

NARRATIVE

A. STATEMENT OF PROBLEM

Delaware's Commitment to Quality Indigent Defense Counsel

U.S. Supreme Court Justice Lewis Powell, Jr. wrote, "It is fundamental that justice should be the same, in substance and availability, without regard to economic status," and this is a principle to which the Delaware Office of the Public Defender is dedicated. After the Gideon decision, Delaware established one of the nation's first statewide Public Defender Offices, and since that time, it has been the duty and privilege of the Office of the Public Defender to strive to provide quality representation equal to or better than any private attorney or law firm.

However, in Delaware, not all indigent defendants are represented by the Office of the Public Defender. In Delaware, the courts appoint counsel for indigent defendants. If the Office of the Public Defender is unable to represent a defendant due to a conflict of interest, an attorney is assigned by the Office of Conflicts Counsel. While the Public Defender is a well-established agency, the Office of Conflicts Counsel was formed in July 2011 and took over administration of the conflicts program in November 2011. The OCC is part of the Office of the Public Defender, but it has a different structure and resources which require it to employ different methods for providing indigent defense services.

Formation of the Office of Conflicts Counsel

Prior to November of 2011, Delaware's conflict program was managed by a patchwork team of judges, secretaries, court clerks and court administrators. The five major challenges with this model were: 1) no statewide administration existed for a program with a budget of \$2.95 million in fiscal year 2011; 2) various judges in each county and court hired and oversaw the

conflict attorneys and approved attorney and expert bills; 3) a myriad of court staff (court clerks, law clerks, and secretaries) were responsible for the assignment of conflict counsel; 4) the process of approving and paying for services was complex and inconsistent, requiring several layers of approval and multiple courts and judicial agencies; and 5) the program was consistently underfunded in the State's annual budget, requiring additional requests for funding during the fiscal year. Simply put, the program was underfunded, there was no centralized administration of the program, and processes and procedures were inconsistent, all of which imposed unnecessary burdens upon both the courts and conflict counsel.

The Office of the Public Defender envisioned an alternative method of administering Delaware's conflict program that would: 1) relieve the judiciary of the obligations of administering the program; 2) eliminate any appearance of impropriety that can arise when judges hire and pay appointed criminal defense counsel; 3) consolidate the administration of the conflicts counsel program into a single statewide office to standardize procedures; and 4) incorporate in-house expert and professional services similar to those currently available in the Office of the Public Defender.

To gain a better understanding of alternative means for conflicts administration, the Office of the Public Defender spoke with Delaware judges, court staff and conflict attorneys. The Public Defender also surveyed conflicts programs in other jurisdictions including Colorado, Georgia, Maryland, Massachusetts, New Hampshire, Vermont, Monroe County (NY), and San Diego County (CA) to design a program for Delaware. The Pubic Defender proposed a new conflict administration model more closely aligned with the ABA's *Ten Principles of a Public Defense Delivery System* and the ABA's *Eight Guidelines of Public Defense Related to Excessive Workloads*. The new model would have established a conflicts office that had in-

house resources similar to that of the Public Defender. Attorneys would still provide services on a contract basis, but the conflicts office would employ investigators, psycho-forensic evaluators¹, and mitigation experts to provide needed case related services. Unfortunately, the new model was not approved by the Delaware Office of Management and Budget. The Office of the Public Defender assumed responsibility for Delaware's conflicts program with the budget remaining the same as when the program was administered by the courts. The only difference was instead of the patchwork team of judges, secretaries, court clerks, and court administrators to administer the program, two positions were approved to administer the program.

The OCC's Current Structure and Caseload

Unlike the Office of the Public Defender which has a staff of approximately 150 employees which includes attorneys, investigators, psycho-forensic evaluators, mitigation experts, and legal support staff, the Office of Conflicts Counsel is staffed by one attorney (Stephanie J. Volturo, Esq., CV attachment 1) and one paralegal (Jennifer M. Young, MA, CV attachment 2). Attorneys provide services either under annual contracts or are appointed as needed on a case by case basis. All expert and other services are provided by independent contractors. With minimal staffing, the OCC oversees a network of attorneys that handle a large and complex caseload that requires significant expert and other services. Representation is provided in all Delaware state courts including Family Court, the Court of Common Pleas, the Superior Court and the Supreme Court. In fiscal year 2011, the Office of the Public Defender declared conflicts in more than 3,900 cases, including 1,094 cases in Superior Court, Delaware's felony level court.

¹ In 1980, the Delaware Office of the Public Defender established the first Psycho-Forensic Unit of any public defender office in the nation. The unit consists of Masters-level Psycho-Forensic Evaluators (PFEs) who assist the attorneys in their goal of providing the best possible legal representation to the client. The PFEs accomplish this task by obtaining relevant background information on a client's medical, mental-health and substance-abuse history; connecting the client with treatment services, developing client-specific plans for conditional pre-trial release, alternatives to incarceration and mitigation at sentencing; and assisting attorneys in the hiring, communication and presentation of expert witnesses to provide mental-health defenses and/or mitigating testimony.

This caseload includes matters wherein the client is facing significant consequences, including minimum mandatory jail sentences of up to life imprisonment, and, in the most extreme circumstances, the death penalty.

In Delaware, the Office of Conflicts Counsel represents approximately half of all defendants in capital cases. Although Delaware is the second smallest state, it has the third highest death-sentencing rate in the United States. Generally, between one percent and three percent of all murders result in a death sentence in other states. In Delaware, the rate has exceeded 20 percent of all homicides in some years.² Defending an individual charged with a capital offense requires an extraordinary amount of time and effort on the part of the defense team. According to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, a capital defense team must consist of two qualified attorneys, a mitigation specialist and an investigator. The team must contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. While the Public Defender currently has the resources to employ all required team members, the OCC has no support or expert services in-house and all expert and other case-related services are provided by independent contractors. “Death is different” and it is critical that attorneys defending capital cases have the resources necessary to properly defend these cases. Capital cases are expensive to defend, and since all services in conflict cases are provided by independent contractors, the number of capital cases assigned to conflict attorneys has a profound impact upon the OCC’s budget.

With a small staff and consistent underfunding, the OCC needs to take steps to make sure that it is able to continue to deliver effective, efficient, and quality legal representation for

² Johnson, Sheri Lynn, Blume, John H., Eisenberg, Theodore, Hans, Valerie P. and Wells, Martin T., The Delaware Death Penalty: An Empirical Study (March 11, 2012). Iowa Law Review, Forthcoming; Cornell Legal Studies Research Paper No. 12-24. Available at SSRN: <http://ssrn.com/abstract=2019913> or <http://dx.doi.org/10.2139/ssrn.2019913>

indigent criminal defendants and to provide the services conflict attorneys need to defend capital cases. All indigent defendants are entitled to high quality representation, and the quality of representation a defendant receives should not be different depending upon whether they are represented by the Office of Conflicts Counsel or the Office of the Public Defender. As many States, including Delaware, have faced budget crises in recent years, the need becomes more critical than ever to develop innovative, data-driven approaches for indigent defense delivery systems. In order to continue to provide high quality representation and to ensure that attorneys have access to the expert and other services they need to represent their clients, the OCC must engage in long-term strategic planning, establish best practices policies and procedures, and enhance its database so that the OCC can collect data that will enable it to make sound case management and resource allocation decisions and provide data that will support funding requests. The OCC will do this by implementing the following proposed project.

B. PROJECT DESIGN AND IMPLEMENTATION

Why Delaware?

Delaware's limited land mass but nationally representative demographics provide a rare opportunity to use a state level data set, data analysis and case-study to inform national level policy. Delaware is sometimes referred to as a microcosm of the nation because Delaware's demographics and land use reflect those of the nation as a whole. Delaware is comprised of three counties that supply the state with distinct metropolitan (New Castle County), micropolitan (Kent County) and rural (Sussex County) areas. Delaware's racial and ethnic composition is comparable to the racial and ethnic composition of the nation.³ A case study of Delaware provides an opportunity to develop and implement programs and policies on a state-wide level

³ 2005-2009 American Community Survey Delaware/prepared by the U.S. Census Bureau, 2011

while providing national level insight using a more research friendly limited state data set.

The Delaware Office of the Public Defender is committed to the unified statewide administration of the conflict counsel program. The “Answering Gideon’s Call: Improving Indigent Defense Delivery Systems 2012” grant offers a rare opportunity to research best practices policies and procedures and implement those practices in a newly formed office. Funding would allow Delaware’s Office of Conflicts Counsel to enhance its ability to provide quality representation to indigent defendants by developing and implementing an innovative data-driven approach that promotes strategies identified in the ABA’s *Ten Principles of a Public Defense Delivery System*.

As a newly established agency, the OCC is in a unique position to serve as a case study and become a best practices model for conflict counsel programs nationwide. The office is not burdened with outdated policies, procedures and data collection methods and is ripe for the implementation of effective, fiscally responsible practices that will ensure that the OCC provides high quality representation to indigent defendants.

The OCC will hire a Gideon Fellow who will serve as the point person for all grant activity. The fellow will be responsible for grant task coordination, reporting, and policy consultation. The fellow will serve as a policy advocate, building coalitions and working with grant partners such as the University of Delaware, Widener University School of Law and other indigent defense stakeholders. The fellow will be responsible for the coordination of the comprehensive review of policies and practices in the Office of Conflicts Counsel. The Fellow will utilize OCC resources and staff to help conduct an accurate and unbiased review of the OCC’s strengths and weaknesses. The Fellow will work with OCC staff and the University of Delaware to create a

comprehensive case management system. The Fellow will strive to ensure deadlines are met and keep OCC staff informed of all Gideon Grant progress.

Funding from this grant will allow the OCC to complete the following four objectives:

Objective 1: Identify and publish best practices in conflict counsel programs

To complete this objective the OCC will contract with Widener University School of Law to conduct a comprehensive review of policies and practices of indigent defense delivery systems within states and local jurisdictions to create a best practices guide for conflict services.

Widener School of Law's comprehensive review will address but is not limited to:

- Government entities and independent boards responsible for assigning, overseeing and financing indigent defense counsel
- Oversight of model contracts for assigned counsel
- Compensation for conflict counsel
- Resource allocation criteria for expert and other case related services (e.g. investigation, mitigation and psycho-forensic)
- Processes to ensure that only highly qualified lawyers are approved for indigent defense rosters
- Processes to remove unqualified lawyers from indigent defense rosters
- Processes that match cases to attorneys based upon attorney experience and training and case complexity and severity
- Development and implementation of training curricula for conflict lawyers

This task will be completed in months 1-6 of the grant cycle. The Gideon Fellow will work with Widener School of Law faculty and law students complete this objective (Sydney Howe-Barksdale, Esq., PhD, CV attachment 3). The Gideon Fellow will coordinate meetings between Widener School of Law and the OCC as necessary, establish a timeline for task completion, provide the OCC with regular updates, and work with Widener School of Law to ensure that the research timeline is met.

This guide will not only aid the OCC, but will advance the field of conflicts counsel administration as a whole by serving as a guide for other jurisdictions that wish to establish new or improve existing conflict counsel programs.

Objective 2: Conduct a survey of the strengths and needs of the OCC and make recommendations based on the best practices guidelines

To complete this objective the Gideon Fellow will work with OCC and Public Defender staff to complete an asset map of the OCC. The Fellow will identify strengths and weaknesses of the office. This task will also be completed in months 1-6. The Fellow will then work with the University of Delaware [REDACTED] and OCC staff to analyze and make recommendations using the best practices literature provided by Widener School of Law in months 6-12.

Identifying strengths and weaknesses and implementing proven best practices strategies will allow the OCC to ensure quality representation for indigent criminal defendants that the Office of the Public Defender cannot represent and to implement proven strategies for realizing the objectives with which it has been tasked by the Office of the Public Defender. Those objectives are: 1) to ensure sure conflict counsel are compensated fairly; 2) to provide conflict counsel with sufficient administrative support; 3) to hire a sufficient number of qualified attorneys to represent the volume of clients in need of, and entitled to counsel; and finally 4) to make appropriate expert services and other services available to conflict counsel.

Objective 3: Create research based policies and procedures for the provision of costly expert services

To complete this objective the Gideon Fellow will work with OCC staff and the University of Delaware. The University of Delaware will review the research provided by Widener and further enhance the research by:

- Surveying other jurisdictions regarding conflict expert services
- Analyzing cost benefit models
- Developing policies and procedures based on these findings

This task will begin in months 6-12 and continue through months 12-18. Completion of this objective will allow the Office of Conflicts Counsel to make sound resource allocation decisions and to provide justification for funding requests, thereby ensuring that conflict attorneys have the expert services necessary to provide quality representation to their clients.

Objective 4: Develop an interactive computer based caseload supervision management system that will monitor caseload and inform resource allocation decisions.

To complete this objective the Gideon Fellow and OCC staff will work with the University of Delaware to accomplish the following tasks:

- Create a supervision program that continuously monitors the workloads of conflict attorneys
- Adopt processes that match cases to attorneys based upon attorney experience and training and case complexity and severity
- Create a robust supervision and review process for indigent defense providers
- Create a system that tracks the use and cost of experts and other services by case and type of service
- Develop data mechanisms to collect and analyze such information

This task will begin in months 6 – 12 and continue through months 12 – 18. A pilot will begin in months 18-24. Completion of this objective will enable the Office of Conflicts Counsel to monitor caseloads, assign attorneys based upon caseload and level of experience, better monitor attorney performance, accurately track use of services and associated costs and make informed decisions regarding case assignments and allocation of resources.

Project Timeline

Objective	Activity	1-6 Completion	6-12 Completion	12-18 Completion	18-24 Completion
	Hire Gideon Fellow	X			
	Coordinator perform asset mapping	X			
	Begin Widener Lit Review & Best Practices Research	X			
	Meet w UD to Discuss Idea and Brainstorm Data collection methodology	X			
	Review Literature		X		
	Review Asset Map		X		
	Review Best Practices		X		
	Design Database		X		
	Interview Experts from Best Practice Sites		X		
	Begin testing new Database			X	
	Review Best Practices and Case Study			X	
	Develop Sustainability Plan			X	
	Publish Best Practices and Cast Study				X
	Analyze and share 6 mos database results				X
	Share sustainability plan				X

C. CAPABILITIES AND COMPETENCIES

The Office of Conflicts Counsel functions under the Office of the Public Defender for the State of Delaware. The Office of the Public Defender handles approximately 40,000 cases per year with an annual budget of over \$15 million (\$185,000 in federal funding). The Public Defender has 147 statewide employees (See attached Organizational Chart) which includes 68 attorneys, 6 investigators, 2 mitigation experts, 12 Psycho-Forensic evaluators and 59 legal support staff. An assistant public defender has been barred for an average of 19 years and has 16 years of state service. The Public Defender currently manages the following four open grants: 1) Mitigation Specialist for Capital Cases in Kent and Sussex; 2) Expansion of Statewide Mental

Health Services; 3) Gun Court Defender Advocacy Project; and 4) Community Prosecution and Defense Grants. The Office has the capacity to manage additional grants.

The OCC functions under the Office of the Public Defender, but maintains a separate office and budget. Funding for the Office of the Public Defender is separate and cannot be used to help with OCC expenses. In fiscal year 2011 the conflicts program was responsible for a total of 3,901 cases: 1,767 cases in the Court of Common Pleas, 1,042 cases in Family Court and 1,094 Superior Court cases. The OCC which now administers this program is staffed by two employees, an experienced attorney and a paralegal, both with Masters Degrees in Urban Affairs and Public Policy.

Although the OCC has a small staff and limited budget, it benefits from being part of a well-established and well-respected Office of the Public Defender that is committed to providing the best representation possible for indigent defendants. In its first six months, the Office of Conflicts Counsel seamlessly assumed responsibility for Delaware's conflicts program. The OCC's accomplishments to date include but are not limited to:

- Creating a central point of contact for attorneys, clients, and the courts to answer questions about conflict cases
- Enhancing administration and support for attorneys, allowing attorney's to focus less on administrative tasks and more on providing quality representation to conflict clients
- Ensuring timely assignment of conflict counsel in all counties
- Streamlining processes for expert and service requests
- Establishing uniform and consistent procedures for payment requests and approvals
- Implementing a case management system and budget tracking database adopted from the Office of the Public Defender

The OCC will contract with [REDACTED] from Widener University School of Law to conduct a comprehensive review of policies and practices of indigent defense delivery systems within states and local jurisdictions to create a best practices guide for conflict services. [REDACTED] is the Director of the Public Interest Resource Center and a

Professor of Legal Methods at the Widener University School of Law in Wilmington, Delaware.

works to promote public interest work among Widener law students by developing relationships with agencies in Delaware, Pennsylvania and New Jersey that need law school student volunteers. In addition, she supervises pro bono programs based on Widener's campus.

has been active in many professional and civic organizations including serving as a Board member of the United Way and as a Board member of the Germantown YWCA. She currently serves on the Board of Directors of the Delaware Volunteer Legal Services, the Law School Outreach Committee of the Philadelphia Bar Association, Public Interest Section of the Pennsylvania Bar Association, a member of the Parent Alliance and on the Leadership Team of the Families of Color organization at Westtown School.

is admitted to practice in the State of Maryland, and is a member of the ABA, NBA, and Philadelphia Bar Association.

The OCC will also contract with from the University of Delaware to conduct meetings/brainstorming sessions, conduct a literature review and provide database consultation (CV attached). is an interdisciplinary scholar of penology, law and society. Since arriving in Delaware in July 2007, she has placed five articles in peer-reviewed journals and co-authored two law review articles. She was awarded a General University Research Grant in 2008 which she used to complete two articles and to revise her book, *Sex Fiends, Perverts and Pedophiles*, published in 2011. Her work consistently prioritizes the study of justice institutions in practice. While earlier work focused on sex offender punishment, more recently her work in specialized courts focuses on conceptions of justice expressed by individuals across institutional levels: policy-makers, bureaucrats in middle management, and

Objective	Performance Measures	Data Grantees Provide
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front-line actors as well as the objects of justice institutions (such as criminal defendants). Such multi-level analysis was the key feature of her sex offender research, including her book and related articles in *Criminology and Public Policy* and the *International Journal of Law and Psychiatry*.

The Delaware Office of the Public Defender, the Office of Conflicts Counsel, Widener University School of Law and the University of Delaware have the capabilities and competencies to implement this project and collect data to support the research component. All staff members involved are qualified to produce the grant deliverables. The OCC under the Public Defender’s Office meets this grant’s eligibility requirement.

D. DATA COLLECTION PLAN

In order to measure the results of work done with funding from the “Answering Gideon’s Call” grant, the OCC will establish performance measures, collect and analyze data and report findings to the Office of Justice Programs. The following table includes measures the OCC will use to evaluate the project.

<p>Enhance a state or local jurisdiction's ability to provide quality representation to indigent defendants through training and technical assistance focused on the ABA Ten Principles</p> <ul style="list-style-type: none"> Identify and publish best practices guidelines for conflict counsel programs Conduct a survey of the strengths and needs of the OCC based on the best practices guidelines 	<p>Increase percentage of Delaware OCC conflict attorneys who are aware of best practices in conflict counsel by 100%</p> <p>Increase the number of Delaware attorneys who are aware of best practices in conflicts counsel by 20%</p> <p>Increase the number of national attorneys who are aware of best practices in conflicts counsel by 10%</p> <p>Increase percentage of OCC conflict attorney's who report an increase in knowledge or skill by 50%</p> <p>Increase percentage of OCC policies compliant with best practices guide by 50%</p>	<p>Number of Delaware best practices guides provided to OCC conflicts counsel attorneys during the reporting period</p> <p>Number of Delaware attorneys who request best practices guidelines in conflicts counsel during the reporting period</p> <p>Number of national attorneys who request best practices guidelines in conflicts counsel during the reporting period</p> <p>Number of Delaware best practices guide requests received from state and local public defender offices during the current reporting period</p> <p>Number of OCC attorneys reporting an increase in knowledge and skill</p> <p>Number of current policies compliant with best practices guide in year 1 and year 2</p>
<p>Support the development and implementation of effective policies and practices that advance indigent defense reforms and employ the ABA Ten Principles.</p> <ul style="list-style-type: none"> Create research based policies and procedures for the provision of costly expert services Develop an interactive computer based caseload management system that continuously reviews conflict attorney caseloads. 	<p>Implementation one or more best practices recommendations for the provision of costly expert services</p> <p>Increase percentage of OCC conflict attorneys who report greater efficiency in expert services needs by 30%</p> <p>Implementation of the interactive computer based caseload management system that continuously reviews conflict attorney caseloads</p> <p>Increase the number or cases entered into the database within 2 months of case start to 100%</p> <p>OCC adoption of adherence to numerical workload standards</p> <p>OCC adoption of classifications of attorneys based upon experience and training</p> <p>OCC adoption and development of enhanced case management system</p> <p>OCC adoption caseload standards that reflect the complexity/severity of cases assigned</p>	<p>Number of best practices recommendations for the provision of costly expert services implemented by OCC</p> <p>Number of OCC attorneys who report greater efficiency in expert services provision by the OCC.</p> <p>Number of expert and services requests</p> <p>Amount spent on expert and service requests per case</p> <p>Number of conflict counsel cases assigned</p> <p>Number of conflict counsel cases assigned per attorney and type of case (felony, misdemeanor, capital)</p> <p>Number of guilty, non-guilty and pleas in conflict counsel cases type of agencies that completed an evaluation of services</p> <p>OCC number of A. Adopted and adhered to numerical workload standards B. Adopted classifications of attorneys based upon experience and training C. Developed or enhanced their case management system D. Adopted caseload standards that reflect the complexity/severity of cases assigned with no corresponding</p>

