

Study: Delaware legal defense of poor risks lawsuit

By Sean O'Sullivan, The News Journal 10:55 p.m. EST February 18, 2014



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An independent review of Delaware's legal defense system for the indigent concludes it is "constitutionally deficient" and effectively denies many poor Delawareans their right to adequate representation.

The 200-page report by the nonprofit Sixth Amendment Center was commissioned by Delaware Public Defender Brendan O'Neill and paid for with a \$120,000 federal grant.

It determined that the state does a good job for indigent defendants facing felony charges, such as rape and murder, in Superior Court. But it fails to provide adequate representation for lesser, misdemeanor charges in the Court of Common Pleas.

The Center's executive director, David Carroll, said it is not a matter of Delaware failing to meet a "perfect" standard, but the state failing to meet minimum American Bar Association and constitutional standards. If the failings are not addressed, they could bring a civil rights lawsuit from the U.S. Department of Justice or the American Civil Liberties Union, he said.

Although misdemeanor crimes involve far less – if any – jail time, Carroll said the state's failure results in severe and life-long consequences for those who end up with a criminal record. "People's lives are being ruined," he said.

[Auditor says lawmakers are jeopardizing investigations \(http://www.delawareonline.com/story/firststatepolitics/2014/02/18/auditors-lawmakers-higher-pay/5587195/\)](http://www.delawareonline.com/story/firststatepolitics/2014/02/18/auditors-lawmakers-higher-pay/5587195/)

Carroll said the problem was not the quality or professionalism of attorneys in the Public Defender's Office or with private "conflict" attorneys hired by the state.

"You have good people, but they are working in a deficient system," he said. "The system has just evolved over time, and it hasn't been able to get the resources needed."

Kathleen MacRae, executive director of the Delaware ACLU, said she found the report "eye-opening" and "profoundly concerning."

MacRae said the problems highlighted need to be addressed, and that if the state fails to act, the ACLU is prepared to sue. But at the same time, MacRae said she understands that everyone involved needs time to read the report and absorb the recommendations.

"We're not rushing to file a lawsuit," she said. But if the state ignores the issue, litigation "is on the table."

O'Neill said when he commissioned the report he was looking for an objective, outside analysis, and that is what he got. He compared the final result to an uncomfortable visit to the doctor after a routine physical found problems.

"They said some things that make us realize we have some work to do," O'Neill said. "We are not looking at it as blaming anyone, but as an opportunity to better serve our clients. The facts are what they are."

The report found that though defendants are advised of their right to an attorney at their initial appearance, they often do not get to talk to an attorney unless they are incarcerated before trial.

As a result, many misdemeanor criminal defendants often appear at court proceedings without an attorney.

"There they face subtle, and often overt, pressure to discuss potential plea arrangements with the prosecution or to waive due process rights," wrote the report's authors.

The report also cited a similar failure to have adequate representation for children in delinquency proceedings in Family Court, leaving children and their parents to fare for themselves early in the process.

And for those cases that move forward in the Court of Common Pleas, the report faulted the Public Defender's Office for failing to have consistent representation – meaning one attorney following a defendant's case through the system. Instead, clients are often handed off between lawyers resulting in little attention to each individual case.

The report's authors said excessive caseloads leave public defense attorneys "with insufficient time to properly work on all their cases." Some public defenders are routinely handling three times the national standard, according to the report.

The report's authors also called for greater training and accountability for lawyers who represent the poor, decrying the lack of explicit, formal performance standards and a mechanism to review the performance of the attorneys.

Carroll said Delaware also should establish an independent board to oversee defense of the indigent – as has been done in other states – to both enforce standards and take over appointment of the Delaware Public Defender to insulate the office from political pressures.

Currently, the governor appoints the state's chief public defender to a six-year term.

Carroll said without that independence, the office is encouraged to make do with what they have rather than zealously advocating for changes or additional funding.

Having an independent commission "isn't a blank check," Carroll said, but it has a better chance of getting what is needed.

Carroll also said that more money is not necessarily the only way to address the problems. The state also could look at structural changes like downgrading some categories of misdemeanor charges – such as minor motor vehicle infractions that carry potential jail time – to civil violations, which do not require the state to provide legal representation.

O'Neill said he is taking steps to address concerns raised in the report and also has created an advisory group – including the ACLU's MacRae – to assist in implementing its recommendations.

"We are going to implement as much as we can without incurring any new costs," he said. But O'Neill added that to fully enact the report's reforms, he will need help from Dover.

"It is not going to be easy. It took us 50 years to get to this point; we are not going to turn it around in six months," he said.

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