 203-204 (2001); *Mempa v. Rhay*, 389 U.S. 128 (1967); *Wiggins v. Smith*, 539 U.S. 510, 538 (2003).

The judge breathed in stiffly before expressing his deep consternation that, when given the opportunity, the defendant found no room for remorse – that he could not even turn around to the other boy and offer an apology.

“Your attorney had me sold,” the judge concluded. “He had me down to 30 days, Level 5. You’ve just convinced me to make it 60 days.”

It is a long-established rule of thumb for attorneys to learn and follow the “rules of the house.” Every judge has his likes and his dislikes. Some prefer attorneys to stand when addressing the court, and others prefer they remain seated. Some take no offense to attorneys answering a few emails on their smartphones between cases, and others cannot abide the smallest distraction. The lawyer should try to follow the practices of the court, and learn the do’s and don’ts for each judge before whom he practices.

But the widespread culture of all defense attorneys we observed (whether privately retained or publicly appointed) to remain silent as the judge examines the client directly and without objection does not suggest to us that all attorneys have come to learn that all judges by chance prefer it done this way. It instead suggests something more endemic. When clients answer for themselves, the result is rarely if ever positive. This of course is why defendants have representation in the first place – the lawyers are there literally to represent their interests.

At what point then does the Office of the Public Defender have an obligation to question the common practice? At what point does the agency have an obligation to examine whether the way things are done in Delaware is in fact good for its clients?

The need for defender training goes well beyond the courtroom. In fact, as the justice system has become “a system of pleas, not a system of trials,”<sup>268</sup> the role of the criminal defense attorney today is as much an out-of-court negotiator as a courtroom advocate. This is particularly true with criminal and delinquency cases in the Family Court and Court of Common Pleas.

No matter how complex or basic a case may seem at the outset, there are certain fundamental tasks each attorney must be able to do on behalf of the client in advance of the plea. Even in the average misdemeanor case, the attorney must be able to, in part: meet with and interview with the client; attempt to secure pretrial release if the client remains in state custody (but, before doing so, learn from the client what conditions of release are most favorable to the client); keep the client informed throughout the duration of proceedings; prepare for and appear at the arraignment, wherein he must preserve his client’s rights; request formal and informal discovery; launch an investigation, scouring all sources of potential investigative information in the process, and as soon as possi-

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<sup>268</sup> *Lafler v. Cooper*, 566 U. S. \_\_\_\_ (2012).

ble; develop and continually reassess the theory of the case; file and argue on behalf of pretrial motions; read and respond to the prosecution's motions; negotiate plea options with the prosecution, including sentencing outcomes; and all the while prepare for the event that the case will be going to trial. The attorney, after all, will always seek to protect the client's rights – including the right to a jury trial – and will only advise the client to waive such rights by taking a plea deal if there is a clear strategic and tactical reason for doing so.<sup>269</sup>

Attorneys may feel that they know how to do all of these things, that they have all the tools they need from years gone by, but without constant honing, those tools lose their edge. For example, more than one attorney we spoke with expressed the belief that most DUI cases are fairly predictable and therefore do not require much investigation. In a given case, a lawyer might be right – in the end there may not be any need to enlist the help of an investigator. But say an investigator is critical to establishing a valid defense in only one out of every 50 drunk-driving cases – how can that lawyer know which case is the exception without taking the time to examine whether an investigator is needed in each case? In truth, he cannot. Playing the percentages may yield the same result for many, but never for all.

Attorneys, therefore, need ongoing training on the use of investigators in all case types. Such training should focus on ensuring attorneys know when the use of an investigator is appropriate and/or strategically essential to the defense, but also how best to employ the unique skill-sets investigators have to offer. In fact, to target this second portion of the training requirements, some defender systems have begun using their own staff investigators as trainers for attorneys: this is what we investigators are good at, and here is how you attorneys should best take advantage of what we have to offer.

Investigators are critical to the attorneys' ability to ensure better pleas for their clients. By all outward appearances, the public defense and conflict systems in Delaware make good use of investigators in capital cases. As for non-capital felonies, misdemeanors, and juvenile delinquency matters, however, investigation is used with significantly less frequency. One senior public defender expressed his frustration at this, and the broader cultural impact that has resulted. Because of the lack of resources available to indigent defense lawyers (see page 115), the use of investigators has been triaged to the most serious cases, and over time has led to an institutionalized mindset of "because we do not use investigators in misdemeanor cases, they must not be important." But those less-serious case types are most likely to result in a plea agreement in Delaware, and a plea reached in the shortest amount of time, meaning the lawyers have less information at their disposal and must rely instead on their instincts, gut feel and chance. "There is

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<sup>269</sup> These obligations, and others, are contained in the National Legal Aid & Defender Association's *Performance Guidelines for Criminal Defense Representation*. Available at: [http://www.nlada.org/Defender/Defender\\_Standards/Performance\\_Guidelines](http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines).

not a sufficient culture of independent investigation in the Delaware defense bar,” the attorney concluded.

The ability of each defense lawyer to fulfill his client’s right to the effective assistance of counsel during plea negotiations<sup>270</sup> is premised on the attorney having a strong position. The lawyer should not only have an understanding of the controlling law, but he should also have completed his analysis of the evidence likely to be introduced at trial.<sup>271</sup> Much of this analysis, even in less-serious cases, is aided by the use of investigators. After all, if a valid defense is lost, one that could have been uncovered by the investigator, because the attorney failed to explore the topic in advance, he was hardly negotiating the plea deal from a position of strength. “Investigations win cases,” said one private attorney, frustrated at the lack of advocacy he observed throughout the lower courts. “How can you win the case or even negotiate a shoplifting misdemeanor if you never, ever use an investigator?”

A similar question could be asked regarding the motions practice of public defenders, which, as one judge described, “is not really heavy here.” Motions are a vitally important component of an attorney’s litigation strategy. Where the government’s evidence was acquired through an unlawful search, as one example, a defense lawyer’s motion can eliminate such evidence, thereby increasing the chances of a better plea offer from the prosecution or maybe even dropping the charges entirely. The same strategy applies in cases involving children or less-serious offenses. But as one Family Court commissioner in Kent County told us, “There is virtually no motions practice. I’ve had two suppression motions in the six years I’ve been here.”

A healthy motions practice is integral to the advocacy demands of each attorney for each client. It is the attorney’s duty to examine each case to determine whether or not a motion is warranted, rather than filing frivolous or stock motions at every opportunity. There is a great distinction between being a zealous advocate and an obtuse obstructionist. But as a general finding, there is little chance of defenders in Delaware being accused of the latter given the state of current practice. As one judge said: “The public defender sometimes doesn’t challenge the state as much as they should.”

And lastly, public defenders need constant reminding of the importance of client communications. Among the results of triaging the limited time public defenders have available is that attorneys tend to categorize clients by type of charge, as though those

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<sup>270</sup> *Lafler v. Cooper*, 566 U.S. \_\_\_, No. 10-209 at 3-4 (March 21, 2012); *Padilla v. Kentucky*, 559 U.S. \_\_\_, No. 08-651 at 16 (March 31, 2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).

<sup>271</sup> The Washington State Bar Association codified this requirement with its *Performance Guidelines for Criminal Defense Representation* (2011). Specifically, Guideline 6.2(b) reads, in part: “Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.”

clients all have the same interests. A common theme heard throughout this study is “95% of our clients just want to get out of jail.” Perhaps this is true in the end, but the public defender has an obligation not only to learn from the client, through timely and confidential discussions about the case, what outcome or resolution the client seeks, but also to explain the collateral consequences of guilty pleas, including immigration consequences.<sup>272</sup>

Perhaps the client relies on federal assistance for housing. Or perhaps the client intends to serve in the military. Or perhaps he is working toward a license to practice a particular trade. It certainly could be true that 95% of clients want to get out of jail right away, but there is no doubt that 100% of clients enter jail lacking complete information. Would the client take the plea offer if he will lose his home as a result of his conviction? Would the client take the plea if that means he cannot join the Air Force? Would he rather fight the charges against him, even if that means he has to stay in jail in the short term, in order to have a better chance at getting a job later? And how would he make an informed decision if his attorney never asks?

Public defenders have an ethical<sup>273</sup> and constitutional<sup>274</sup> duty to provide effective representation to every single defendant they are appointed to represent. They have an obligation to each client not to assume the rule, but to look for the exception to that rule in every single case. Corner-cutting is substandard representation always, but the impact is never more detrimental to the agency's effectiveness than a lack of communication with the client.

As discussed on page 39, the client's trust in his attorney is central to that attorney's ability to zealously advocate on behalf of the defendant. But where the client has an attorney standing at his side encouraging him to waive his preliminary hearing or to plead guilty, just moments after meeting that lawyer for the first time, the client must be forgiven for believing the whole process to be intrinsically unfair. Under those circumstances, trust is not part of the equation.

Where the larger client community sees its brothers, cousins, aunts, and children time and again processed through the criminal justice system in similar fashion, the bond of trust between the agency and the community it represents is broken. The community, like the individual defendant, will soon lose faith in the fairness of the entire criminal justice system.

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<sup>272</sup> *Padilla v. Commonwealth of Kentucky*, 559 U.S. 356 (2010).

<sup>273</sup> *Delaware Rules of Professional Conduct*, Rule 1.1: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

<sup>274</sup> *McMann v. Richardson*, 397 U.S. 759 (1970).

## PUBLIC DEFENDER TRAINING IN THE DISTRICT OF COLUMBIA

The Public Defender Service for the District of Columbia (PDS) maintains a high level of quality among its team of attorneys from one year to the next. Much of this is achieved through its rigorous training program for new attorneys, most of whom are recent law school graduates.

Each year, PDS hires between five and 12 attorneys. Those new hires arrive on the first Monday of October to begin their first day of training, and spend their next three years together as a class. None of the attorneys in the class touch an actual case until their ninth week, even as second chair, meaning the attorneys' first eight weeks on the job are spent in the classroom. Weeks 1 through 6 are focused on the "gold standard of trial lawyering" with special attention to the application of that standard to District of Columbia law.

Week 1 is all about client-centered representation: what that means in general, but also delving deep into the ethical rules, what they mean, and how they are applied. As the entire agency is built on the principle of client-centered representation, however, much of the first week is also spent indoctrinating the newest class into the PDS community. Lastly, the training program begins the long process of skills-development for its new attorneys, but again through the prism of the client being represented. So, as attorneys begin to learn the art of public speaking or the skill of interviewing, it is in preparation for being able to tell the client's story before

a packed courtroom. All of this, mind you, is in week number one.

Week 2 is a patient progression through each stage of the case, aimed toward building more of the new attorneys' base of knowledge. This week is giant leap beyond the trial advocacy courses the attorneys had while in law school. Because of its high value on the process by which the result is achieved as much as the result itself, in the second week of training PDS begins to teach its new hires the specific method of advocacy the agency expects all of its attorneys to follow. Through readings, presentations by individual trainers and experts, and many other specific "courses" offered as part of its Criminal Practice Institute, the attorneys learn the proper method involved in effective advocacy when it comes to information-gathering, reviewing discovery, and so on. The week ends with the attorneys challenged with a number of hypotheticals designed to tie everything they have learned together so far.

Weeks 3 through 6 are more skills training. Attorneys learn how to challenge probable cause, practicing taking witness statements and cross-examining witnesses. They learn legal skills like gathering evidence, and they read a lot of cases.

And all the while they are working on mock cases. To end Week 2, each member of the class had been assigned a mock case, which they take through until trial. For each case,

one of PDS' staff investigators takes the role of the client, a seasoned PDS lawyer acts as the prosecutor, and a real Superior Court judge presides over the mock bench trial in Superior Court in Week 10, which includes advocacy through the entire scope of representation until sentencing and disposition.

Meanwhile in Weeks 7 through 10, the training is focused on the nuts and bolts, with the lessons transitioning from making certain the new lawyers have what they need to be able to begin picking up clients' cases of their own within the first 10 weeks to now making sure the lawyers are prepared to handle murder cases in five years. In this way, the PDS training program is built with long-term goals in mind for its attorneys.

The lawyers leave the classroom in Week 11, shadowing a veteran attorney early on and picking up cases toward the end of the week. And as the new hires begin handling

actual cases, PDS ensures there are ongoing opportunities for training and learning. For example, every trial lawyer has a supervisor. Of the 50 lawyers in the trial division, eight are supervisors, yielding a ratio of one supervisor to every five "advisees." Supervisors sit in on all of their advisees' trials, whether the advisee has been there one year or five. They also continually review their advisees practice areas, case files, and general preparation methods. And the trial lawyers continue returning to the classroom in small "trial practice groups" to discuss with supervising attorneys or other members of the group any issues in their cases, or other practice concerns, along with office-wide training days and workshops.

As noted above, attorneys do not graduate from law school or pass the bar exam knowing how to be criminal defense lawyers. As much as every organization has an internal culture and set of values,<sup>275</sup> the initial training program is the opportunity for the public defense system itself to indoctrinate the novice attorney into *its* culture and *its* values structure. The Office of the Public Defender, however, has no such intensive training program for new attorneys. Delaware’s public defenders are left only to learn from their surroundings, adopting the values and practices observed in their peers.<sup>276</sup>

Without guidance, any organization will develop its own set of values from within.<sup>277</sup> Over time, that which may have once been grudgingly accepted – 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 – now becomes the established standard.

Is this the value the Office of the Public Defender places on its clients? We believe not. In fact, from discussions with State Public Defender Brendan O’Neill and members of his leadership team, including the supervising attorneys in both the Kent County and Sussex County offices, it seems quite the opposite is true. But without constantly reinforcing those values, how are the agency’s lawyers supposed to know any differently?

## THE CONFLICT SYSTEM

Training standards, including ABA *Principle 9*, apply with equal gravity to conflict defender programs. The Office of Conflicts Counsel has no training program of its own. Instead, contract attorneys take advantage of CLE events offered by the public defender’s office<sup>278</sup> as part of their ongoing bi-annual obligations to the state bar. Attorneys are welcome to attend these trainings in-person at the public defender’s office in Wilming-

<sup>275</sup> Mitja Gorenak and Suzana Košir. “The Importance of Organizational Values for Organization.” As presented to the Management, Knowledge and Learning International Conference 2012. Available at: [http://www.issbs.si/press/ISBN/978-961-6813-10-5/papers/ML12\\_117.pdf](http://www.issbs.si/press/ISBN/978-961-6813-10-5/papers/ML12_117.pdf). See also: Leyla Norman, Demand Media. “What is an Organizational Value Statement?” (Houston Chronicle.) Available at: <http://smallbusiness.chron.com/organizational-value-statement-23848.html>.

<sup>276</sup> See generally, Bruce M. Meglino and Elizabeth C. Ravlin. *Individual Values in Organizations: Concepts, Controversies, and Research*. Journal of Management (1998), vol. 24, no. 3, pages 351-389.

<sup>277</sup> Mitja Gorenak and Suzana Košir. “The Importance of Organizational Values for Organization.” As presented to the Management, Knowledge and Learning International Conference 2012. Available at: [http://www.issbs.si/press/ISBN/978-961-6813-10-5/papers/ML12\\_117.pdf](http://www.issbs.si/press/ISBN/978-961-6813-10-5/papers/ML12_117.pdf). See also: Leyla Norman, Demand Media. “What is an Organizational Value Statement?” (Houston Chronicle.) Available at: <http://smallbusiness.chron.com/organizational-value-statement-23848.html>.

<sup>278</sup> The Delaware Association of Criminal Defense Lawyers advertises on its website the public defenders’ internal CLE programming as “FREE of charge and open to the public.”

ton, or if they practice in one of the lower two counties the attorneys can join by videophone like their colleagues in the Kent County and Sussex County public defender offices. The Office of Conflicts Counsel makes no requirement of its attorneys to attend training. In fact, the only performance requirement included in each contract is that the attorneys abide by “the Delaware Lawyers’ Rules of Professional Conduct effective October 1, 1985 and any amendment thereto.”<sup>279</sup>

There is no mechanism or uniform system by which conflict attorneys are matched against individual case assignments, as required by ABA *Principle 6*, based on case-complexity and each attorney’s own capabilities.<sup>280</sup> Instead, attorneys are pooled together by the types of courts in which they accept conflict appointments: Superior, CCP, and Family. Many of the Superior Court conflict attorneys are highly respected criminal defense lawyers with several years of experience; some even counted among the best defense attorneys in the state. Some, however, have been members of the bar for less than five years, and a few began taking felony appointments as Superior Court contract attorneys shortly after entering the legal profession.

One lawyer recalled having joined the conflict system as a young attorney, taking felony cases right away. But he soon found himself totally unprepared to handle some of the cases he was assigned. And so he took it upon himself to seek the advice and mentorship of more seasoned criminal practitioners, develop a handbook for general case-preparation, and overall to become better prepared. While he believes he was well served by the “wake-up call” he received early on, he would have been better served to have a more formalized system of training. “Sometimes you don’t even know what questions you should be asking. You don’t know what you don’t know.”

As noted earlier, attorneys do not graduate from law school or pass the bar exam knowing how to be criminal defense lawyers. They do not automatically have critical legal skills like interviewing, storytelling and investigating. They do not know how to assemble the social histories of their clients and how to use that information, for example, at sentencing to achieve better outcomes for their clients. These are essential advocacy skills that all attorneys must develop. But the initial training curriculum should include more than trial-advocacy preparation alone.

Without access to or any requirement to attend an intense immersion program, many conflict attorneys view the contract system itself as a training ground for novice attor-

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<sup>279</sup> Except for small changes to the beginning paragraphs, the conflict contracts in all counties and courts use boilerplate language. The standard copy reads, “The services rendered by you in this contract shall be in an attorney-client relationship subject to the Delaware Lawyers’ Rules of Professional Conduct effective October 1, 1985 and any amendment thereto.”

<sup>280</sup> The Office of Conflicts Counsel assures us that there is thought given to determining which cases are going to be assigned to which attorneys, but it agrees with the overall point that there is no formalized method being followed in each instance.

neys – a way for lawyers just entering the local defender community to cut their teeth. “I view the contract program as a limited exposure kind of thing,” said one current conflict lawyer. “You gain exposure, build your reputation, and move on.” Learning on the job and at the expense of the due process rights of the accused, however, is expressly prohibited by the ethical canons of the legal profession<sup>281</sup> and by the constitutional demands of providing effective assistance to all clients.<sup>282</sup>

Most current contracts were let between the specific court, based on the senior judge’s review of available applicants, and the individual attorney. In each instance, where the attorney applicant had little-to-no experience handling criminal cases, the actual contract was made under the informal agreement that a more seasoned attorney in the attorney’s firm will guide the novice’s work. This made sense to the judges, as many contracts for conflict services in Delaware have been passed from a partner in a small law firm one year to a junior associate the next – the more seasoned attorney had in fact been seasoned in the ways of the conflict contract. For the majority of conflict contracts, the Office of Conflicts Counsel has renewed whatever contracts were previously let by the local courts, including the presumption that whatever training the attorneys might require is provided from within.

The obligation under national standards to provide novice conflict attorneys with access to entry-level training programs, however, falls on the administrator of the conflict system, rather than the private firm within which the conflict attorney practices.<sup>283</sup> All new members of the conflict system should be required to attend an “orientation program,”<sup>284</sup> not only to introduce the agency’s personnel policies and procedures, but also an orientation to the local criminal justice system’s component parts and processes. In addition, all national standards require intensive entry-level training for new attorneys

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<sup>281</sup> ABA *Model Code of Professional Responsibility*, Canon 6.

<sup>282</sup> *McMann v. Richardson*, 397 U.S. 759 (1970).

<sup>283</sup> See, for example, NLADA *Standards for the Administration of Assigned Counsel Systems*, Standard 4.3.1, “(a) The Administrator shall be responsible for preparing, in accordance with Board specifications, an entry-level training program. (b) Entry-level training shall be mandatory for all attorneys unless they come under exceptions specified by the Board, or the Administrator acting at its direction.” The standard presumes Delaware’s conflict system operates within the oversight of an independent board or commission. The absence of such a board, however, does not exempt Delaware’s conflict system or its administrator from the requirements of the standard.

See also, NLADA *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, Guideline III-17: “The contract should provide funds and sufficient staff-time to permit systematic and comprehensive training to attorneys and professional staff. Resources for training should be no less than is provided to prosecutors and judges in the jurisdiction, and should include continuing legal education programs, attendance at local training programs, and the opportunity to review training and professional publications and tapes. Where appropriate and where the size of the contract program requires, all attorneys should be required to attend an intensive, entry-level training program.”

<sup>284</sup> NLADA *Standards for the Administration of Assigned Counsel Systems*, Standard 4.2: “The Administrator shall ensure that lawyers new to the Program receive a mandatory orientation on Program policies and procedures before they are assigned cases.”

to develop core practice skills.<sup>285</sup> After all, OCC has a duty to develop its own standard of acceptable attorney performance.

In fact, because the Office of Conflicts Counsel has established no such minimum standard, each of the nine conflict programs over the decades has developed its own internal culture and set of values. “I’m worried about quality control,” said one attorney of the conflict panel as a whole. “Some of the representation is not very good. I see a lot of good too, but I don’t see a lot of consistency in general.”

For this reason, while initial training of new attorneys is important, all national standards require that training be an ongoing part of development for all lawyers<sup>286</sup> and, particularly for conflict attorneys,<sup>287</sup> that attendance is a requirement for remaining on the panel.<sup>288</sup>

Attorneys new to the state – experienced and novice alike – do not know the array of public and private treatment options for their clients’ mental health or substance abuse needs, or who the most reliable experts are. As one attorney pointed out, “after three years, I still didn’t know who all the vendors were.” Training on the proper use of non-attorney support services, like social workers and investigators, is vitally important

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<sup>285</sup> National Advisory Commission on Criminal Justice Standards and Goals, *Chapter 13, The Defense*, Standard 13.16. See also, ABA *Providing Defense Services* (1992), Standard 5-1.5: “it is particularly important that there be entry-level training programs, so that new attorneys receive at the outset of their practice an intensive learning experience that will equip them to provide effective representation.”

<sup>286</sup> See, ABA *Providing Defense Services* (1992), Standard 5-1.5: “To meet the need for training, programs should be established for both beginning and advanced practitioners, and should emphasize substantive legal subjects as well as effective trial, appellate and collateral attack techniques”; National Study Commission on Defense Services, *Guidelines for Legal Defenses Systems in the United States*, Guideline 2.4(4): “The Office of State Defender should provide initial training for all new defender staff attorneys and conduct seminars for the continuing education of the staff of all defender offices and coordinated assigned counsel programs in the state”; and National Study Commission on Defense Services, *Guidelines for Legal Defenses Systems in the United States*, Guideline 5.8: “In-service training programs for defender attorneys should be provided at the state and local level so that all attorneys are kept abreast of developments in criminal law, criminal procedure and the forensic sciences.”

<sup>287</sup> NLADA *Standards for the Administration of Assigned Counsel Systems*, Standard 4.3.2, “(a) The Board shall establish regulations requiring attorneys to attend a specified number of training units per year in order to remain on a Program roster. (b) The Administrator shall be responsible for preparing, in accordance with Board directives, periodic in-service training programs to provide systematic, comprehensive instruction in substantive law and courtroom skills. He or she shall also determine, upon request, whether training offered by entities other than the Program may be counted toward the training units required by the Board. (c) The Administrator shall ensure that attorneys remaining on a Program roster have attended the number of training units required by the Board. (d) The Board and Administrator shall encourage attorneys to participate in training sessions beyond the mandatory units.”

<sup>288</sup> National Study Commission on Defense Services, *Guidelines for Legal Defenses Systems in the United States*, Guideline 5.8: “Special programs should be established for those less experienced attorneys who wish to qualify for the assigned counsel panel. . . . Reasonable attendance at training programs should be required of attorneys in order to remain on the panel.”

## ATTORNEY-QUALIFICATION IN THE MASSACHUSETTS SYSTEM

The Committee for Public Counsel Services oversees the delivery of indigent defense services in all courts across the state of Massachusetts. Traditionally, since its founding in 1983, CPCS has employed the assigned counsel model to provide the bulk of its representational needs, with public defender offices handling only the most serious cases in the more urban areas of the state. CPCS itself is a board of 15 members, appointed by diverse authorities to ensure that no one branch of government can exert disproportionate influence over the delivery of right to counsel services. The board appoints CPCS's chief counsel to run the agency from its central office in Boston.

The delivery of direct services at the trial level is divided between two divisions, the Public Defender Division and the Private Counsel Division, each with a deputy chief counsel at its head. The deputy chief counsel for the Public Defender Division and the deputy chief counsel for the Private Counsel Division sit as equals on the agency's executive team, and ethical screens maintain confidentiality of direct services between one division and the other and between each division and the central office. While the proportion of services provided by full-time employee attorneys has increased in recent years, the method by which the panel of private bar attorneys is administered and supervised remains the same.

More than 2,000 private attorneys handle direct services on behalf of CPCS statewide. (Some years it is even larger. In FY2010, there were 3,026 attorneys on the roster.)

That is a ratio of one private attorney handling public appointments for every 3,300 citizens. Delaware's 25 attorneys on its private counsel roster amounts to a ratio of one conflict attorney to every 36,000 citizens. In other words, Massachusetts' conflict panel is 11 times the size of Delaware's even when accounting for the difference in size of their respective populations.

Of the 2,000 attorneys participating in the statewide panel, more than 600 are certified to handle cases in Superior Court (cases involving more than 2.5 years in jail). Of those certified for Superior Court work, 150 attorneys are certified even further still to handle murder cases. And as implied, the certification requirements increase with each level of court.

But while the minimum standards for certification are promulgated at the state level, the initial screening of attorney applicants is handled locally. CPCS maintains annual contracts with non-profit bar advocate programs in each county. Those bar advocate programs in turn select a volunteer board to review attorney applications using CPCS' minimum statewide qualification standards. (The composition of the local volunteer boards is also done according to statewide standards promulgated by CPCS.)

To further ensure that all representation is provided locally, the county bar programs are responsible for the actual assignment of cases to individual attorneys. Private attorneys accepting public case-assignments agree to abide by CPCS' *Performance Guide-*

*lines Governing Representation of Indigents in Criminal Cases.* But as with most everything else in the Massachusetts assigned counsel program, the direct review of ongoing attorney performance is also handled locally. Each county bar program maintains contracts with private attorneys who handle no cases, and instead act solely as supervisors for other private attorneys handling direct case-assignments.

There is no minimum level of experience required for attorneys in order to apply to handle misdemeanors and concurrent felonies in District Court (the lowest level of qualification). Instead, selection is based on merit and by interviews with the local volunteer board. Attorneys selected must then complete a seven-day training program (or apply for a waiver), which involves lectures each day, along with small group sessions targeting skills training (client interviews, ethics, direct/cross, immigration, etc.).

Attorneys seeking approval for Superior Court work have to have handled a minimum of six criminal jury trials as lead counsel within the past five years. A state blue ribbon panel of "top notch" attorneys then reviews their applications. Finally, each attorney must complete eight hours of mandatory CLE, with CPCS pre-approving specific sessions. Certain attorneys may need additional training, which is determined by the attorneys and their private bar supervisors. Certification to handle murder cases requires a minimum of ten jury trials, of which five must be felonies carrying a potential of life imprisonment, within the past five years.

for lawyers of all levels of experience. One veteran private investigator reported that he has never been asked to help in Family Court cases “because the budget’s not there.” Then again, he went on, “if the need was there, I’m sure they’d ask me.” Outside of serious felony cases, many judges struggle to recall an investigator being used, and the use of social workers is entirely unheard of.

Just as the Office of Conflicts Counsel is responsible for ensuring all conflict lawyers know what is required in determining whether to hire an investigator or seek other services in each case, so too is it responsible for ensuring its lawyers know what is required in communicating with each client. But as with all groups and organizations, the new conflict attorneys eventually learn from their surroundings, adopting the values and practices observed in their peers. “I almost feel like it’s become the norm for there to be very little contact with the client,” said one frustrated conflict lawyer. “The attorney shows up at the case review saying, ‘You’ve got to take this plea,’ and the client’s like ‘I haven’t ever met this guy before today.’”

Communicating with the client is not just a means to an end, but a critical advocacy component in and of itself. It is crucial to developing trust between attorney and client, or “the inviolable character of the confessional” as the Supreme Court so eloquently described the relationship.<sup>289</sup> Too many of the conflict attorneys we spoke with took the position that contact with the client is pointless if there is no discovery yet to review.

To be fair, many lawyers expressed an interest in meeting more frequently with their incarcerated clients, but complained heavily about the access available at the state’s correctional facilities.<sup>290</sup> But other attorneys suggested that such complaints are rather “blown out of perspective,” and that the facilities’ procedures for requesting time to meet with clients are rather straightforward. The Office of Conflicts Counsel, therefore, has an obligation not just in establishing that communicating with the client is a clear expectation of the attorneys it hires, but also to teach those attorneys the proper procedures for client visitation, both to maximize efficiency but also to diminish the frustration of all parties. In fact, any training program should aim to demonstrate for all lawyers how to go about interfacing with other components of the criminal justice system.

This of course is the dividing line between competence and performance. The requirements of *Principles 6 & 9* serve to ensure that attorneys employed by the conflict program have the training and knowledge needed to handle the types of cases to which they are assigned. An attorney may know how to do an important task. He may know that communicating with the clients is critical to zealous representation. He may know investigation is often critical to factual development. And he may know that an acquittal might turn on a well-argued motion.

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<sup>289</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>290</sup> This complaint was levied most heavily against Vaughn Correctional Facility.

But knowing how to do all of these things does not guarantee that they are in fact being done. That only comes through ongoing supervision and systemic accountability, which are both required under ABA *Principle 10* and, as we will discuss in Chapter 8, both are lacking in Delaware.

# CHAPTER 8

## ACCOUNTABILITY & INDEPENDENCE

The first chapters of this report detailed the failure of the state of Delaware to provide counsel to all who are entitled, to appoint attorneys early enough to be effective, to provide for continuous representation, to limit workload, and to provide training. This has been allowed to occur because there is a lack of accountability within the system.

There are two parts to accountability: accountability of the attorneys within the system and accountability of the system itself. The former is dealt with under ABA *Principle 10*'s demand that defense counsel be supervised and systemically reviewed for quality and efficiency according to locally adopted standards. The latter is dealt with through the ABA's first *Principle* requiring an independent board, free from undue political or judicial interference, providing oversight of the system itself and of the chief executive in particular.

### 1

## ATTORNEY ACCOUNTABILITY

There are no formal performance standards in Delaware.<sup>291</sup> Moreover, 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.

Delaware, we are constantly reminded, is a very small state where everyone in the legal community practically knows everyone else. People just know, we were told, who is a good lawyer and who is not. But even if that statement were true, a system still needs standards by which to evaluate, and if necessary, remove the poorly performing lawyers. Having a culture of familiarity in lieu of clear policy standards generally results in

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<sup>291</sup> OPD has developed “performance plans,” individualized for each attorney it employs (as well as for non-attorney staff members), but as we discuss later, such plans are not as extensive as those used elsewhere in providing attorneys with clear performance guidelines.

**ABA Principle 10: Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.** The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.

under-performing lawyers staying on panels because there is no sound basis for removing them.

The supervision of the office's contractors by OCC staff does not factor into the team's current obligations, obviously and quite simply, because there is no time available. With just one attorney and one paralegal between them, OCC already has too much work for two people just trying to keep up with the long list of administrative duties they are responsible for, like: processing the appointment of individual attorneys to conflict cases; responding to requests for experts and investigative services on individual cases; approving the payment of vouchers for hourly and contractual conflict work; among other administrative tasks. It is already far too much for the two employees even without substantive oversight duties.

In the absence of adequate training and supervision, it therefore falls to the individual lawyers to seek the guidance of their peers. Such "mentoring" is beneficial to any system and, indeed, national standards call for the use of mentoring programs<sup>292</sup> as part of a supervisory structure in any contract or assigned counsel system. But even such limited, informal supervision structures are failing in Delaware. "The mentoring program is broken," one conflict attorney said of the private criminal defense bar in general. "People no longer ask for help. Maybe it's an ego thing, or the fear of getting labeled."

When it comes to supervision and performance review, the conflict program's lack of supervision and performance review largely mirrors the defaults of the primary system.

<sup>292</sup> NLADA *Standards for the Administration of Assigned Counsel Systems*, Standard 4.4.1, "(a) The Board shall establish a policy with regard to the provision of mentors -- more experienced, competent attorneys -- to advise less experienced attorneys on a Program roster. (b) Mentors shall be compensated for mentoring services according to Board specifications."

To be fair, however, the primary system – and OPD’s current administration in particular – has made significant progress in recent years toward meeting national standards in this area, and should be applauded. Beginning in 2010, the Office of the Public Defender first developed performance plans, individualized for each employee, including non-attorneys. Each plan is tailored to the individual staff member, with the supervisor and supervisee working together to delineate specific duties and expectations. As a result, where two employees have identical positions, their performance plans set the same obligations for both. “We want them to be pretty similar for each attorney in the same unit,” said OPD’s Chief of Legal Services.

To some extent, the performance plans are simply a list of basic performance expectations. For example, attorneys are generally expected to meet with the client, review discovery, examine whether substantive support (by way of investigation or a PFE) is required, and file motions. However, most performance guidelines promulgated by other states, by way of court rule or other binding authority, go much farther by detailing specific steps within each general obligation. For example, beyond establishing that attorneys are expected to file pretrial motions generally, performance standards should establish how attorneys should go about exploring what pretrial motions should be filed and which have no merit.<sup>293</sup> Or, beyond establishing that attorneys should explore generally whether to enlist the assistance of an investigator, performance standards should guide attorneys point-by-point on specific aspects of investigation that may be essential to the defense.<sup>294</sup> Without this next layer for Delaware’s performance plans, it mostly falls to the supervising attorneys of each unit or office to define performance expectations for the team’s staff attorneys.

OPD has made initial strides in conducting performance reviews, even as the agency’s leadership acknowledges that its method of performance review is largely a work-in-progress. Senior OPD attorneys attended a state human resources training program in 2010 and developed an evaluation protocol based on state government templates. Reviews are now conducted once per year in January. And while the specifics vary by OPD unit (largely based on the stylistic differences of the supervisors), in general, the supervising attorney begins by reviewing with the supervisee his or her previous year’s performance report. Next, the supervisor and the attorney review the current year’s expectations before analyzing whether progress was made and whether additional areas for improvement have been found. Those findings are then compiled into the supervisor’s report, and together the supervisor and trial attorney craft the coming year’s performance plan, which is signed by the attorney and then submitted to OPD’s Chief of Legal Services for approval. But even then, some within OPD expressed concern that the performance review process is not yet as effective as it ought to be. For example, there is no uniformity in how supervising attorneys conduct performance evaluations,

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<sup>293</sup> See NLADA *Performance Guidelines*, Guideline 5.1.

<sup>294</sup> See NLADA *Performance Guidelines*, Guideline 4.1.

nor is there uniformity in the criteria used to gauge the attorney's effectiveness against each specific responsibility. Because of this, there is still work to be done to advance the evaluation program.

National standards suggest that performance reviews should be conducted more routinely. In fact, many defender systems in other states conduct ongoing performance reviews, where attorney supervisors review case files and conduct in-court observations on a regular basis, accounting for qualitative analysis of each attorney's substantive case-related decisions. The annual review, in a system with a fully developed supervision program, is thus a culmination of work performed throughout the year. In Delaware, however, it is instead a once-a-year chance to try to improve performance.

Leadership within the public defender's office generally takes the position that it hires attorneys that it believes to be qualified, that the attorneys should know what is expected of them, and that they should be trusted to perform their advocacy duties competently. But at the same time, OPD's leaders recognize there is no expectation the supervisors will proactively gauge the trial lawyers' compliance with those expectations. Supervising attorneys can review quantitative measures within the OPD's internal databases to see, for example, how many times each trial lawyer has visited clients, but not necessarily the time frames of such visits (i.e., within hours, days, or weeks of incarceration). Similarly, supervisors can count the number of motions an attorney has filed, but have no means of qualitatively analyzing the attorney's decisions. "No supervisors are looking into an attorney's case files with that level of detail," said one senior OPD attorney.<sup>295</sup> The supervising attorneys do not perform regular court observations.<sup>296</sup> They see attorneys practicing next to them the courtrooms in which they also happen to have cases, but they do not sit and watch all types of court proceedings as a matter of course.

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<sup>295</sup> Our conversations with supervising attorneys confirmed this. When pressed, more than one supervisor told us that the door is always open – that whenever a lawyer might face a challenging issue in a particular case, they are free to duck their head in and ask for help. Indeed, we observed several such discussions throughout our visits. But ongoing supervision cannot be limited only to passive activity, with such heavy reliance on an attorney's self-assessment rather than ongoing, preemptive, and objective review.

<sup>296</sup> And how could they, with such heavy caseloads as they carry themselves? The supervising attorney in Kent County alone handles each year what national standards suggest would take 2.4 full time attorneys to reasonably handle. Perhaps OPD expects its supervising attorneys to lead by example. But with such enormous caseloads, how can the supervising attorney know if anyone is actually following his examples?

# ONGOING ISSUES OF JUDICIAL INTERFERENCE

## THE TERTIARY SYSTEM

Right to counsel services in Delaware is a structure with three layers: the primary system is the Office of the Public Defender; the secondary system, or conflict system, is the Office of Conflicts Counsel; and the tertiary system for the occasional conflict case that cannot be handled by OCC.

Although funding of the tertiary system comes from the OCC, in general, the courts administer the system. There are no state-wide standards nor uniformity policy as to how each court in each county must do so. Not surprisingly, we found variances in how the tertiary system is managed throughout the state. Here is what we know. Most courts keep a list (either formally or informally) of all of the members of that county's bar association. They use the lists for a variety of appointments, not just involving Sixth Amendment cases, but civil cases too. In some courts in some counties, the clerks appoint whichever attorney is next on the list – be it a real estate lawyer or divorce specialist – when OCC has a conflict. Some court clerks will make an exception for criminal and delinquency cases to try to find a qualified attorney. And other courts do not follow any list at all.

Judges base their authority to make such unqualified appointments on a ruling of the state Supreme Court, which held that by virtue of having been admitted to the Delaware Bar all attorneys are minimally competent in the law to represent any client in any

type of case.<sup>1</sup> But, just because a judge *has* the authority to make such an appointment, does not mean he *should* except in the most extreme of circumstances. It is a simple truth that Delaware's most outstanding corporate lawyers are complete novices when it comes to defending a client in, for example, a complex sexual assault case.

To be sure, many judges we spoke with expressed concern about this practice. "How do you take a lawyer who does personal injury and put them on a complex felony in Superior Court?" asked one. Some judges, we were told, simply bypass the traditional list maintained by their court's administration, if they believe the case merits the appointment of a private attorney better suited to the advocacy needs of the defendant. Others, however, are more hesitant. One Family Court commissioner expressed deep concern about the appropriateness of her overriding the court's list to directly appoint attorneys she felt more qualified. When asked if she would bypass the rotating list if she had less concern about the appropriateness of doing so, the commissioner answered flatly: "Yes."

In any event, the practice of judges appointing unqualified attorneys persists to this day. A Sussex County Family Court commissioner recounted a recent case where she appointed a real estate lawyer to handle a delinquency case. The attorney called the commissioner to inform her that he was

<sup>1</sup> *In the Matter of a Member of the Bar of the Supreme Court of the State of Delaware: John M. Murray, Respondent*. No. 223, 2012 (Board Case No. 2011-0170-B).

not qualified to handle the case. The commissioner refused to withdraw the appointment. "I told him to get qualified," she said.

Here is what the American Bar Association had to say on this topic, back in 1970: "While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. How-

ever, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client."<sup>ii</sup>

In other words, any lawyer can, as the commissioner in Sussex County suggested, "get qualified" in any field of practice, but never at the expense of the person he is representing.

<sup>ii</sup> ABA *Model Code of Professional Responsibility*, Canon 6.

## ONGOING ISSUES OF JUDICIAL INTERFERENCE

### THE USE OF PSYCHO-FORENSIC EVALUATORS

OPD's team of psycho-forensic evaluators (PFE) are a group of trained psychiatrists, social workers, mitigation specialists, and forensic nurses, as well as those with master's degrees in policy and other non-legal fields. PFEs examine public defender clients for substance abuse, cognitive psychosis, or developmental issues during initial interviews. Where there is a need for an outside expert on a particular case, such as a psychologist or psychiatrist, the PFE handles the interfacing between the expert and the trial attorney. If issues are identified early on, the PFEs can work with the attorney to consider starting the client on a treatment program to generate a positive record, even during the course of the trial. PFEs also assist in providing attorneys with general mitigation or sentencing recommendations.

But some judges view the public defender office's team of psycho-forensic evalua-

tors as though it is a court resource rather than an integral component of the defense function. We observed a number of court proceedings where a judge suggested or directly requested that the public defender enlist a PFE on the client's case.

To be clear, the judges' desire to make use of these PFEs is entirely benevolent in nature. However, not all psych-evaluations necessarily place clients in the best light from the defense lawyer's perspective, or the defendant could respond poorly to the treatment program he was entered into pre-trial. Such strategic decisions – whether to seek substantive help or not, and whether to introduce the results or analysis of such outside work as evidence in the client's case or not – are therefore the defense lawyer's alone to make in considering the advocacy needs of his client.

## HOW FLAT FEE CONTRACTS CAN LEAD TO INCREASED JUDICIAL INTERFERENCE

Conflict attorneys in most Delaware counties are paid a flat annual fee regardless of how many cases they are assigned. This means that with each new conflict the public defender's office declares, the conflict attorneys feel the weight of that next client's case. In the absence of workload controls built into their contracts, the pushback of the conflict lawyers against the primary system's policies is their only recourse in keeping their caseloads remotely manageable. Because of the ongoing dispute, judges become arbiters between one indigent defense component and the next.

However, there is no uniformity in how the courts involve themselves in resolving the conflict dispute. Though one Superior Court judge made it clear that the obligation of identifying conflicts rests solely with the public defender's office, and that the court should have no role in approving or denying conflicts at all, it is clear from our interview with the presiding judge of the Court of Common Pleas, that the intended policy of CCP is just the opposite. In CCP, all judges must approve any conflicts prior to the case being reassigned to the conflict system (but even then, it seems that this policy is not uniformly followed by all judges in all counties).

To be clear, national standards state that judges should never be involved in approving whether or not a conflict exists, even in the limited scope of reviewing disagreements between the primary and conflict systems.

The 6AC is of the opinion that the judicial role (particularly in some CCP courts) in certifying conflicts was not done out of malice. Rather, it is simply a symptom of a deficient system.

In describing his deep consternation at the delay in processing serious felony cases, as the primary and conflict attorneys battle out which functions will represent particular defendants' cases, one senior prosecutor noted the imbalance in resources between the primary and conflict system. After all, the public defenders can dedicate to the client's defense internal resources, such as investigators, psycho-forensic evaluators, and even mitigation specialists in capital cases. "They can't have it both ways. If [the public defender's office is] going to conflict out of these cases, then they have to give them the resources to do the job." We agree. The problem is that the flat fee contracts are forcing the court to deal with an issue it should not.

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## SYSTEMIC ACCOUNTABILITY

The question of systemic accountability is a bit more complicated. 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 questioned 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. In the absence of institutionalized systemic accountability, who is responsible for the systemic deficiencies uncovered in this report?

Though it is human nature to want to assess "blame" for problems of this magnitude we think that is a useless endeavor. These problems were not caused by one or two malevolent policymakers or criminal justice stakeholders. Instead, it was the absence of systemic accountability itself that caused these problems over a series of decades. We believe the better question is: Moving forward, who should be providing systemic review of indigent defense services?

WHY JUDGES CANNOT PROVIDE OVERSIGHT  
OF INDIGENT DEFENSE

National standards and U.S. Supreme Court case law are clear that judges cannot provide such oversight. As far back as the *Scottsboro Boys* case in 1932, the U.S. Supreme Court has been on record in questioning the efficacy of judicial oversight and supervision of right to counsel services, asking: "[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."<sup>297</sup>

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<sup>297</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

National standards of justice reflect the aims of the U.S. Supreme Court. The ABA *Ten Principles* explicitly require that the “public defense function, including the selection, funding, and payment of defense counsel, is independent.”<sup>298</sup> In the commentary to this standard, the ABA notes that the public defense function “should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel” noting specifically that “[r]emoving oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.”<sup>299</sup>

The evolution of Delaware’s indigent defense system could, in many ways, serve as a textbook example of why judicially controlled systems eventually fail. For most of Delaware’s history, judges were tasked with administering the indigent defense system. They decided upon the structure of the system, and how many attorneys would be involved. They also chose *which* attorneys were assigned cases and which were not. They determined how much the attorneys were paid and by what method they were compensated – an hourly rate or annual contract. And if an attorney felt it important to bring in an expert witness or an investigator, the judge decided whether or not his request had merit. After 1964, when the Office of the Public Defender was created, this judicially controlled system remained for conflict representation.

Judicially controlled indigent defense systems often follow or adjust to the needs of each court rather than focusing on providing constitutionally effective services for each and every defendant. That is what happened in Delaware. The system evolved within each county over the years, largely based on the needs of each court and, as such, the systems varied widely from county to county and even within each court within each county. In fact, decisions that were made within each county had nothing to do with how the system might be evolving elsewhere in the state. All decisions were local.

“Every time the judge changed, the perspective on how the contracts were administered or how the approval of investigators and experts was handled would change as well,” one long-time participant in the conflict program told us. “So the rules were constantly changing.” The Superior Court in New Castle County alone contracted with several attorneys to handle felonies. In Kent County by contrast, as recently as the late 1990s, a single attorney was responsible for handling all conflict cases across all courts. “It wrecked your health,” said a former private attorney who held the Kent County contract, who has since joined the bench. “The caseload was massive!” More recently, this lone contract was split into three individual contracts, and to relieve some of the workload concerns the attorneys were given a cap on the number of cases they could be assigned in given month.

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<sup>298</sup> ABA *Principle 1*.

<sup>299</sup> *Ibid.*

The contracts for conflict representation in Sussex County, however, had no such case-load caps. Beginning in 1977, Sussex County, like Kent County, maintained a contract with a single private attorney who handled all cases in all courts. Eventually, the contract system grew to include three conflict attorneys for Superior Court alone, and a separate contractual arrangement for Family Court and the Court of Common Pleas. But unlike Kent County, the conflict attorneys in Sussex County were paid a flat annual fee, and in turn they would accept however many cases they happened to be assigned. In one court, New Castle County Family Court, the annual contract method never caught on. Private attorneys instead were paid by the hour for their work on whichever cases the judges assigned to them, just as they had 50 years ago. There was no uniformity as the system grew to reflect the personality of each judge.

OPD inherited this disconnected, non-uniform system when Chief Justice Steele removed the judiciary from the further administration of the public defense conflict system. The Office of Conflicts Counsel's chief attorney, Stephanie Volturo, recalled her own frustration at trying to understand how disjointed representation had become. "I spent the first couple of months [after being appointed to the chief counsel position] trying to figure out how each county's system actually works."<sup>300</sup>

## WHY THE OFFICE OF THE PUBLIC DEFENDER CANNOT CURRENTLY PROVIDE APPROPRIATE OVERSIGHT

By all accounts, the morale within the Office of the Public Defender is high, and many criminal justice stakeholders – including private attorneys, prosecutors, and judges – attribute much of this to Chief Public Defender Brendan O'Neill's stewardship. That O'Neill and his management team have fostered a good work environment for the agency and its employees, in fact, was recently recognized by the *Wilmington News Journal*, which ranked the Office of the Public Defender fourth on its annual list of top places to work in 2013 among similarly sized Delaware corporations and businesses.<sup>301</sup> For this, the Office of the Public Defender should be applauded.

Although achieving the positive outlook of its employees is preferable, it is not the end purpose for which the agency, nor the entire indigent defense system, exists. The indi-

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<sup>300</sup> One of Volturo's primary short-term goals for the conflict program is to redo each contract to reflect the attorney's actual duties and role within the local indigent defense system. Among the reasons Volturo has not done so already is that she is waiting on the findings and recommendations included in this report before contemplating any changes to the contract system.

<sup>301</sup> Sean O'Sullivan, "Time in trenches carries over for public defenders." *The News Journal*, August 17, 2013. Available at: <http://www.delawareonline.com/apps/pbcs.dll/section?Category=NEWS1107>.

gent defense system's effectiveness must be measured solely by the quality of services provided to clients. No matter how high the morale of the attorneys, if whole categories of indigent defendants receive a level of advocacy that falls short of constitutional demands – an inevitability anywhere that services are triaged in favor of some but to the detriment of others – or if even larger categories of indigent defendants receive no representation at all, then the system itself is in default of its obligations. And, as we have shown to this point, this is the current status of the right to counsel in Delaware.

Why is this so? In Delaware, the chief public defender is a direct gubernatorial appointee. *ABA Principle 1* bars undue political interference along with undue judicial interference. Because Delaware's public defense system is accountable solely to the interests of whomever occupies the governor's office, those gubernatorial interests can, and often do, conflict with the constitutional right to an adequate defense for each and every person facing a potential loss of liberty in the state's courts.

Where the chief defender is a direct gubernatorial appointee, that executive attorney can feel the pressure of undue political interference if, for example, the governor calls for all executive departments to take a 10% budget cut. Unlike other aspects of the criminal justice system, public defenders are constitutionally required to defend all people appointed to them by the court. This number could be very large, or it could be very small – it depends on policy decisions of other criminal justice stakeholders<sup>302</sup> – but either way, the defense practitioners have no control over the number of new cases requiring their services. Therefore a 10% budget

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<sup>302</sup> The legislature could increase the number of statutory offenses in which jail time is a potential sentence; an increase in the number of police positions will correspondingly increase the number of arrests being made; and prosecutors may choose to file charges, rather than dismissing marginal cases. All of these choices are outside of the control of the indigent defense system, but all of them will increase the number of clients that system must represent.

***ABA Principle 1: The public defense function, including the selection, funding, and payment of defense counsel, is independent.***

The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.

cut is impossible to implement if it is not met by a 10% cut in public defender workload – at least it is impossible if one is concerned about maintaining parameters of ethical representation for all clients. Since the bulk of an indigent defense system's expenditures are in personnel, the cut must come at the expense of staff. But, despite the ethical considerations, a public defender that is a direct gubernatorial appointee is likely to cut 10% rather than risk being replaced by someone who will do what the executive says. And, though this is the most easily understood form of political interference, it is just as destructive to right to counsel services if every year the executive grants incremental increases where such increases do not match what is actually required to uphold the Constitution.

In 1981, the United States Supreme Court determined that states have a “constitutional obligation to respect the professional independence of the public defenders whom it engages.”<sup>303</sup> Observing that “a defense lawyer best serves the public not by acting on the State's behalf or in concert with it, but rather by advancing the undivided interests of the client,” the Court concluded in *Polk County v. Dodson* that a “public defender is not amenable to administrative direction in the same sense as other state employees.”<sup>304</sup>

Though it is not binding, the constitutional necessity for public defender independence was acknowledged in Justice Sandra Day O'Connor's dissent in *Georgia v. McCollum*: “Moreover, we pointed out that the independence of defense attorneys from state control has a constitutional dimension. *Gideon v. Wainwright*, 372 U.S. 335 (1963), ‘established the right of state criminal defendants to the guiding hand of counsel at every step in the proceeding against [them].’ Implicit in this right ‘is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate.’”<sup>305</sup> We agree with Justice O'Connor, who expressed in *Georgia v. McCollum*, that “the defense's freedom from state authority is not just empirically true, but it is a constitutionally mandated attribute of our adversarial system.”

In Delaware, we do not think that the undue political interference is today, or has been in the past, as overt as our hypothetical “10% budget cut” example suggests. During the course of this study, we were told that Delaware's previous chief public defender (who served for 39 years) often made budget presentations requesting increased resources as proof that chief defenders in Delaware have always been independent, despite their status as direct gubernatorial appointees. But those budget requests were not funded, and rather than one big budget battle, the system began devolving over decades by a series of a thousand slices because the chief public defender was forced to accept an inadequate amount of resources than the system needed without recourse to do anything

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<sup>303</sup> *Polk County v. Dodson*, 454 U.S. 312 (1981).

<sup>304</sup> *Ibid.*

<sup>305</sup> 505 U.S. 42 (1992).

about it. That is, when appropriate resources were not forthcoming, rather than refusing cases, the caseloads of individual attorneys simply grew.

Whether or not one agrees with that assessment, it is simply a fact that over time OPD began taking on more cases than its attorneys could ethically handle (in violation of *Principle 5*), its attorneys began delaying working on a case (in violation of *Principle 3*), triaging their hours available in favor of some clients, but to the detriment of others, thereby failing to meet the parameters of ethical representation owed to all clients (*Principle 10*). Again, we do not think the lack of independence and undue political interference points to anything untoward on the part of either the current or former chief defender, or the current or former governors. It is simply that major systemic deficiencies evolved over time and are now institutionalized as part of the Delaware criminal justice system.

## HOW OTHER STATES EXERT SYSTEMIC ACCOUNTABILITY

ABA *Principle 1*'s commentary specifically recommends that in order to “safeguard independence and to promote the efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.” Footnotes to ABA *Principle 1* refer to the National Study Commission on Defense Services' (NSC) *Guidelines for Legal Defense Systems in the United States* (1976). The *Guidelines* were created in consultation with the United States Department of Justice (DOJ) under a DOJ Law Enforcement Assistance Administration (LEAA) grant. NSC *Guideline 2.10* states that “a special Defender Commission should be established for every defender system, whether public or private,” and that the primary consideration of appointing authorities should be “ensuring the independence of the Defender Director.”

Most states' right to counsel services have evolved beyond Delaware's system by insulating the chief public defender – or more likely the chief executive of the larger “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. There are now 21 states and the District of Columbia that have statewide public defender commissions overseeing all right to counsel services (primary and conflict): Arkansas, Colorado,<sup>306</sup> Connecticut, the District of Columbia, Hawaii, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, Virginia, West Virginia, and Wisconsin. Another two states, Florida and Tennessee, publicly elect chief defenders to ensure that they are accountable to the voters

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<sup>306</sup> Colorado has two separate commissions for right to counsel services, with one overseeing the primary system and another overseeing conflict services.

and not judges or other elected officials. Delaware, however, is one of only eight states with statewide structures that fail to protect the system from undue political influence: Alabama, Alaska, Iowa, New Jersey, Rhode Island, Vermont and Wyoming.

To be sure, independent commissions are not a “blank check” for indigent defense systems. Legislatures certainly have the power to say “no” to any budget requests. But what distinguishes functioning public defense systems from Delaware’s is that, if resource requirements are not met, the system in those states can refuse to take on the additional cases they cannot effectively handle without fear that the chief defender will be fired or not reappointed when his term is up.

Further still, in states with an independent commission overseeing right to counsel services in which all three branches of government, the state bar, and accredited law schools all have an equal stake in the system, the chief executive has a team of people on which to call upon to help educate the legislature about the need for improved services on a continual basis rather than being limited to budget presentations. And maybe that is what happened in Delaware. Perhaps the former chief did ask for ample resources each and every year. The fact remains he did not get them and was not free to then do anything about it.

We are left to conclude that, without first addressing the independence issue, all other attempts to repair Delaware’s indigent defense system will eventually fall victim to the same history.

# PART FOUR

## CONCLUSION AND RECOMMENDATIONS

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"An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be 'of little avail,' this Court has recognized repeatedly. 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.'

... If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated. To hold otherwise 'could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment' . . .

Thus, the adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.' The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted - even if defense counsel may have made demonstrable errors - the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. . . . 'While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.'

*United States v. Cronin*, 466 U.S. 648 (1984).  
[internal citations omitted]

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# CONCLUSION AND RECOMMENDATIONS

Delaware's citizens should be proud of their deep and rich history when it comes to the right to counsel. On July 1, 2014, the Office of the Public Defender will celebrate its 50th year. However, work did not end with the creation of the OPD in 1964. The right to counsel in America has been evolving since the earliest European settlers first stepped foot in this country. Accordingly, the systems for providing indigent defense services need to evolve as well to be able to continually meet the evolving standards of what it means to provide zealous representation.

Chief Justice Myron Steele's removal of the conflict system from under the authority of the courts in January 2011 was just one example of a necessary evolution of a public defense system. Evolving standards – such as the growing acceptance of the ABA *Ten Principles* as the basic parameters for a system to provide necessary safeguards<sup>307</sup> – require that our judges and courts remain neutral arbiters between the prosecution and the defense.

Unfortunately, the Office of the Public Defender has not been able to evolve with this change. And as a result, in 2011 an unorganized conflict system was grafted onto an already-overloaded primary system. Neither component of the indigent defense system is now capable of fulfilling the state's constitutional obligation to provide minimally effective representation – a right owed to *all* persons facing the prospect of jail time.

We began the introduction to this report with a quote from the U.S. Supreme Court's decision in the 1972 case *Argersinger v. Hamlin*.<sup>308</sup> There, the Court found the right to the assistance of counsel to be “fundamental and essential” to fair trials even in petty offenses, so long as the threat of jail time exists. The Supreme Court's description in *Argersinger* is in fact a reasonable indictment of many proceedings in the criminal and family courts across the state of Delaware.

In general, able attorneys are working in a structure that prevents them from meeting constitutional adequacy despite their commitment, dedication and hard work. Where defendants have not already relented to pressure to forego the right to counsel by enter-

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<sup>307</sup> See for example, U.S. Attorney General Eric Holder, *Speech before the American Bar Association's National Summit on Indigent Defense* (New Orleans, February 4, 2012), available at: <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html>.

<sup>308</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

## THE SYSTEM IS DEFECTIVE . . . THE LAWYERS WITHIN THE SYSTEM ARE NOT

OPD points to the number of trials resulting in “not guilty” dispositions as evidence that its lawyers are providing quality services for their clients. “Anecdotally,” the lead defender with the Superior Court unit in New Castle County told us, “just this past week we had four trials, and we won three of them.” And, if one sets aside the number of pleas occurring after the start of trial and looks simply at the ratio of not guilty dispositions to trials, OPD does obtain a significant percentage of not guilty dispositions for its clients. Data provided by OPD shows its lawyers obtaining not guilty dispositions in 78 of 204 trials conducted in all courts in all counties from January through October 2013 (or 38.24%).

However, these statistics and stories simply underscore our main finding that systemic impediments force OPD to triage justice to some clients at the expense of others. In cases that go to trial, lawyers are most likely to employ investigators and PFEs, and to conduct legal research and

file motions. The results speak for themselves. But the number of trials per year is so small compared to the number of closed files (204 of 29,436, or 0.69%) that it makes one question what would have occurred if the same level of care went into every appointed case.

In *Missouri v. Frye*, the U.S. Supreme Court notes that 94% of state court convictions are obtained through guilty pleas, meaning the average trial rate in state courts across America is 6%. If that same percentage was applied to OPD’s caseload, its attorneys would bring an additional 1,500 cases to trial every year; far more than they currently can. The system is simply not structured to accommodate such a workload. And, this does not even account for the tens of thousands of people that are entitled to a lawyer but who are pressured into forgoing that right.

It is the system itself that is defective and *not* the individual lawyers working within that system.

ing into plea negotiations directly with the prosecution, 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, in Delaware’s system of pleas,<sup>309</sup> the indigent defense function fails to subject the prosecution’s case to “the crucible of meaningful adversarial testing” rendering the entire adversarial process “presumptively unreliable.”<sup>310</sup>

Where a breakdown in the adversarial process has occurred, wholesale structural improvements are necessary. The Sixth Amendment Center, therefore, makes the following recommendations.

<sup>309</sup> The U.S. Supreme Court estimates that now 94% of all criminal convictions in state courts are the result of pleas negotiations noting, without judgment, “the reality that criminal justice today is for the most part a system of pleas, not a system of trials.” (*Lafler v. Cooper*, 566 U. S. \_\_\_\_ (2012).)

<sup>310</sup> *United States v. Cronin*, 466 U.S. 648 (1984).

# RECOMMENDATION 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.***

When the Office of the Public Defender accepted the Chief Justice's recommendation to take over the administration of the conflict system, the chief public defender position was also transformed. Before, the chief defender was purely an administrator of a stand-alone law firm providing representation only to those clients assigned to that office by the court. Now the person who holds the chief defender position is charged with nothing less than ensuring that everyone charged with a crime or delinquent act facing potential incarceration is provided with the same constitutionally adequate level of representation anywhere in the state of Delaware, bar none. That is, the appropriate removal of the conflict panel from under the court created (or should have created) a single unified "indigent defense system" of which the OPD is still a very important part, but just a part nonetheless.

There seems to be little recognition of this fact, and the OPD continues to operate as it always has. Take the indigency screening function as one example. (See page 128.) The personnel of the intake team are OPD employees. The intake staffers check for financial eligibility of clients to receive public representation, and if no immediate conflict is found they begin looking at substantive issues for the client's case. In this way, those staff members see themselves as part of the advocacy team for the primary system's clients. But, the allegiance of the intake function to the primary system places the clients of the alternate defender system at an enormous disadvantage, both in terms of timeliness of trial advocacy and in terms of the depth and breadth of information the alternate trial advocate has available. With the chief defender now overseeing an entire indigent defense system, the intake function for that entire system must be realigned as well – this function must be part of an independent "indigent defense system."

National standards are clear that the defense function must be insulated from outside political or judicial interference by a board or commission appointed from diverse authorities, so that no one branch of government can exert more control over the system than any others. To assist jurisdictions looking to establish such a board or commission, the National Legal Aid & Defender Association has promulgated standards. For example, the organization's *Guidelines for Legal Defense Services* (Guideline 2.10) states:

A special Defender Commission should be established for every defender system, whether public or private. The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable

factions or components of the client population, and judgments as to which non-client groups should be represented. Commission members should be selected under the following criteria: The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director. (a) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics. (b) No single branch of government should have a majority of votes on the Commission. (c) Organizations concerned with the problems of the client community should be represented on the Commission. (d) A majority of the Commission should consist of practicing attorneys. (e) The Commission should not include judges, prosecutors, or law enforcement officials. Members of the Commission should serve staggered terms in order to ensure continuity and avoid upheaval.<sup>311</sup>

There are many ways to comply with this standard, thereby achieving independence. For example, Delaware could opt to establish more than one commission, as the state of Colorado has done. There, primary defender services are provided by the Office of the Public Defender, and are overseen by an independent Public Defender Commission.<sup>312</sup> All conflict services, however, are kept entirely separate – administered by a separate central office, the Office of the Alternate Defense Counsel, and overseen by a separate independent commission.<sup>313</sup>

Michigan has also established two separate commissions to oversee the provision of right to counsel services, but with one responsible for all trial-level services across the state (primary and conflict)<sup>314</sup> and the other responsible for all appellate services (primary and conflict).<sup>315</sup>

Should Delaware stakeholders determine it makes more sense to establish independence under one statewide commission responsible for the delivery of all right to counsel services, it certainly has that option. For that, we recommend looking to Oregon, Wisconsin, and Massachusetts as examples. The state of Oregon has a single commission that oversees all right to counsel services throughout the state, whether primary or conflict, and with all direct client services provided by a mixture of private non-profit law firms and individual attorneys all working under contract with the Oregon commission's central administrative offices.<sup>316</sup> (See side bar, page 140.)

But, given Delaware's current momentum toward establishing a single indigent defense system responsible for primary and conflict services under a central authority, the Wisconsin and Massachusetts systems seem the most applicable. The Wisconsin State Public Defender is statutorily responsible for all right to counsel services, primary and

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<sup>311</sup> The NLADA *Guidelines* are available here: [http://www.nlada.org/Defender/Defender\\_Standards/Guidelines\\_For\\_Legal\\_Defense\\_Systems#twoten](http://www.nlada.org/Defender/Defender_Standards/Guidelines_For_Legal_Defense_Systems#twoten).

<sup>312</sup> §21-1-103, C.R.S.

<sup>313</sup> §21-2-101, C.R.S.

<sup>314</sup> MCL 780.981 et seq.

<sup>315</sup> MCL 780.711 et seq.

<sup>316</sup> O.R.S. Chapter 151.

conflict, and is overseen by an independent board.<sup>317</sup> The provision of trial level right to counsel services is split between the Trial Division and the Assigned Counsel Division.

Massachusetts likewise has a single commission overseeing all services, with the actual provision of direct services split into two equal divisions within the central agency that commission oversees.<sup>318</sup> Massachusetts differs from Wisconsin most significantly through its method of supervision for private assigned counsel, which is handled locally rather than from the agency’s central office. (See side bar on the Massachusetts system, page 167, for a full explanation.) The deputy chief counsel for the Public Defender Division and the deputy chief counsel for the Private Counsel Division sit as equals on the Committee for Public Counsel Services’ executive team, and ethical screens maintain confidentiality of direct services between one division and the other and between each division and the central office. The Sixth Amendment Center suggests the Massachusetts model is most suitable to Delaware’s needs, but the final decision belongs to Delaware’s policymakers and will most likely take portions of various existing models and adapt them to local circumstances.

Should Delaware choose to modify the Massachusetts model to its own needs, two major structural changes are needed: first, the entire system must be protected by an independent board; and second, the chief public defender position must be elevated to a chief executive position overseeing all services, but with proper

## Oversight Structure for Indigent Defense Systems

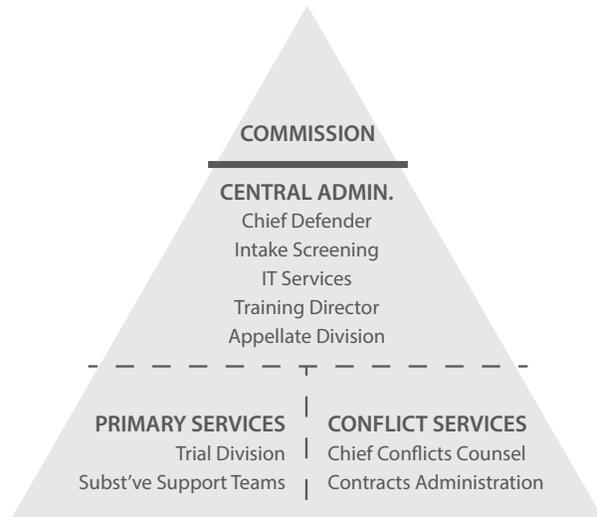
### THE CURRENT STRUCTURE



*Ethical screens divide the work of the primary and conflict systems, but the conflict system reports directly to the head of the primary system, among other problems.*



### A BETTER OVERSIGHT STRUCTURE



*The primary and conflict systems are equals, both reporting to a single central administration. Ethical screens in place between primary and conflict service providers, and between both service providers and the central administration. Efficiency found by sharing resources, like training, intake and IT.*

<sup>317</sup> Wisc. State Statutes Chapter 977.

<sup>318</sup> Mass. G.L. 211D.

ethical screens between the primary system and the conflict system, and ethical screens between the chief executive's administrative office and all direct client services. (See chart, previous page, for a visual representation.)

## RECOMMENDATION 2

***The Family Court should adopt a rule prohibiting children in delinquency matters from waiving the right to the assistance of counsel.***

Rule 44(a) of the *Delaware Family Court Rules of Criminal Procedure* states: "A waiver of the right to counsel by a child shall be in writing unless made in Court on the record or made in the presence of the child's custodian."

As we have noted, our courts are supposed to protect the accused by ensuring that, before he waives any of his due process rights – including the right to be represented by counsel – he fully understands what he is doing;<sup>319</sup> for any such waiver to be valid, it must be voluntary, knowing and intelligent.<sup>320</sup> The written waiver in Delaware has proven insufficient to meet this constitutional requirement, even for adults, and with disastrous results for children in particular. (See page 93.)

The National Juvenile Defender Center counts Delaware among states with the "least restrictive approach" to "permitting a juvenile's waiver of the assistance of counsel."<sup>321</sup> The next more restrictive approach recognized by NJDC is that requiring "parental presence, concurrence or consultation."<sup>322</sup> But again, in Delaware, even that has proven severely flawed. In some courts, the parent's "concurrence or consultation" on their child's right to counsel is replaced by the judge proceeding as though that right belongs to the parent and not the child. (See page 97.) Judges, after all, cannot always know whether a conflict exists between the child to whom the right to counsel attaches and the parent advising that child to waive that right. (See page 89.) Both such examples are clear violations of the constitutional requirement that any waiver of the right to counsel is voluntary.

Acknowledging that the right to counsel belongs to the defendant and not to the parent, and that, by nature of being children, any waiver of the right to counsel by definition cannot be knowing or intelligent, more and more states have adopted statutory or court rules "prohibiting the possibility of waiver for certain offenders or at certain stages of

<sup>319</sup> *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942).

<sup>320</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

<sup>321</sup> National Juvenile Defender Center, "Waiver of the Right to Counsel," available at: [http://www.njdc.info/pdf/Waiver\\_of\\_the\\_Right\\_to\\_Counsel.pdf](http://www.njdc.info/pdf/Waiver_of_the_Right_to_Counsel.pdf).

<sup>322</sup> *Ibid.*

proceedings.”<sup>323</sup> According to NJDC, there are 14 such states: Arizona,<sup>324</sup> Arkansas,<sup>325</sup> Illinois,<sup>326</sup> Iowa,<sup>327</sup> Kentucky,<sup>328</sup> Minnesota,<sup>329</sup> Montana,<sup>330</sup> New Jersey,<sup>331</sup> Ohio,<sup>332</sup> Oklahoma,<sup>333</sup> Pennsylvania,<sup>334</sup> Texas,<sup>335</sup> Vermont,<sup>336</sup> and Wisconsin.<sup>337</sup> To that list, we can add Idaho, which disallowed juvenile waivers of the right to counsel in its most recent legislative session.<sup>338</sup>

Delaware’s Family Court – or if more appropriate, the Supreme Court or Legislature – should promulgate a similar rule prohibiting children from waiving the right to the assistance of counsel.<sup>339</sup> As the Supreme Court has noted, “the right to be represented by counsel is by far the most pervasive for it affects [an accused person’s] ability to assert any other rights he may have.”<sup>340</sup>

## RECOMMENDATION 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.***

In Delaware, attachment defined by *Rothgery* can occur at Family Court for certain cases, but for most cases the attachment occurs at Justice of the Peace Court. The indigent defense system, therefore, should ensure that, from the initial appearance before the JP Court magistrate and onward, and whether detained pending trial or not, the accused

<sup>323</sup> *Ibid.*

<sup>324</sup> Ariz. R. Juv. P. 10(D).

<sup>325</sup> Ark. Code Ann. § 9-27-317(d)-(g).

<sup>326</sup> 725 Ill. comp. Stat. 5/113-5.

<sup>327</sup> Iowa Code Ann. § 232.11(2).

<sup>328</sup> Ky. Rev. Stat. Ann. § 610.060(2)(a).

<sup>329</sup> Minn. R. Juv. Del. P. 3.02, 3.04.

<sup>330</sup> Mont. Code Ann. § 41-5-1413.

<sup>331</sup> N.J. Stat. § 2A:4A-39(b)(3).

<sup>332</sup> Ohio Juv. P. R. 3.

<sup>333</sup> 10A Okl. St. § 2-2-301.

<sup>334</sup> PA R. Juv. Ct. P. 152.

<sup>335</sup> Tex. Fam. Code Ann. § 51.10(b).

<sup>336</sup> V.R.F.P. 6(d)(4).

<sup>337</sup> Wis. Stat. § 938.23(1m)(a).

<sup>338</sup> House Bill 149 of the 2013 session, available at: <http://www.legislature.idaho.gov/legislation/2013/H0149.pdf>.

<sup>339</sup> Upon review of a draft of this report, OPD noted that Delaware’s Family Court has begun efforts to adopt such a rule. Any such efforts should be encouraged.

<sup>340</sup> *United States v. Cronin*, 466 U.S. 648 (1984).

has access to counsel as is his right. Some indigent defense systems solve this by bringing the initial screening process to the initial court appearance – with interviews to determine financial eligibility occurring at the courthouse moments after arrest. With so many Delaware defendants appearing at their second court hearing, in Family Court or the Court of Common Pleas, having not visited the public defender's office to get screened in advance, we suggest Delaware's indigent defense system strongly consider adopting this as its model.

No matter what method the indigent defense system chooses in the end, the courts and the prosecution have a constitutional obligation to refrain from pressuring, suggesting, or outright directing unrepresented accused persons from entering into plea negotiations with a prosecuting attorney (or a police officer acting as prosecutor) at any stage, and certainly not in advance of or during the defendant's initial appearance before a judicial officer. And where the defendant's initial appearance in court is also a critical stage, the court (whether Justice of the Peace Court or Family Court) is constitutionally obligated against conducting the court proceedings unless appointed counsel is present. Written waivers of the right to counsel should be abolished. Any examination of a defendant's intent to waive the right to counsel should be conducted by a judge, on the record, and in accordance with U.S. Supreme Court case law.<sup>341</sup> Delaware certainly has the option of limiting the number of court proceedings that qualify as critical stages as currently defined by the U.S. Supreme Court. For example, the Justice of the Peace Court could no longer be permitted jurisdiction to resolve cases in which the Legislature has seen fit to attach jail time as a potential sentence. But as with any choice, the Constitution is clear. Delaware must follow it and provide the accused with counsel.

Once counsel is appointed, whether a public defender or conflict counsel, that attorney should continue to represent the client until conclusion of the client's case. Lawyers qualified to handle felony cases, for example, should pick up such cases immediately following (if not at) their clients' initial appearances before the Justice of the Peace Court. Those same attorneys should then prepare for and appear on behalf of their clients at all critical stages in any level of court, whether Court of Common Pleas or Superior Court. If a client's felony charges are negotiated, or amended, to misdemeanors to be heard in the Court of Common Pleas, the attorneys should still continue with that client.

The same vertical representation method should be applied to the representation of all clients in all case types, including children. Children accused of crimes for which statute requires or permits them to be tried as adults in Superior Court should be represented by a public defender or conflict lawyer qualified to handle the client's case in both Family Court and Superior Court, continuing with the client as the case is bound forward and perhaps back again on reverse amenability.

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<sup>341</sup> See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), and *Iowa v. Tovar*, 541 U.S. 77 (2004).

## RECOMMENDATION 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.*

Each state's criminal justice system is unique. Therefore, the constitutional requirement that each state provide the accused with minimally effective representation anywhere the right to counsel attaches will necessarily encompass local realities and procedures. For this reason, many states' defense functions have promulgated performance guidelines for criminal defense representation made specific to their respective criminal justice needs. (See page 132.) Delaware should do the same, and the indigent defense system should adopt the policy that advancement for public defenders and certification for private counsel should be tied to regular, ongoing compliance with such standards.

But even after promulgating such performance standards, the indigent defense system must also develop a rigorous program to train its public defenders and private attorneys handling public counsel appointments on specific aspects of those performance standards. More than a basic approach to continuing legal education, the system's training program should have specific modules for core practice areas, with immersion sessions tailored for more novice attorneys. Training should never be *ad hoc*, but should be planned like any curriculum across several weeks and months so that each component of the training program serves to build the attorneys' knowledge and skill-set to better meet the advocacy needs of the system's clients. To that end, the training director should be a key member of the indigent defense system's management team, in order to coordinate the planning of specific training programming with the heads of the primary and conflict divisions. Attorney attendance at training opportunities must be compulsory to continued employment or participation in the conflict roster.

Each component of the indigent defense system, primary or conflict, must then monitor attorney performance for quality representation. The Office of Conflicts Counsel should look to the Massachusetts model here, and consider hiring private attorneys to handle supervisory tasks, like reviewing case files or conducting court observations and otherwise being available to act as a sounding board for private attorneys weighing difficult strategic options in their public cases. To eliminate conflicts between contract or appointed counsel, such supervising attorneys should not handle cases themselves. And as the courts system varies with such significance by county, the conflicts system should consider the Massachusetts model once more in tying supervision to the local needs of each county.

The primary system must also adopt a method for proper, ongoing supervision of the attorneys employed within the Office of the Public Defender. Supervising attorneys should handle fewer cases than line attorneys in order to allow sufficient time to handle their supervisory responsibilities, like reviewing case files or conducting court observations and otherwise being available to act as a sounding board for defenders weighing difficult strategic options in their cases, for each attorney they supervise. National standards, for example, suggest that a full time supervising attorney (who has no caseload himself) can supervise ten trial attorneys; a part time supervising attorney (who has a half-caseload) can supervise five attorneys.<sup>342</sup>

The indigent defense system must likewise limit workloads for all attorneys to ensure each has sufficient time to meet all performance requirements. Delaware-specific workload maximums should be adopted for each county, as the nature of the criminal practice varies from New Castle County to Kent County to Sussex County. Workload limits should apply equally to public defenders and private attorneys. Contracts for conflict counsel appointments should be tied to workload maximums, and all private attorneys seeking public counsel appointments should be required to report privately retained caseloads. And the indigent defense system must adopt procedures to ensure that, where the addition of one more case will cause an attorney to breach the established workload maximums, the excess workload is passed from the primary system to the conflict system, and where the conflict system is similarly overloaded, the excess workload is passed from the conflict system to the tertiary system.

Lastly, although it is more of a best-practice than constitutional requirement, the indigent defense system should consider tracking attorney and non-attorney time against specific performance criteria to garner a more accurate projection of what it actually takes to handle each component of a client's advocacy needs, based on each type of case – a far more accurate method of measuring (and thereby limiting) workload than any other available. More than that, however, tracking time enables policymakers to tie specific variables (like, “time meeting with the client in person”) not only to specific case outcomes and dispositions, but also to systemic outcomes (like recidivism rates, or the rate of former clients now employed and contributing to the tax base).

The 6AC recognizes that Recommendations 3 and 4, in particular, will require additional resources, such as the increased infrastructure (office space, computers, etc.) to allow for the additional attorneys needed, along with comparable increases in support staff.<sup>343</sup> Part of the required resources can be offset by reclassifying low-level, non-violent crimes to citations, promoting pre-adjudication diversion programs, and other means to lower the number of cases needing counsel in the first place.

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<sup>342</sup> National Study Commission on Defense Services' *Guidelines for Legal Defense Systems in the United States* (1976), Guideline 4.1. Available at: [http://www.nlada.org/Defender/Defender\\_Standards/Guidelines\\_For\\_Legal\\_Defense\\_Systems](http://www.nlada.org/Defender/Defender_Standards/Guidelines_For_Legal_Defense_Systems).

<sup>343</sup> National standards for public defense systems call for adequate support staff (such as social workers, investigators, mitigation specialists, paralegals, etc.) to assist the staff attorney in case-preparation. For example, standards call for one investigator and one social worker per three FTE attorneys. (NSC Guideline 4.1 and commentary, note 342 above.)

# APPENDICES

# APPENDIX A

## DECLARATION OF CONFLICT LETTER

**COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE**  
**New Castle County**  
**PUBLIC DEFENDER DECLARATION OF CONFLICT/  
REQUEST FOR APPOINTMENT OF COUNSEL**

**Name of Defendant:**  
 [REDACTED]

**Case No of Pending**  
 [REDACTED]

<u>Charge(s)</u>	<u>Type</u>	<u>Class</u>
TERROR THREAT	M	A
ENDANG WLF CHLD	M	A
ENDANG WLF CHLD	M	A
OFF TOUCHING	M	
OFF TOUCHING	M	
MENACING	M	

<u>Next Event</u>	<u>Next Event Date</u>
Trial	04/11/2013

**Name of Conflicting Client:**  
 [REDACTED]

**Case No. of Conflicting Client's**  
 [REDACTED]

**Case Open?**  
 Yes

**Next Event**  
 Trial

**Next Event**  
 04/25/2013

**Statement of Conflict:**  
 3. PD represents victim in this case

**Rule of Delaware Lawyers' Rules of Professional Conduct and Case Law**

The Public Defender's Office represents ██████████ in case # ██████████ in the Court of Common Pleas. ██████████ is seeking Public Defender representation in case # ██████████ in the Court of Common Pleas in which our present client, ██████████ is a listed victim. Pursuant to Rule 1.7(a)(1), the Public Defender's Office cannot represent ██████████ because attorneys from the Public Defender's Office cannot be required to cross-examine their own client, ██████████. ██████████ and ██████████ have adverse interests and therefore the Public Defender's Office cannot represent ██████████.

**Asst. Public Defender**  
██████████**Date**

02/18/2013

# APPENDIX B

## NOTICE OF HEARING LETTER

FAMILY COURT OF THE STATE OF DELAWARE  
22 THE CIRCLE  
GEORGETOWN, DE 19947  
ARRAIGNMENT 05/21/2013

THE FAMILY COURT OF THE STATE OF DELAWARE  
IN AND FOR SUSSEX COUNTY

Notice of Hearing

Case Number: [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] DE 199 [REDACTED]

DATE / TIME: Tuesday 05/21/2013 , at 09:00 AM  
EVENT: ARRAIGNMENT  
LOCATION: 22 THE CIRCLE, GEORGETOWN, DELAWARE  
FLOOR:  
COURTROOM:  
BEFORE: BEFORE THE HONORABLE ANDREW K. SOUTHMAYD

RE: STATE OF DELAWARE VS. [REDACTED]

Having been charged with the following offense(s):

Charge(s):  
001 Offensive Touching  
002 Disorderly Conduct by Fighting

You are hereby notified to appear personally before the Family Court of the State of Delaware in and for SUSSEX County, for ARRAIGNMENT

YOUR ATTENDANCE IS REQUIRED. YOUR FAILURE TO APPEAR FOR THIS HEARING MAY RESULT IN A CAPIAS/WARRANT BEING ISSUED FOR YOUR ARREST.

You are advised that you have the right to be represented by an attorney in any criminal proceeding before this court. If you feel that you can not afford to hire an attorney, immediately contact the Office of the Public Defender at (302) 856-5310, where they will determine if you qualify for the services of their attorney.

Plan on arriving at least 15 minutes early. Since your case is probably one of several scheduled for the same time, be prepared to spend as much time as necessary to get this matter resolved.

BRING THIS NOTICE WITH YOU AND DRESS APPROPRIATELY.

form CD (Defendant) generated: 05/06/2013 by KAS

# APPENDIX C

## COMPLAINT & SUMMONS

RUTH H. BARKLEY  
NOTARY PUBLIC  
State of Delaware  
County of Sussex  
My commission expires on October 03, 2013

STATE OF DELAWARE  
UNIFORM CRIMINAL COMPLAINT & SUMMONS  
STATE OF DELAWARE COUNTY OF SUSSEX  
CITY OR TOWN OF [REDACTED]

Date sworn: 4/25/2013  
Officer: JOSEPH W. MELVIN

OFFENDER SBI Number: [REDACTED]  
The undersigned police officer has just and reasonable cause to believe that on: 04/25/2013  
Name: [REDACTED]  
Address: [REDACTED]  
Date of Birth/Age: [REDACTED] 13 Sex: Female Race: White  
Eye Color: [REDACTED] Hair Color: [REDACTED] Height: [REDACTED] Weight: [REDACTED]  
Social Security No.: 000000000 Employer: [REDACTED]

Parent/Guardian  
[REDACTED]

You are hereby summoned to appear:

DATE/TIME: at [REDACTED]  
COURT: Sussex County Family Court  
LOCATION: The Circle Georgetown, DE 19947

### SUMMONS

### OFFENSE

Charge Sequence: 001 Police Complaint Number: [REDACTED] Arrest Number: [REDACTED]  
Charge: **Offensive Touching**  
In Violation of 11 Del.C. § 0601-00a1-M  
Location: [REDACTED]

TO WIT: [REDACTED], on or about the 25th day of APRIL, 2013, in the County of SUSSEX, State of Delaware, did intentionally touch [REDACTED] either with a member of her body or with any instrument, knowing that she was thereby likely to cause offense or alarm to that person.

See next page for remaining charges.

### AFFIDAVIT

PFC [REDACTED]  
Complaint Number: [REDACTED] Arrested \_\_\_\_\_  
(Release by Auth. Official)

sworn before me this \_\_\_\_\_ day of \_\_\_\_\_, AD \_\_\_\_\_.

Judge, Magistrate, Alderman, Commissioner \_\_\_\_\_

Failure to respond to this summons will result in the issuance of a warrant for your arrest and may result in fine or imprisonment or both.

I promise to appear in said court at said date and time.

Offender \_\_\_\_\_ Date \_\_\_\_\_

Parent \_\_\_\_\_ Date \_\_\_\_\_

Uniform Case Number: [REDACTED] CJIS Case Number: [REDACTED]  
Officer \_\_\_\_\_ Date \_\_\_\_\_

# APPENDIX D

## RIGHTS OF JUVENILES FORM

Form 290  
(Rev. 5/11)



### The Family Court of the State of Delaware

In and For  New Castle  Kent  Sussex County

#### RIGHTS OF JUVENILES

I, \_\_\_\_\_, fully understand that:

- (1) I have the **RIGHT TO BE REPRESENTED BY A LAWYER** in all hearings in Family Court. I also have the right to ask the Court to appoint a Public Defender to represent me if the Court finds that my parents/custodians cannot afford one.
- (2) I have the **RIGHT TO REMAIN SILENT** and cannot be forced to testify against myself.
- (3) I have the **RIGHT TO A SPEEDY TRIAL**.
- (4) I also have the **RIGHT TO QUESTION**, myself or through my lawyer or parents/custodians, **ANY WITNESS WHO TESTIFIES AGAINST ME**.
- (5) I have the **RIGHT TO HAVE WITNESSES TESTIFY FOR ME**.
- (6) I am **PRESUMED INNOCENT** until either:
  - (a) I plead guilty to the charge(s) or,
  - (b) I plead not guilty and am found guilty beyond a reasonable doubt of the charge(s) based on admissible evidence.
- (7) If I plead guilty to or am found guilty of the charge(s), I understand that the Judge/ Commissioner will impose a sentence within the limits set forth by law.

#### WAIVER OF RIGHT TO COUNSEL

(Check Box to Indicate if Waiving Your Right to Counsel)

- I have not retained a lawyer, privately or through the public defender's office, and I waive my right to be represented by a lawyer at my arraignment today. I understand that it is my responsibility to obtain a lawyer immediately if I want to be represented by a private lawyer or public defender at the trial.

**I HAVE READ AND UNDERSTAND MY RIGHTS AS STATED ABOVE.**

\_\_\_\_\_  
Parent or Custodian

\_\_\_\_\_  
Child

\_\_\_\_\_  
Court Staff  
Witness as to Signatures

\_\_\_\_\_  
Date

Form 290  
(Rev. 5/11)

**MANDATORY COMMITMENT**

The Mandatory Commitment Statute is intended to warn the first offender of the consequences of a second delinquency conviction. A delinquency conviction refers to an offense that would have been a felony had the juvenile been an adult when the act was committed.

I, \_\_\_\_\_, fully understand that:

1. The Court must and will commit a juvenile to the Division of Youth Rehabilitation Services for at least six months if he or she has been adjudicated delinquent of a felony by this Court and subsequently within the twelve months commits one or more felonies and is thereafter adjudicated delinquent of said offense(s).
2. A juvenile committed to the Division of Youth Rehabilitation services under the Mandatory Commitment Act will not be released on pass, leave, or aftercare during the first six months unless the Director of Youth Rehabilitation Services, in his discretion, determines that it is in the best interests of the child's treatment to participate in the programs which may require the child to leave the institution. Upon filing of a petition, the juvenile must appear before the original Trial Judge or a Judge designated by the Chief Judge before such a release will be considered.
3. An amenability hearing will be conducted for the juveniles who are charged with felony offense(s) after having been committed under the Mandatory Commitment act; that is, a hearing will automatically be conducted to determine if the juvenile should be heard in Family Court (as a juvenile) or in Superior Court.

We have read or had read to us the above explanation and understand the implication of the Mandatory Commitment Act.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Juvenile

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Parent/Guardian



SIXTH  
AMENDMENT  
CENTER

[www.sixthamendment.org](http://www.sixthamendment.org)