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**Delaware Public Defender
2004 Review**

FINAL REPORT
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Introduction

In July 2004, the Delaware Public Defender contacted The Spangenberg Group to assist it by conducting an updated review of the statewide public defender program. This report provides a current look at the Delaware Public Defender based on our most recent study. Although our study was somewhat limited in terms of scope and time, it aims to provide information and assessment on recent public defender projects and to make recommendations for continued program improvements.

The Spangenberg Group has worked with the Delaware Office of the Public Defender a number of times over the last seven years, providing technical assistance, reviewing the program, and making recommendations to assist in further improvement of the program. In 1997, TSG conducted an on-site assessment of the public defender program. In 1998, TSG assisted the public defender in its creation of a five-year strategic plan and returned to Delaware to assist in making the DELJIS case tracking system more valuable to the program and other Delaware criminal justice agencies.

The Spangenberg Group (TSG) is a nationally and internationally recognized criminal justice research and consulting firm that specializes in indigent defense services. TSG has conducted research in all 50 states and provides consultative services to developing and developed countries that are reforming their legal aid delivery programs. TSG has conducted comprehensive statewide studies of indigent defense systems in more than half of the states, and has worked with many jurisdictions in evaluation public defender systems.

Recently, TSG returned to Delaware on two occasions in July and August 2004 to survey improvements achieved, survey new programs, and to target areas for improvement. We met with over twenty attorney and non-attorney staff at the Public Defender's Office and the Delaware Criminal Justice Council (CJC). Among those interviewed are the Chief Public Defender Lawrence Sullivan, Deputy Public Defender Angelo Falasca, attorney supervisors, attorneys and staff of the various grant programs and the videophone unit, psycho forensic evaluators, the forensic nurse and DNA attorney, technology staff, Chief Justice of the Delaware Supreme Court, and Executive Director of the CJC. The report that follows is intended to both recognize progress in the public defender program and to identify areas to be targeted for improvement.

Public Defender Leadership

The Delaware Public Defender's Office is fortunate to have an experienced, dedicated, and innovative leader. Chief Public Defender Larry Sullivan has 34 years of experience in leading the program and is clearly dedicated to improving the quality and efficiency of the office.

Over the years, the Public Defender has advocated for and received salary increases for staff which has helped to keep experienced and dedicated attorneys in the program. The Public Defender has also managed to hire and keep attorneys who are qualified to expand the program's expertise in fields such as forensic evidence. We learned that other staff are also hired who contribute to the program's resources, such as in an-house investigator trained and certified to administer polygraph examinations. Public defender attorneys and staff also appear loyal to their longtime leader.

As discussed throughout this report, the Chief Public Defender has shown a concern for the rehabilitation and treatment of public defender clients, and he has acted by helping to institute unique, social service-oriented programs or services, including the Responsible Release Program, Civigenics Program, JAIBG VOP Program, Mental Health Court, and the longtime staff positions of psycho forensic evaluators. Such programs assist the attorneys by helping to improve client contact and referral services, assist in advocating for sentencing alternatives, and help to treat what is often the underlying cause of a client's criminal behavior.

In addition, the leadership of the Public Defender's Office has made exemplary use of federal grants to expand the program and its services, as shown by the projects discussed throughout this report. In doing so, the Public Defender has also shown a concern for efficiency and for easing the burden of other criminal justice agencies as well. The Videophone Project, for example, which started with federal funds, has helped to ease the burden of all participating criminal justice agencies statewide that are linked to the system. Through the use of the videophone system, agencies have saved substantial travel time, and the Department of Corrections has saved close to \$3 million in the cost of transporting prisoners in FY 03 alone. This project now pays for itself with the collection of a small user fee. The JP 20 Project, also federally funded, has similarly been successful in reducing Court of Common Pleas (CCP) caseloads and disposing of motor vehicle and misdemeanor cases more quickly.

The Public Defender has been intricately involved in the advancement of the Delaware criminal justice system over the years. In some jurisdictions across the country, the public defender agency is isolated from the rest of the criminal justice community and either does not attempt to be or is not accepted as a leader and a player to be consulted and heard. The Delaware Chief Public Defender, however, has been engaged over the years in all aspects of the criminal justice system. In addition to being Vice Chairman of the Criminal Justice Council (CJC), he has served on numerous CJC sub-committees over the years and has become a leader with innovative ideas who takes action and seeks positive change.

We feel that it is important for the leadership of a public defender program to not only be engaged in the criminal justice community, but also to be active in bringing about improvements. The Delaware Chief Public Defender has been in the position for 34 years, but this has clearly not kept him from continuously seeking to improve the agency, its services, and its efficiency.

Staffing, Salaries, and Experience Levels

Staffing

In 1998, we found that the Delaware Public Defender was in urgent need of additional staff due to overwhelming workloads. In FY 05, we find that the Public Defender has been successful in creating additional staff positions, although workload remains high today. The following table displays the staffing for the Public Defender's Office for FY 99¹ and FY 05:

Public Defender Staff - FY 99 & FY 05

| | Admin. | Attorney | Investiga- tion/Intake | Evaluators | Technology | Support | TOTAL |
|------------------|---------------|-----------------|-----------------------------------|-------------------|-------------------|----------------|--------------|
| <i>FY 99</i> | 5 | 56 | 13 | 8 | 4 | 27 | 113 |
| <i>FY 05</i> | 8 | 65 | 16 | 14 | 5 ² | 35 | 143 |

In FY 99, the Public Defender had a total of 113 positions, including three contractual attorney positions. In FY 05, the program has grown by 21 percent with a total of 143 positions, although not all are state-funded positions. Of these 143 positions, 128 are general FTE positions, five are federally-funded³, eight are contractual, and two are seasonal or casual. Approximately 10 percent of the current 143 positions are contractual, federal, or grant-funded positions. As discussed throughout this report, the Delaware Public Defender has been especially innovative in using alternative funding sources to expand its program.

In terms of attorney positions, the program has increased by 16 percent, or nine positions. However, six of the attorney positions in FY 05 exist only through federal grant funds and therefore cannot be considered permanent FTE positions.⁴ While the Delaware Public Defender has had success in turning federal positions into permanent positions with state funding, such positions nonetheless lack permanency. Stability of attorney positions is important for the Public Defender's Office, which needs to rely on them for workload distribution. This need is underlined by the high attorney caseloads in the office (see Caseloads, below).

Since TSG's prior work in Delaware, the Chief Public Defender and Chief Deputy Public Defender have become full-time positions, which we feel was an important step toward strengthening the administration of the program. In addition, in

¹ We attempted to compare staffing to FY 1998, but a staffing table for that year was not available.

² This includes one technology position placed at the Department of Corrections.

³ One of these positions receives appropriated special funds (ASF), which are federal funds channeled to the Public Defender through another state agency.

⁴ The six federally-funded positions are: two Justice of the Peace Court 20 positions; three Juvenile Accountability Incentive Block Grant positions; and one Re-entry Program position.

1997, TSG found that the Public Defender had insufficient administrative staff, and we recommended the creation of supervisory positions: Chief of Legal Services; Chief of Support Services; and Budget Management Officer. These positions were created and filled. Chief of Legal Services Brendan O'Neill oversees all attorney staff. Chief of Support Services Melvin Slawik oversees all support staff, including psycho forensic evaluators, investigators, intake workers, and secretarial staff. Budget Management Officer Mary Beth McDermott oversees the financial affairs of the program.

Attorney Salaries and Experience

While overall funding between the Public Defender and Attorney General shows a continued disparity (see Budget, below), Delaware is one of a few states with parity of public defender and attorney general salaries.⁵ In 2000, the Public Defender instituted a pay plan with a well-defined salary structure featuring promotional aspects that apply to all employees, whether they are staff, contract, or grant positions.

Since FY 1998, personnel costs, including public defender staff salaries and benefits, have comprised between 90 and 94 percent of the Public Defender's annual budget. Under the current pay plan, assistant public defender (APD) positions range from APD I to APD V, with salaries ranging from a starting salary of \$46,454 for an APD I who has passed the bar, to \$93,602 for a top APD V supervisor (and above for the Deputy and Chief Public Defender positions). The Delaware Public Defender has done well in advocating for the pay plan and salary increases. In FY 98, salaries were approximately \$10,000 less than they are today. Prior to the institution of the pay plan, in FY 98, a starting salary for an assistant public defender was \$36,111, and the highest salary for a senior public defender was \$84,308.

Under the pay plan, each of the five attorney levels has minimum qualifications, duties, and performance requirements. Within each of the five levels are further salary steps, primarily based on years of experience. The pay plan states that promotion through the successive steps can be attained only through "consistently meeting and exceeding the stated performance criteria."

The public defender pay plan salaries exceed those of most public defender programs in which we have had experience across the country, and we believe they are largely responsible for attracting and keeping experienced attorneys on staff. The Office of the Public Defender is fortunate in this respect. Often times, public defender programs are unable to attract and retain experienced attorneys because of low salaries, yet these are usually the attorneys who not only handle the more serious cases, but also are able to handle more cases with greater efficiency because of their experience.

Quality often comes with experience. We were generally impressed with the experience level and quality of both the attorneys and staff with whom we met, who

⁵ Other states with salary parity of prosecutors and public defenders include Connecticut and Massachusetts.

appeared dedicated to their work, to the program, and to the Public Defender. In FY 2005, the average experience level of the attorneys in the Delaware Office of the Public Defender is 19 years, which is the highest we have seen in our work around the country. In some states, such as Massachusetts where the starting public defender salary is currently \$35,000, low- and mid-level attorneys leave the program for private practice after gaining experience, primarily for financial reasons.

Both the Office of the Public Defender and the Office of the Attorney General are on an equivalent pay plan. We were told that the average years of experience of public defenders well exceeds that of assistant attorneys general; so do the salaries. This is unusual and speaks to the high degree of respect and consideration which the Office of the Public Defender has garnered in the state over the years.

Use of Federal Funds

A long-time priority for the program has been to make use of available federal funds. This was a priority for the program prior to 1998, and as well as in its 1998 five-year strategic plan, and it has certainly followed through. The Public Defender has made excellent use of federal funds and grant initiatives to expand the program's delivery of services and to improve the quality of representation provided. Too often, public defender programs fail to seek alternative funding sources.

With these efforts, one must keep in mind that federal grant funds are a time-limited resource that generally must end after three years. Thus, there is always a risk that federally-funded programs and staff will be lost when the grant ends. The Public Defender, however, has reportedly been able to continue nearly every federal grant program beyond three years by showing the success of the program to the state and receiving general funds for its continuance. This fiscal year (05) was an exception. With Delaware essentially in a budget freeze, the state did not pick up two federal grant programs, the JP 20 Project and the Responsible Release Program (see below), but the federal funding was able to be extended for another year.

Throughout this report, we describe a number of programs that either began with federal funds or that continue to exist through federal funds. The two examples below are in addition to the Videophone Project and others in the next section of the report that either began with or still receive federal funds.

JP 20

The Justice of the Peace Court 20 (JP 20) was created to help reduce the congestion and backlog of cases in the Court of Common Pleas of New Castle County. In 1998, the Municipal Court of Wilmington merged with CCP. The court consolidation took place in 1999 with the creation of JP 20, with representation provided by the Public Defender.

JP 20 hears state criminal and motor vehicle misdemeanors as well as a large volume of motor vehicle and other infractions occurring within the City of Wilmington. By statute, the Public Defender is prohibited from handling offenses that are filed exclusively as infractions in JP 20. JP 20 does not have jurisdiction to dispose of felonies.

Now in its fourth year, the JP 20 Project has been funded by a federal grant. The grant employs two public defender attorneys, two deputies attorney general, and support staff to handle the cases for pre-trial proceedings and trials. A public defender investigator performs intake and indigency screening for all out-of-custody clients. In FY 2005, the project was picked up again with federal funds, presumably due to its success in reducing the backlog and providing some relief to CCP's burgeoning caseload.

JP 20 hears both criminal and motor vehicle cases. Some cases are initially heard in JP 20 but must be transferred to CCP for disposition. Other cases must be resolved in JP 20, as CCP does not have jurisdiction. However, most cases heard in JP 20 may either be resolved there or may be transferred to CCP. The latter cases are usually resolved in JP 20 and thus receive an earlier disposition and reduce the CCP caseload. In this respect, JP 20 has been meeting its goals.

While we do not doubt the benefits of JP 20 in resolving a large volume of cases, and in a shorter period of time than CCP, we are concerned that the high caseloads of the public defender JP 20 attorneys and other circumstances (as discussed below) make ensuring sufficient client contact and case preparation in every case extremely difficult. Our table in the Caseloads section of this report, below, shows an average of 1,142 cases handled by each of the two public defender attorneys in JP 20 for FY 04. By the end of FY 2005, the Public Defender estimates that the attorneys will have each handled 1,231 cases. These caseloads are nearly three times the national standard of 400 for misdemeanor cases, although the national standard does not include motor vehicle offenses which normally take less time to resolve (see Caseloads, below). Still, the caseloads are very high. When we visited JP 20 in August 2004, the JP 20 public defender unit had 470 open cases, or an average open caseload of 235 per attorney. With caseloads this high, it is difficult for even the most experienced attorney to provide quality representation to every client.

In addition to high caseloads, the circumstances of some JP 20 cases make it difficult for attorneys to prepare their cases. The majority of cases in JP 20 are motor vehicle cases, which do not always come with a police report. JP 20 also handles non-motor vehicle, criminal cases. The defense may only have a complaint and a warrant in these cases, which makes it difficult to prepare a defense. Also, in JP 20, the defense attorneys generally receive case files the day before court, are not able to meet their clients until the day of trial, and are therefore unable to request investigation and subpoena witnesses prior to that time. If investigation or subpoenas are needed, attorneys must request a continuance. JP 20 attorneys and their clients may also decide that it is in the best interest of the client to transfer a case to CCP, which delays the case by several months.

Finally, the office space for the public defender staff of JP 20 is completely inadequate. The room is small and should be an office for one person, but all three employees must share the space. Two desks face each other with a divider in between, and the floor space is minimal with one chair for clients or witnesses to use, and there is little to no storage space. Furthermore, the office provides no privacy for privileged attorney-client communication as the wall separating the room from the hallway does not meet the ceiling, and the office is located just outside the courtroom, two doors down from the prosecutors' office, and next door to a common room used by both defenders and prosecutors. Given the high volume of cases that go through JP 20, we have a serious concern about the lack of space and privacy in which the defenders must work each day.

Forensic Services and Education

In addition to its focus on rehabilitation and treatment, the Delaware Public Defender is a leader in its focus on providing forensic services and education to both public defender staff and the Delaware bar to promote better understanding and use of the growing field of forensic technology in criminal cases. Through its education and DNA and Forensic Nurse Projects, the Public Defender's Office aims to identify forensic issues early in the case process and provide better advice to clients and seek outside experts sooner. Issues that may otherwise have been overlooked may be identified. The strength or weakness of the state's forensic evidence may be better understood, which may quicken a plea disposition or assist in the confrontation of evidence at a hearing or trial.

The Forensic Services and Education program has been in existence since 2001 and is funded by a federal Byrne grant that was expanded to four years and picked up in FY 2005 with state general funds. The Forensic Services and Education Coordinator, or the DNA attorney, is both an attorney and a registered nurse with knowledge and expertise in the field of DNA technology who trains public defender staff on DNA and forensic evidence, coordinates outside experts for trainings, and serves as an in-house resource for staff. The DNA attorney also receives case referrals from public defender staff, assists them in case preparation, and works closely with an in-house forensic nurse.

Cases in which the client has been charged with rape, homicide or attempted homicide, or a Class A violent felony are automatically referred for forensic and DNA review. Other cases that may be referred include those in which blood or hair samples were taken from the client, the client suffers from a serious physical illness or takes a large number of medications that may have affected his/her conduct, the client claims self defense and medical reports exist, and sexual assault cases where the victim received a medical examination.

In addition to the DNA Project, the Public Defender's Forensic Nurse Program employs one contractual nurse through a federal Forensic Nurse Grant. The nurse provides additional expertise and assistance to staff attorneys on new technology and

evidentiary tools such as forensic evidence and DNA technology. The Public Defender has also hired a recent law school graduate with a master's degree in forensic science and experience working at the state medical examiner's office who should soon become another staff attorney with forensic expertise.

Without these in-house resources, attorneys lacking the knowledge in this important field may miss important issues and defenses and fail to investigate scientific issues. Early identification of issues can also mean that important forensic evidence is preserved and collected. Both the DNA attorney and the forensic nurse may collect forensic evidence for testing, may participate in the medical aspects of a capital mitigation case, and may testify as medical fact witnesses in order to get medical information into the record. These in-house services save the time and expense of hiring an outside expert. The DNA attorney may also assist staff attorneys with direct or cross examinations of expert witnesses.

In one publicized success story, the DNA Project succeeded in getting a charge of attempted first-degree robbery dropped. The prosecution's eye-witness was an off-duty police officer, and without the DNA testing requested by the public defender attorney that ultimately proved his client's innocence, the client would almost certainly have been convicted.

The prosecution commonly has at its free disposal a myriad of scientific experts and resources. This stands in sharp contrast to public defenders who normally have no such readily-available resources. Both the Forensic Services and Education Program and the Forensic Nurse Program help to level the playing field, and they are reportedly the first such programs in a statewide public defender agency in the country.

Rehabilitation, Treatment, and Lowering Prison Populations

In its five-year strategic plan in 1998, the Public Defender noted a lack of rehabilitation and treatment programs being provided to the accused, estimating that 70 percent of persons charged with major crimes have a substance abuse problem that often relates to the offense. Since then, the Public Defender has narrowed this gap and instituted a number of programs that address rehabilitation and treatment for defendants pre-trial, during detention, and post-disposition. Such programs improve not only indigent defense services, but also the criminal justice system as a whole as they stand to reduce recidivism, prevent violations of bail and sentences, and lower the prison and juvenile detention populations, thereby creating a cost savings to the state.

Programs With Federal Funding:

Responsible Release Program

The Public Defender's Responsible Release Program (RRP), was started three years ago with federal Byrne grant funds to help address the overpopulation of inmates

housed at the Gander Hill prison in New Castle County. The goal of RRP is to reduce the New Castle County prison population by 100 inmates a year by helping low-level offenders meet pre-trial release conditions through close contact with volunteers. RRP individually trains volunteer members of the community to work with released defendants. While felony cases are not excluded, most of the defendants chosen for RRP have been charged with misdemeanors. Although the Attorney General supports the program, the office is not involved in deciding which defendants are recommended for RRP.

RRP, which staffs two persons, is located at the prison. RRP staff review the calendar, for arraignments and more recently also for capias returns, for new defendants in custody with a bail under \$10,000. RRP runs these defendants' criminal histories and capias histories, decides who may be suited for the program, and makes recommendations known to the public defender handling the case at the upcoming hearing. Defendants who are placed on RRP at their court hearing are released that day and must call or appear at the RRP office immediately or a capias is issued.

The Responsible Release Program has been very successful. We were told that each year, it has exceeded the goal of reducing the prison population by 100 inmates by about 20, and this year has exceeded the goal by 80-90 inmates. At any given time, RRP reportedly has between nine and 13 percent of the prison population on release through its program. Thus, the program has not cost the state anything, but has saved much in terms of prison costs. In addition, the program allows low-level offenders to be released and to receive treatment for mental health or substance abuse problems. We were told that some of the defendants are homeless, and thus likely would not have been released without RRP. In addition, 85 percent of those in the program are referred to mental health or substance abuse treatment. RRP therefore helps many to receive treatment that they would likely not otherwise have received on their own, thus also helping to reduce the chances of violations of bail and recidivism.

RRP has also reportedly been a successful vehicle for community outreach, involving local ministries as well as citizens. The number of citizen volunteers in the program has grown from nine to 58.

Juvenile Accountability Incentive Block Grant (JAIBG) Program

The Public Defender is now running its second federally-funded Juvenile Accountability Incentive Block Grant (JAIBG) program. The first program lasted for three years under the grant and addressed juveniles with mental health issues. The program was quite successful, as we were told that 56% of the juvenile cases involved in the program were not processed.

The second and current JAIBG program identifies and tracks juveniles who are at risk for violating their probation and represents those juveniles on the case in chief and at subsequent probation violation hearings. Cases are followed for nine months post-

adjudication for potential violations of probation. The Violation of Probation (VOP) program aims to address the high percentage of juveniles detained on probation violations. Juveniles who are appropriate for the program are identified at intake through a series of questions that assess risk factors.

The program staffs three attorneys on contract, one in each county, and one clinical psychologist. Under the terms of the grant, the attorneys are limited to the national juvenile caseload standard of 200 cases per year. With this caseload limit, the attorneys are able to give sufficient time and attention to the juveniles, which is an essential part of the success of the program. In addition, each juvenile in the program receives a psychological evaluation by the clinical psychologist, so that any mental health problems can be addressed and appropriate treatment sought.

Since the VOP, or JAIBG-2, program began in November 2003, through the beginning of August 2004, we were told that 42 cases have been completed, and only one juvenile has violated probation.

Re-entry Program

The Re-entry Program exists through federal funds to assist defendants released from prison after serving sentences to adjust back into society and to comply with existing conditions of release. Although the program was not the impetus of the Public Defender, it is staffed through the Public Defender program with one contractual attorney position. The federal funds for this contract attorney position come to the Public Defender through the Division of Health and Social Services (also described as appropriated special funds).

Programs With Some State Funding:

Civigenics Program

The Civigenics Program (formerly known as the Public Defender's 6 for 1 Drug and Alcohol Rehabilitation Program) began its operation in January 2003 as a result of a proposal drafted by the Delaware Public Defender to the Joint Finance Committee. The proposal sought to create a program that would allow pretrial detainees who cannot make bail or are in default of bail to receive substance abuse treatment in prison. The Division of Health and Social Services and the Department of Corrections agreed to the program and helped to set it up through their own budgets. As a result, the Public Defender was able to return the \$55,000 that it had received for the program to the state.

The Civigenics Program is a 45-day in-house treatment program at the prison, with 80 beds. Between December 2002 and December 2003, 157 inmates graduated from the program. By early 2004, only ten of these graduates had returned to prison.

Such a rehabilitative program addresses the substance abuse issues that are often the cause of criminal conduct and may well help to reduce recidivism, thereby reducing crime, future prison populations, and costs to taxpayers. The Responsible Release Program staff also monitor defendants in the Civigenics Program to assess whether they may be suitable candidates for release.

Mental Health Court

Mental Health Court began in Newcastle County Court of Common Pleas (CCP) in November 2003 to give specialized attention and treatment to defendants with mental health issues. This diversion court began through a coordinated effort of many criminal justice agencies, including the Public Defender, Attorney General, Division of Substance Abuse and Mental Health, and CCP. The Public Defender chaired the subcommittee of the Criminal Justice Council that was dedicated to starting the diversion program. The only state funding provided for the program was to the Division of Health and Social Services for two case managers who monitor defendants in the Mental Health Court and provide treatment referrals.

The Public Defender's Office, which has received no special or additional funding for the program, has one CCP attorney assigned to handle cases in the Mental Health Court, in addition to a CCP caseload. For a couple of years prior to the creation of the Mental Health Court, this attorney was similarly assigned to handle cases involving mental health issues, although there was no dedicated court program for them.

The public defender attorney can have no more than 30 open cases at a time in the Mental Health Court program. In addition, the Public Defender has one psycho-forensic evaluator who works with the staff attorney on the cases. The program requires the defendant to plead guilty, but a guilty finding is deferred for at least 18 weeks while the defendant receives mental health treatment. The Attorney General must consent to cases entering the program. Between November 2003 and the beginning of August 2004, 60 defendants have been referred to the program, eight have successfully graduated, and only one has left the program.

After successful completion of the program, defendants must petition the Superior Court to expunge their record. Expungement supports a person's rehabilitation as it helps prevent future discrimination from employment, education, and other opportunities based on a prior criminal history. However, because the onus is on the defendants themselves to file the petition to expunge (pro se or through a private attorney), typically it is simply not done. In response to this problem, the Public Defender plans to explore the possibility of having a law clerk file the petitions to expunge, and we strongly support this idea.

Programs Without Special Funding:

Innocence Project

In 2000, the Delaware General Assembly passed legislation that allowed previously convicted defendants to reopen their cases in order to seek DNA testing on old evidence. The Public Defender's Innocence Project, which has received no funds, is dedicated to reviewing old cases, investigating possible DNA issues, and seeking new testing where appropriate. The DNA attorney and thirty-six staff attorneys reviewed and investigated the written applications for testing. By February 2004, the Innocence Project had reportedly opened and investigated over 300 cases. This process involved finding the old cases, reviewing the facts, and searching for biological evidence. Because this was done without a budget, attorneys on the project still had to handle regular caseloads.

Psycho Forensic Evaluators

In addition to providing its clients with legal representation, the Delaware Public Defender's Office is clearly dedicated to seeing that its clients' underlying problems, such as mental health and substance abuse issues, are also addressed. The program's dedication and provision of such services goes well beyond that of any other statewide public defender program that we have seen, as evidenced in part by its use of psycho forensic evaluators. The Public Defender created the Psycho Forensic Unit in 1980 in large part due to the committed work of senior psycho forensic evaluator Beth Dewson. Chief of Support Services Melvin Slawik, who has been with the Public Defender's Office since 1991, oversees the unit and deserves recognition for the success of many of the innovative programs in the office. Although not a recent addition to the program, we feel that the work of the Psycho Forensic Unit is an integral part of the Public Defender program and worth a detailed discussion.

As of August 2004, the Psycho Forensic Unit of the Public Defender's Office had 12 psycho forensic evaluators (PFEs) and one supervisor. All PFEs have master's degrees and are experienced in social services. Clients are referred to the PFEs based on their responses to a series of questions during their intake interview. PFEs work with clients who have mental health or substance abuse issues and are the lead person in the office for client contact and communication. While a client may be represented by different attorneys at different stages of the case (e.g., preliminary hearing in CCP and case review in Superior Court), the PFE remains a consistent contact person. PFEs work with clients and can make outside referrals to treatment programs. Treatment referrals are an important part of representing indigent defendants, but in many public defender programs they are often not performed because attorneys simply do not have the time or resources to investigate and make the referrals themselves.

In addition to providing treatment referrals, half of the PFEs are trained to perform the particular evaluations that are necessary for a client to receive state social service through the Division of Alcohol, Drugs and Mental Health. This cuts down on

the time that clients have to wait to receive services, as it takes longer to get an evaluation from the state agency itself.

The PFE Unit in the Delaware Public Defender's Office provides an invaluable service to the clients and is largely successful through the support of the Public Defender who has made it a priority to (1) conduct needs assessments, and (2) to provide early intervention where possible. In addition to these goals, the PFEs also assist in the sentencing phase by creating and recommending alternatives to incarceration and assisting in mitigation. PFEs draft sentencing reports that are submitted to the Superior Court prior to sentencing hearings. In CCP and Family Court, PFEs may make oral presentations to the court on sentencing when there is not enough time to draft a written report. We were told that the pre-sentencing investigators outside of the program like and rely on the PFE reports which cover much of the same ground as their pre-sentencing reports. We were also told that 67 percent of the PFE sentencing plans are completely accepted by the court, and that 80 percent are at least partially accepted, which we believe is an impressive success rate.

In response to recent federal and state capital case law, as well as Delaware State Bar requirements in capital cases, the Public Defender's Office is converting two of the PFE positions into mitigation specialist positions. In addition, the office sought to create a third mitigation specialist position through a federal Byrne grant, so that each county will have a dedicated mitigation specialist to work full-time on the mitigation aspects of capital cases. We were told that statewide, the office averages between seven and nine capital cases a year. At the time of our site visit, there were seven open capital cases: four cases in the pre-trial stage and three on appeal. Mitigation specialists are an essential tool in the defense of capital cases, and the new positions are a positive addition to the program.

Public Defender Training

In its 1998 Five-Year Strategic Plan, the Public Defender's Office acknowledged that training for staff historically had been lacking. At that time, the goal and intention was to develop new training materials and to develop entry-level and ongoing training for all staff statewide. In addition, the program intended to create videos and make use of the videophone system for cost-effective and accessible trainings for staff across the state. Finally, the program hoped to receive grant funding so that it could send staff to outside conferences and trainings to exchange ideas and learn of recent developments with practitioners outside of the Delaware Public Defender's Office.

The Public Defender's Office has made excellent strides toward meeting its training objectives. Today, the office provides ongoing, in-house Continuing Legal Education (CLE) programs to staff attorneys between the months of September and April each year. Delaware attorneys must fulfill 24 hours of CLE every two years, and the public defender trainings allow them to satisfy this requirement as they are approved for CLE credit. The CLE training program at the Public Defender's Office is run by the

Forensic Services and Education Coordinator. A database records and maintains public defender attendance, so the office knows when attorneys have fulfilled certain training requirements. For example, competency in forensics is a requirement for an attorney to proceed to a higher attorney level and pay scale, and this is monitored through the in-house program.

The CLE programs provided by the Public Defender's Office are free and open to attorneys outside the office, which allows the office to run them without paying a CLE provider fee. The trainings provided cover topics such as domestic violence, capital litigation, immigration, substance abuse and mental health, trial practice, ethics, and DNA and forensic evidence. The trainings are made available on videotape and through the videophone system for those that cannot attend live trainings.

We received positive feedback from staff about the trainings, which were described as topical and professional. In addition, we were told that attorneys outside the office attend the trainings. The CLE program was created and is largely run by the Public Defender without funding. The Public Defender did receive some grant funds for the CLE program which it used to retain persons such as Peter Neufeld of Cardozo School of Law's Innocence Project to conduct trainings, but these funds were depleted. However, the program has still managed to get some outside trainers without charge from universities and other organizations, and also continues to use its own staff to conduct trainings.

The Public Defender is to be commended for meeting a large part of its goal to provide in-house training through the creation of its CLE program, and for doing so at little to no additional cost. The program appears to be a success, and we agree with the Public Defender that both on-going and initial training for staff attorneys is very important to the goal of providing an effective defense. Moreover, while the program has been running on a "shoe-string" budget, we feel that it deserves to be regularly funded on some level with its own line-item. Such funding would ensure that the program can continue to attract new persons to conduct quality trainings on current issues. Such funding could also be used to send some attorneys to national conferences and trainings with criminal defense attorneys across the country. New ideas and information can be brought back to the program and shared with all staff. Finally, training funds should be used to create a training program for new attorneys who need to be trained in the fundamentals of the public defender practice not addressed by the CLE program. Although most public defender attorneys are well-experienced, new attorneys are occasionally hired and should receive some specialized training. Additional provisions for national and entry-level trainings would complete the Public Defender's 1998 training goal.

Data and Technology

Case Tracking

TSG previously recommended that the Public Defender and other criminal justice agencies use a common case definition for tracking its cases. The Public Defender's Office counts cases according to their Delaware Uniform Case (DUC) number. A DUC number is assigned to every case after arrest and remains with it through final disposition. A DUC number is defined as a unique defendant and unique incident (in time and place). A single DUC number will result in a single warrant but may involve multiple charges. The DUC number remains with the case throughout the court process.⁶ The DUC number exists as a possible uniform method of case counting among Delaware's criminal justice agencies. We were told that most of the agencies are using the DUC number for reporting case data, although some courts do not appear to be uniformly following this method.

Within the Public Defender's Office, much progress has been made in the past several years in terms of its own case tracking capabilities. In 1997, TSG found that the case-tracking system in the office needed to be refined or perhaps entirely revamped using a more accessible software program and consistent data entry. We also suggested that in redesigning the system, the office consider the types of reports it would like to regularly generate.

Today, the office is tracking detailed information on all cases in the office. Close to 100 different reports are run on case data, and technology staff is capable of running about 100 additional reports on an ad hoc basis. The regular case data reports that are run include nearly 50 annual reports, 36 quarterly reports (including six for grant projects), and 12 monthly reports. The office tracks opened, closed, and pending cases according to court and attorney. Cases are also tracked according to disposition and the stage in the case in which the disposition occurred (e.g., plea at arraignment or trial – not guilty). Reports can be run to reflect the caseload and case dispositions by an individual attorney, court, county, or statewide office. Reports on attorney open caseloads are set to be run monthly by the attorneys and sent by e-mail to their supervisors.

Following our recommendation from our 1997 report, the office began tracking the classification of each charge by level of seriousness (Felony A, Felony B, etc.). Although the office occasionally produces reports by case classification on an ad hoc basis, they do not produce such reports on a regular basis. We recommend that the office develop regular reports based on case classification to more accurately reflect workload.

⁶ If a case with multiple charges is later split by the Attorney General (e.g., a misdemeanor charge returns to CCP but the felony charge remains in Superior Court), then the DUC number remains with each charge but there will be an additional use of an (A) or (B) following the number. Similarly, the Attorney General may later choose to consolidate one or more original cases (incidents) against one defendant by filing a single indictment. In this case, the original, separate DUC numbers are supposed to be superseded by a new DUC number associated with the single indictment, although this reportedly does not always occur.

In 1997, the Public Defender was not counting violation of probation and capias matters in the public defender workload. Because public defender attorneys spent time and effort in providing representation in these cases, it was our opinion and recommendation that the office begin to count these matters separately in attorney and office caseloads. In 1998, the office created a separate database for tracking and counting violation of probation and capias matters to more accurately reflect attorney workload. However, as discussed below in “VOP and Capias Representation”, we believe this database should be expanded to separately track and report on the cases in which the Public Defender represented the defendant on the underlying case and those in which a private attorney previously represented the defendant. We understand that the technology staff already has the capability to do this using the cases’ DUC numbers.

We should note that because of the manner in which representation is provided by the office (i.e., one case may be handled by several attorneys at different stages), the case tracking data does have some flaws. Some cases may be counted twice in different courts. For example, a felony case with a preliminary hearing in CCP court is counted in CCP, but will also be counted upon disposition in Superior Court. Still, the preliminary hearing handled by the CCP attorney is work performed and should be factored as part of that attorney’s workload. At the same time, a case that remains in the same court is counted only towards the caseload of the attorney who disposes of the case. For example, if a case in CCP court is handled by one attorney for a motion hearing, and by a second attorney for trial or plea, only the second attorney is credited with handling the case in terms of caseload disposition. Thus, some work performed by individual attorneys is not factored in to their workload.

Through the Public Defender Case Database, attorneys and staff can track useful information on their individual cases, including: client and case information; forensic and DNA evidence; prison and video phone visit tracking; case events; case remarks; plea offers; and foreign language translator account tracking. Through this database, automated discovery requests are sent to the Attorney General’s Office, which saves in staff time and office resources, and expedites the discovery process.

In 2003, the Public Defender Conflict Module was created to identify and track conflict cases statewide and the reason for the conflict. The module automatically prints and files conflict documents with the court and reports a variety of statistics. This is an important addition to the program’s case-tracking system, as conflict cases should be tracked for caseload and fiscal projections.

We were impressed with the quality of the program’s technology staff who we met; they are both knowledgeable and experienced. The technology staff are a great asset to the program as they make meaningful use of the data and efficiently track it through the reports. We observed the data tracking system to be efficiently and capably run. We feel that the data tracking capabilities in the Delaware Public Defender’s Office, which is an essential element in the successful operation of a public defender agency, exceeds that of most we have seen.

Finally, in 1998, the Public Defender's Office pledged to continue its efforts and cooperation in developing an integrated statewide case tracking system. The office has been involved in such efforts through its Chief of Technology, William Nissley, who is chairman of the Board of Managers of the Delaware Justice Information System (DELJIS), which oversees the development of Delaware's integrated Criminal Justice Information System (CJIS). The Judicial Information Center (JIC) system is the court-based system used by CCP and higher courts, while DELJIS is the system used by all other agencies and Justice of the Peace (JP) courts. Information from DELJIS is fed into JIC, and vice versa. However, JIC, which is an older system, is to be replaced by a new system called Courts Organized to Serve (COTS). Public Defender Chief of Technology William Nissley serves on the COTS Steering Committee to help ensure that Public Defender interests are represented in this new system.

The Public Defender's Office keeps track of each charge associated with a case, and would like to be able to record the disposition of each charge, but is unable to retrieve the disposition data from the JIC system. JIC is capable of sending this data to the DELJIS system, and we recommend working closely with the court to provide for the transfer of disposition data to the DELJIS system.

DELJIS has created much information-sharing that has proven useful to public defenders. Through DELJIS, attorneys are able to access their client's criminal history, possible arrest photos, DMV photos and records, information on the client's arrest, charges, custody status, and next court date. They can also access Department of Corrections information on their clients, including arrest, bail, and no contact order histories. Also through DELJIS, attorneys can access the FBI's Automatic Fingerprint Identification System (AFIS), and they have online access to the Judicial Information Center (JIC), the court's case database system. DELJIS also allows the criminal justice agencies to directly send documents to other agencies' printers, so that faxing or e-mailing is not necessary. We commend the Public Defender and all criminal justice agencies in Delaware for their coordination and use of DELJIS.

Computer and Technology Resources

Every public defender in the office has a desk top computer with Windows 98, Microsoft Exchange with Outlook for internal and external e-mail, Word Perfect 6.0 or 9.0, and Word 2000. However, the Microsoft Office Software, Word Perfect 6.0, and Windows 98 are all six- or seven-year old versions and need updating, especially as the vendors no longer support all of the products. Although the Public Defender requested funds for updating the programs in the FY 05 budget request, the request was denied.

The office has a Training Administrator to run computer and software trainings (e.g., Microsoft Word cross-training) who is also a knowledgeable resource for staff with technology questions or problems. Technical services and support calls to the help desk are tracked in a call tracker database.

While the Public Defender's Office did not receive funds to upgrade its software programs, it did receive most of the requested funds to upgrade its research capabilities to Westlaw online. Since 1995, the office had been using several legal source software libraries on CD-ROMs for their legal research. However, the CD-ROMs could never provide necessary up-to-date law and had limited search capabilities. The ability of attorneys to perform accurate and current legal research is paramount to providing effective representation. The addition of Westlaw online was also necessary to fairly compete with the Attorney General's Office which has had the service for some time, and will allow public defenders, who must file their own appeals, to be more efficient in performing their legal research. The Public Defender's Office was also able to obtain CLE credit for their attorneys attending the new Westlaw training.

Finally, we were told that public defenders have access to useful litigation resources on the public defender server, including a brief and motion bank, model jury instructions, and DNA pleadings. Such resources are time-saving and useful tools for public defenders.

Videophone Project

A videophone system has successfully been used by Delaware criminal justice agencies for 15 years to provide fast and efficient communication and reduce transportation needs and costs. The Public Defender, who chairs the Criminal Justice Council's Videophone Committee, has supported and helped expand Delaware's Videophone Project. The Videophone Project provides equipment, technical support, infrastructure, training, and other resources necessary to provide statewide networked videophone linkages for participating members of the criminal justice community. The system, which is the first unified statewide criminal justice videophone system in the country, now has over 100 locations linking the courts, law enforcement agencies, Attorney General's Office, Public Defender's Office, Department of Corrections and juvenile detention centers, Boards of Pardon and Parole, and State Service Centers.

Matters such as arraignments, preliminary hearing waivers, capias returns and bail hearings may be handled via videophone. In addition, public defenders can use the system to communicate with clients who are in custody. We support the use and expansion of the Videophone Project, although we caution against a reliance on the system as a substitute for in-person initial interviews of in-custody clients and for use in contested evidentiary hearings. We feel initial interviews should be conducted in person by attorneys whenever possible, and that the presence of the defendant and defense attorney is an important element in contested hearings in order to personally confront witnesses and conduct attorney-client consultation if necessary during testimony. (The latter position is supported by the Public Defender who did not agree to conduct preliminary hearings via videophone when Department of Corrections staff refused overtime which was necessary for transporting prisoners to court.)

The Videophone Project, which has never used state general funds, has saved Delaware millions of dollars over the years in inmate transportation costs alone. The videophone system handles approximately 4,000 transactions statewide in one month, and in FY 03, it reportedly saved the state \$2.8 million in transportation costs. The project began with federal grant funds and is now funded by a \$1.00 user fee on fines that was approved by the legislature and earmarked to fund the videophone system.

The project provides and maintains the videophone equipment and staffs two persons to run the help desk and one technical person. Although the greatest costs of the project have been the long distance phone use, CJC Videophone Project staff implemented a pilot project in four videophone sites using internet rather than phone access, reducing toll call costs by 45 percent. The projected annual income from the Videophone Fund (user fees) is \$177,000, which slightly exceeds the expected operational costs of \$172,500.

Caseloads

In its 1998 Five Year Strategic Plan, the Public Defender's Office reported that its attorneys were overworked and cited average Superior Court attorney caseloads for FY 97 ranging from 632 cases in Kent County up to 748 cases in Sussex County, well above the national standard of 150 annual felony cases. Caseloads in Municipal Court, CCP and Family Court, and appeals were also reported to be similarly in excess of national standards.

In 1973, the National Advisory Commission (NAC) published its recommended maximum annual caseload standards for full-time public defenders, standards which have been endorsed by the American Bar Association and tailored by many local jurisdictions to their own practice. Standard 13.12 on courts of the NAC report states:

The caseload of a public defender attorney should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.⁷

One of the goals of the office in 1998 was to reduce the overwhelming caseloads of the public defender attorneys. However, the Public Defender's Office cannot control the increase of indigent defense cases in Delaware, and cannot add more attorney positions without funding. Through its budget requests, the Public Defender's Office has sought funding for additional attorney positions for years, but the need remains unfilled.

⁷ National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts* at 186 (Washington, D.C. 1973). The standards are disjunctive, thus, if a public defender is assigned cases from more than one category, the percentage of the maximum caseload for each category should be weighted and the combined total should not exceed 100 percent.

Part of the reason the office has been able to handle such high caseloads over the years is the manner in which it provides representation, sometimes referred to as horizontal representation or, as it is called in the Delaware Public Defender’s Office, “zone defense”. Superior Court attorneys in the Delaware Public Defender’s Office keep their cases through trial or plea from the first Superior Court case review, attorneys not in Superior Court are assigned to dockets rather than cases. Attorneys handle all the cases scheduled for the same docket, but afterwards the cases are transferred to other attorneys who are assigned to the next scheduled docket for the case. Drawbacks to this method of representation include lack of continuity in the attorney-client relationship, constant transferring of case files, and limited time for case preparation. While horizontal representation has its critics, it generally allows an office to handle a higher volume of cases. The Public Defender’s Office has also helped ease some of the workload strain with the use of temporary grant funds and alternative projects, as discussed throughout this report. Examples include the JP 20 attorneys, JAIBG grant attorneys in Family Court, and the Videophone Project.

We attempted to compare caseloads of FY 98 to those in FY 04. However, the public defender case tracking system has improved significantly since FY 98, and because of the changes, we were unable to make a valid caseload comparison. Specifically, in FY 98, although the office did not track violation of probation (VOP) and capias cases, an annual estimate of those cases based on limited data was included in FY 98 annual figures, and we were unable to calculate this estimate to create a reliable comparison to FY 04. In FY 04, VOP and capias matters are tracked separately and not included in annual figures. Therefore, we provide FY 04 figures only. The following table represents the average attorney caseloads, by court, in FY 04 based on closed cases (excluding VOP and capias) and attorney positions:

Public Defender Caseloads, FY 04

| | Superior Court | CCP | JP 20 | Family Court |
|---------------------------|-----------------------|------------|--------------|---------------------|
| Closed Cases | 5829 | 11875 | 2284 | 5216 |
| Attorneys* | 27 | 13 | 2 | 11 |
| Avg. Atty Caseload | 216 | 913 | 1142 | 474 |

* Staffing levels are based on Jul 04 - FY 05 staffing table and do not include three JAIBG/VOP attorneys in Family Court (who are limited to an annual caseload of 200).

The caseloads shown in the above table do not reflect the entire workload of the office. Attorneys are performing work not reflected in the above data such as probation violation hearings and capias matters (as discussed below) and videophone representation. In addition, the office counts sentencing matters separately, and these are also not reflected in the above table. Some Alderman’s Court and appellate cases (see below) are also handled by attorneys but not included in average attorney caseloads because they could not be similarly divided by dedicated attorney positions in each court.

As the table above indicates, public defender attorney caseloads are still well in excess of the national standards. Superior Court attorney caseloads (216) are nearly one-and-a-half times the 150 standard. CCP attorney caseloads (913) are nearly two-and-a-half times the 400 standard. As previously discussed, JP 20 attorney caseloads (1,142) are almost three times the 400 standard for misdemeanors. However, this is not an entirely accurate comparison because JP 20 cases are mostly motor vehicle offenses, and as cited above, the NAC misdemeanor standard excludes motor vehicle offenses (which can often be handled in less time than other misdemeanors). Family Court attorney caseloads (474) are two-and-a-third times the 200 standard. In 1997, we said that even for the most experienced attorneys, the caseloads were unacceptably high. This statement remains true today.

In 1997, TSG found that one of the manifestations of the high caseloads was the low trial rate, which had reportedly fallen in recent years from 15 percent to approximately five percent. As discussed above, we could not make an accurate comparison with FY 98 data, but we provide FY 04 data below, by county and by court, on closed cases and trial rates for FY 98 and FY 04.

Cases Closed and Trial Rate, FY 04

| | Cases Closed | Trials | Trial Rate |
|--------------------|--------------|--------|------------|
| Newcastle | | | |
| CCP | 7727 | 66 | 0.9% |
| JP | 2284 | 92 | 4.0% |
| Family | 3540 | 128 | 3.6% |
| Superior | 3398 | 76 | 2.2% |
| Kent | | | |
| CCP | 1826 | 29 | 1.6% |
| JP | 0 | 0 | n/a |
| Family | 967 | 21 | 2.2% |
| Superior | 1222 | 17 | 1.4% |
| Sussex | | | |
| CCP | 2322 | 9 | 0.4% |
| JP | 82 | 2 | 2.4% |
| Family | 709 | 22 | 3.1% |
| Superior | 1209 | 21 | 1.7% |
| Totals | | | |
| CCP | 11875 | 104 | 0.9% |
| JP | 2366 | 94 | 4.0% |
| Family | 5216 | 171 | 3.3% |
| Superior | 5829 | 114 | 2.0% |
| Grand Total | 25286 | 483 | 1.9% |

As in the prior table, these cases do not include additional matters for which the public defender provides representation, including Alderman's Court, appeals, VOP and capias matters.

In FY 04, the Public Defender closed 25,286 cases. The statewide public defender trial rate has fallen to approximately two percent. Forty-seven percent of public defender cases are in the Court of Common Pleas (CCP). As shown in the attorney caseload table, in this court, attorneys' caseloads are nearly two-and-a-half times the national standard. This is likely at least a contributing factor to the lowest trial rate among the courts, at nearly one percent. Justice of the Peace Courts have the highest trial rate at four percent, despite the high caseloads. The Family Court trial rate ranks second, at 3.3 percent, and Superior Court one percentage point above CCP at two percent. Although trial rates appear to be dropping nationwide and are rarely above five percent, the Delaware Public Defender rates appear to have dropped significantly over the past decade, and given the attorney caseloads, they are worth monitoring.

Additional Public Defender Services

Indigency Screening

Public defender staff perform indigency screening for the state. By statute, the Public Defender may determine indigency prior to arraignment; otherwise, the court must determine indigency at arraignment. Public defender investigators or intake workers who perform initial interviews of defendants for the Public Defender's Office also determine whether the defendants are indigent and eligible for public defender representation.

In Delaware, the task of indigency screening is a service provided by public defender staff in addition to performing public defender services, such as interviews and interoffice referrals. As caseloads increase in Delaware, so do the time and need for indigency screenings and, correspondingly, public defender workload and staffing needs.

VOP and Capias Representation

Each year, the Delaware Public Defender's Office provides representation in thousands of violation of probation (VOP) and capias⁸ hearings. This representation is provided although Delaware defendants do not have a right to be represented by counsel at these hearings. Nonetheless, public defender time and resources are dedicated to indigent representation in all VOP and capias matters, regardless of whether the defendant was represented by the public defender on the underlying case. Representation is also not limited to indigent defendants. For example, a defendant may have received probation on a case in which he was represented by a court-appointed or retained private attorney, but if he returns to court for violating that probation without counsel, the VOP becomes a new public defender case regardless of indigency status.

⁸ A capias is a warrant issued by the court when a defendant fails to appear for his or her case in court. When the defendant later appears, either voluntarily or after being arrested on the capias, a hearing is held on a return of the capias, bail is set, and the case is scheduled for the next court proceeding.

As previously mentioned, the Public Defender’s Office began tracking VOP and capias matters in FY 98. The matters are tracked separately from cases involving the disposition of original criminal charges. The following table displays the number of VOP and capias cases handled by the Public Defender’s Office in fiscal years 03 and 04:

VOP and Capias Representation: FY 03 - FY 04

| | VOP | Capias | Other Cases Closed | Total | % VOP | % Capias | % VOP& Capias |
|--------------|------|--------|--------------------|-------|-------|----------|---------------|
| <i>FY 03</i> | 5299 | 8947 | 23541 | 37787 | 14% | 24% | 38% |
| <i>FY 04</i> | 5323 | 9838 | 25542 | 40703 | 13% | 24% | 37% |

As the table illustrates, public defender attorneys have handled over 14,000 VOP and capias matters per year in each of the prior two fiscal years. VOP matters have made up between 13 and 14 percent of their caseloads, and capias matters have made up nearly a quarter of their caseloads. Together, VOP and capias cases are well over one-third of public defender caseloads.

While VOP and capias cases are and should be counted separately because they generally require less time and effort to handle than criminal charges, they do add to public defender workload significantly when experienced in such numbers as these. In Superior Court, for example, the Public Defender’s Office assigns a staff attorney on a rotating basis to handle technical VOPs (as opposed to VOPs resulting from new criminal charges) on a rotating basis. Similarly, every morning and afternoon in Superior Court, there is a capias docket which is covered by a public defender attorney. Such matters may not involve significant case preparation in comparison to criminal charges, but they do require court time and attention, and leave attorneys with less time to handle their own cases.

Conflict Cases

Rules of professional conduct and case law on effective representation prohibit lawyers from representing a client with whom there is a conflict of interest.⁹ Such rules have caused most public defender agencies to have a policy against representing co-defendants, although policies regarding prior representation of a victim or witness vary. Some programs do not accept such cases, while others do with the consent of the client.

⁹ Rule 1.7 of the Delaware Lawyers’ Rules of Professional Conduct prohibit a lawyer from representing a client if the representation will be directly adverse to another client or will be “materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests”. Exceptions exist if the lawyer reasonably believes there will be no adverse effect and the client consents after consultation, which in the case of co-defendants, must include an explanation of the advantages and risks of common representation.

Until several years ago, the Delaware Public Defender's Office represented co-defendants except when there was an explicit conflict of interest. This was the policy until the Delaware Supreme Court decided *State v. Lewis* (No. 354) on July 28, 2000, at the beginning of FY 01. In *Lewis*, one of two co-defendants represented at trial by the same public defender appealed his conviction. The Delaware Supreme Court held that Lewis' Sixth Amendment right to effective assistance of counsel was denied because there was an actual conflict and absence of a valid waiver of that conflict. Since the *Lewis* decision, the Public Defender's Office has not been representing co-defendants.

The previous Public Defender policy of representing co-defendants was a policy that the courts allowed and one that reduced the state's need for private court-appointed counsel. In FY 98, the number of cases statewide that were sent from the Public Defender's Office to court-appointed counsel was only 959. In FY 04, a few years after *Lewis*, the number of cases that were sent to court-appointed counsel more than tripled to 3,134.

As previously mentioned, the office now tracks the number of conflict cases, by county and court, and the reason for the conflict. In FY 04, the office conflicted out of 2,622 co-defendant cases. However, it conflicted out of only 46 cases statewide because of victim representation, and only 18 cases because of witness representation. With 31,800 cases opened in FY 04 statewide, assuming all conflict cases were opened prior to a withdrawal, eight percent resulted in co-defendant conflicts and only one percent resulted in victim or witness conflicts. Less than one percent were considered conflicts for other reasons.

The Public Defender's Office responded to the *Lewis* case by changing its conflict policy. However, the office still lacks a formal, written conflict policy. Such a written policy should cover not only co-defendant cases, but also prior representation of a victim or witness, and other potential conflict scenarios.¹⁰ In addition, the policy should include a procedure for determining conflicts, such as requiring the staff attorney to complete a conflict form and requiring the final conflict decision to be made by a supervisor. Having written policies and procedures in place provides staff with guidance, helps to ensure uniform conflict decisions, and helps to ease any concerns others may have regarding the office's conflict policy and decisions. For example, we were told that the office policy is to represent the first co-defendant who comes in to the office, and a written policy to that effect would show others that such decisions are not made subjectively.

Appeals

The Delaware Public Defender's Office has one statewide attorney devoted to working on appeals only. With this exception, public defender attorneys must file their own appeals and represent their clients at the appeal. This manner of appellate representation is efficient for the courts and for the state, as it saves them from needing to

¹⁰ See, e.g., *ABA Criminal Justice Prosecution and Defense Function Standards*, Standard 4-3.5, available at <http://www.abanet.org/crimjust/standards/home.html>.

appoint and pay another attorney for the appeal. However, this manner of representation also has its critics. First, in a state such as Delaware where the argument of ineffective representation of trial counsel may be raised in a direct appeal, there is at least the potential for a conflict of interest to arise should an attorney be faced with raising the issue of his own ineffectiveness. Second, filing an appeal requires significant attorney time to review the record, perform research, and draft the brief. Appellate work adds to the already high caseload of Delaware public defenders. In FY 04, the office opened a total of 86 appellate cases and closed a total of 116. Although the trial attorneys can and do consult with the appellate attorney for their appeals, the appellate attorney also has his own caseload to handle.

While we do not suggest the Public Defender's Office stop representing clients on appeal, and we understand that its budget is too constrained to create a full and separate appellate unit, we do recommend that the office create written policies and procedures for handling its own appeals, including situations that involve potential conflicts of interest.¹¹ We have already provided the Public Defender with standards and material from other organizations, and we understand that the program intends to review and consider them in the possible implementation of its own appellate policies.

Public Defender Budget

In 1997, TSG found that funding for the Delaware Public Defender was both inadequate and disproportionately lower than the Attorney General. In FY 97, the Public Defender's budget was \$6.1 million while the Attorney General's was over two-and-a-half times that at \$16.6 million. We recognized then, as we do now, that the Attorney General handles a number of non-criminal matters. However, at the same time, the Attorney General receives many in-kind resources not reflected in its budget which the Public Defender lacks, including the resources of state and local law enforcement. While the disparity in funding has been narrowed, it still exists today.

In FY 98, the Public Defender's budget was close to \$6 million. In FY 05, the budget has grown to \$10.6 million. In comparison, the Office of the Attorney General's budget was \$13.4 million in FY 1998 and is now \$20.1 million in FY 05. While the public defender budget has grown by \$4.6 million, the attorney general budget has grown by \$6.7 million. Today, the public defender budget is still half the size of the attorney general budget.

Due to the funding disparity, TSG previously recommended that the Public Defender create a balance sheet to reflect a true comparison of the resources of the two programs. We understand that this was done for the office's FY 99 budget request.

¹¹ See, e.g., *ABA Criminal Justice Prosecution and Defense Function Standards*, Standards 4-8.2 to 4-8.6, available at <http://www.abanet.org/crimjust/standards/home.html>, and National Legal Aid and Defender Association Standards for Appellate Defender Offices, available at http://www.nlada.org/Defender/Defender_Standards/Standards_For_Appellate_Defender_Offices.

Progress towards equalizing the budgets has been made, although the progress is limited. In FY 98, the public defender budget was 45 percent the size of the attorney general budget; in FY 05, this disparity has been reduced by eight percent, as the budget is now 54 percent as large as the attorney general's.

As in many states across the country, Delaware has recently been faced with fiscal problems. We were told that for the past several years in Delaware, there has essentially been a freeze on the state's budget, and therefore on the budget of the Public Defender, which is a state-funded agency. As a result, the Public Defender's budget requests have been very limited, and in its FY 05 request, the program received four of its 25 budget requests, although some only partially, and others involved federal rather than state funding. With state funds, the office received \$60,000 of a \$75,000 request for Westlaw; and one of four requested paralegal positions. In order to save federal grant-funded programs that were not picked up by the state, Justice of the Peace Court 20 (JP20) and the Responsible Release Program, both had their federal funding extended.

Findings and Recommendations

1. The Delaware Public Defender's Office is administered by a dedicated and innovative leader with outstanding experience. The Chief Public Defender has been leading the program for 34 years, and has developed a capacity and reputation for working well with the criminal justice agencies, promoting new ideas, and getting things done. The Public Defender is a strong advocate for the program and has earned the loyalty of the public defender staff. He has remained engaged in the Delaware criminal justice community and is a leader with a voice.

Through the Public Defender's involvement in the Criminal Justice Council and various committees, the Public Defender has been able to advance the program, create innovative projects, and advocate for alternative funds to expand the program's services. Through our work with the Delaware Public Defender over the years, it is clear to us that the Chief Public Defender is dedicated to improving not only the Public Defender program, but also the Delaware criminal justice system as a whole, and continues to search for ways to improve the quality and efficiency of both.

2. The Public Defender has been able to expand its staff and services since 1998, and has made great use of alternative funding sources to do so. Approximately 10 percent of the current public defender staff positions are either contractual, federal, or grant-funded positions. The program's use of federal grant funds exceeds that of any statewide program that we have seen. A program, however, cannot rely on time-limited alternative funds as a stable and reliable way to expand staffing and address workload needs. While the Public Defender has been able to continue nearly all federal grant programs through a shift to state funding, such continued funding cannot be relied upon over time. Because attorney caseloads remain too high, we feel that greater emphasis must be placed on the Public Defender's strong need for additional permanent FTE attorney positions.
3. The Public Defender Pay Plan is an improvement in the program's salary and promotional structure. In conjunction with the salary and promotional steps, the plan includes minimum qualifications, duties, and performance requirements for attorneys. The salaries under the pay plan, which are among the best we have seen, help to attract and keep experienced attorneys in the program.
4. Justice of the Peace Court 20 (JP 20) is meeting its goals of early resolution of cases and lessening the caseload in the Court of Common Pleas. Nonetheless, we are concerned about the volume of cases and other circumstances that limit attorneys' ability to prepare their cases. We are also very concerned about the lack of space and ability of public defender staff to communicate confidentially with client. We recommend that the Public Defender closely monitor JP 20 caseloads and discuss the space and privacy issues with the court and the Attorney General to improve public defender representation.

5. The Delaware Public Defender forensic programs are an important and integral tool in providing efficient and effective representation to indigent defendants. The programs provide public defenders not only with training, but also with in-house expertise and resources so that they may understand and use forensic evidence, keep up with the emerging field of technology, and more closely match the resources of the Attorney General. We were impressed by the quality and professionalism of the forensic staff and by the commitment of the Public Defender to employ people with the ability to run and enhance the forensic programs.
6. The Delaware Public Defender exceeds any other statewide program that we have seen in its dedication to addressing and treating the underlying cause of its clients' criminal conduct. Too often, mental health and substance abuse issues remain undiagnosed and/or untreated, and the cycle of criminal conduct continues. The Public Defender has followed through on its intention to address more of these problems with the creation of the Responsible Release and the juvenile Violation of Probation programs, and with its support and direction in the creation of the Mental Health Court and the Civigenics Program. In addition, the Public Defender continues to employ qualified psycho forensic evaluators that provide valuable services for the clients and public defender attorneys through client contact, treatment referrals, and alternative sentencing reports that are largely accepted by the courts. These program help to lower prison populations and to reduce the chances of recidivism, thereby resulting in cost-savings to Delaware's criminal justice system. We also support the addition of in-house mitigation specialists for capital cases.
7. To the extent possible, the Public Defender should work to develop quantifiable data on the cost-savings resulting from the many innovative and rehabilitative programs that it has helped to create. For example, if clients in the RRP or VOP Program are kept from prison or detention, what are the housing costs saved? Similarly, if PFE reports are accepted by the court and involve less prison time than is being sought by the Attorney General, what are the prison costs saved?
8. The Public Defender training program is largely successful and a marked improvement from 1998. Although the trainings are provided with little or costs, we feel that they should ultimately be regularly funded through a line item in the Public Defender's annual budget. When resources become available, an in-house training program should also be developed for entry-level attorneys, and attorneys should attend national defender conferences and trainings in order to share Delaware's successes and to receive new ideas from other defenders around the country.
9. The Public Defender has made many improvements in the case-tracking capabilities of the office and currently has one of the best case-tracking systems that we have seen. Much information on individual cases can be tracked, as can

specifics on individual attorney caseloads. With these capabilities, and because of the high workload of attorneys, we recommend that supervisors ensure that they regularly receive attorney caseload reports and review them to monitor the balancing of attorney workload and attorney performance. The program should also make use of other Public Defender Case Database capabilities to monitor performance, such as periodic monitoring of attorney-client contact through reports on prison visits and videophone visit tracking.

We recommend that DUC numbers in the VOP and capias database be used to regularly report and distinguish between cases in which the Public Defender represented the defendant on the underlying case and those in which a private attorney represented the defendant. We further recommend that the office develop regular reports that reflect the classification of cases to more accurately reflect attorney workload. Finally, the office should work closely with the courts to provide for the transfer of disposition data to the DELJIS system so that the office may record the disposition of charges.

10. As the Public Defender stated in its FY 05 budget request, the office is strongly in need of updated software programs. The programs currently in use are out-of-date and some are no longer supported by the vendors.
11. Attorney caseloads continue to be a problem. Superior Court attorney caseloads are nearly one-and-a-half times the national standard; CCP attorney caseloads are nearly two-and-a-half times the national standard; JP 20 attorney caseloads are almost three times the national standard for misdemeanors; and Family Court attorney caseloads are two-and-a-third times the national standard. As in 1997, these caseloads are much too high even for the most experienced attorney. In conjunction with continuously high caseloads, the public defender trial rate has dropped from a reported five percent (and a previous 15 percent) to approximately two percent statewide, with the lowest trial rate at one percent in CCP. Low trial rates are often a byproduct of high caseloads, and both should be monitored closely by the office.

The public defender caseloads call into question the ability of the attorneys to continue to meet their professional and ethical obligations to their clients, and put the program and the state at risk for lawsuits. The Public Defender should discuss the risks of the high caseloads and the critical need for additional attorneys with other criminal justice agencies and with the legislators. This must be a top priority for the office.

12. Indigency screening is an additional service provided by public defender staff, one that is frequently performed by the courts or a separate governmental agency. The Public Defender spends time and resources in performing this function, and this should be raised by the program when it seeks additional funds and staff positions. When filings increase, so do the number of interviews and screenings public defender staff must perform.

13. Well over one-third of public defender cases are violation of probation (VOP) and capias matters. The provision of counsel at VOP and capias hearings is not legally required, but public defender representation at the hearings is a convenience and efficiency for the courts and benefits defendants who might otherwise be representing themselves. The Public Defender represents not only defendants that it represented on the underlying case, but also defendants who were previously represented by court-appointed and privately retained counsel, regardless of indigency status. Although VOP and capias matters normally take much less time to resolve than a criminal charge, they nonetheless require significant attorney time and resources especially when handling such a volume (over 15,000 VOP and capias matters in FY 04 alone). The volume of this work is even more significant given the high caseloads in trial matters.
14. The Public Defender should issue written policies and procedures for determining conflicts of interest. Written standards not only provide public defender attorneys with guidance, but also help to defend the office from potential criticism of its conflict decisions. Conflict policies should define a conflict and should address the different types of conflicts that occur. Conflict procedures should describe which co-defendant the office will represent and should provide that the final conflict decision be made by someone other than the assigned attorney (e.g., a supervising attorney).
15. The Public Defender should issue written policies and procedures for handling appeals. The appellate policies should include guidelines for attorneys handling their own appeals to assure that potential issues relating to ineffectiveness of counsel are raised whenever they are appropriate.
16. Notwithstanding public defender salary parity with the Attorney General's Office, overall funding of the programs remains disproportionate. This issue needs careful attention in the immediate future.