



INNOVATIVE SOLUTIONS IN PUBLIC DEFENSE

Kentucky

Supervising and Supporting Contract Attorneys Handling Conflict-of-Interest Cases



Problem

In all areas outside of Louisville, when a person in Kentucky is charged with a crime and cannot afford a lawyer, the Department of Public Advocacy (DPA) is responsible for ensuring that the accused individual has access to effective, zealous, and ethical legal representation. This remains the case even when the DPA has a conflict of interest that would prevent it from directly representing that person (e.g., cases involving co-defendants when the prosecutor offers plea deals in exchange for information each defendant can provide against the other). When these conflicts arise, some cases are handled in-house—where ethical rules allow and with the clients' consent—but other conflict cases are assigned to private attorneys who contract with the DPA.

DPA's method of contracting with private attorneys was hampered by two major problems:

- 1) The system depended on finding qualified attorneys who would take cases below the market rate for their services; and
- 2) As the system was structured, no meaningful supervision or quality control of conflict attorneys' performance was conducted, and few supports were available.

In comparison to the DPA's full-time staff public defender program, which is itself under-resourced, the conflict program suffered from a severe lack of resources and supervision, effectively creating two very different public defense systems for DPA clients.

Solution

Through the support of the Bureau of Justice Assistance, the DPA undertook a project to address these problems and improve the conflict counsel program. This project had four main goals:

- 1) Evaluate the conflict system,
- 2) Provide training to conflict attorneys,
- 3) Increase supervision of conflict attorneys, and
- 4) Improve conflict attorneys' overall performance.

Program

To achieve these goals, the DPA partnered with researchers from the Department of Criminal Justice at the University of Louisville to collect data from a test group of conflict counsel. The program combined increased support for conflict counsel with surveys and evaluations to assess the effectiveness of this support and identify further needs.

Using grant funds, DPA hired an experienced supervising attorney for the new position of Conflict Counsel Coordinator to oversee the test group of conflict attorneys. This role provided assistance that had previously been available only to full-time public defenders, including sharing of sample motions, one-on-one case reviews, and second chair assistance. Additionally, for the first time, DPA hosted intensive, two-day training sessions specifically targeted to conflict attorneys' practice.

University of Louisville researchers surveyed conflict counsel to measure the effectiveness of the additional training and case supports provided through this project. Researchers also used administrative data from the courts and data submitted by attorneys to determine whether increased supervision and support impacted the quality of representation provided by conflict attorneys.

This program was developed to address two of the ABA Ten Principles of a Public Defense Delivery System, which recommend that there be “parity between defense counsel and the prosecution with respect to resources and defense counsel [be] included as an equal partner in the justice system” (Principle #8) and that “[d]efense counsel [be] supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards” (Principle #10).

Results

The conflict counsel surveys allowed DPA to identify more accurately how resources are being used and where more are needed. The DPA's final report recommended several strategies to improve the conflict counsel program, including:

- **Restructuring Payments to Contract Counsel:** The flat-fee structure for paying conflict counsel, which was used before and throughout the program, incentivized attorneys to spend as little time as possible on cases, thereby undermining the quality of representation. The project team recommended that conflict attorneys be paid an hourly rate (\$50 to \$75 per hour), with soft caps on how much an attorney can bill for a single case based on the seriousness of the case and the case's disposition (i.e., by plea or by trial).
- **Culture Change:** The prevailing attitude around the conflict counsel program was that because contract attorneys are underpaid, they cannot be held to the same standards and expectations as full-time public defenders. Changing that approach is key to bringing the quality of conflict counsel services in line with those provided by public defenders.
- **End Late Appointment of Conflict Counsel:** Conflict counsel was typically not appointed until after indictment and sometimes as late as the client's second court appearance, “meaning that clients sometimes had to wait over 60 days after arrest until meeting with their attorney.
- **Supervise and Enforce Standards:** Ensuring the quality of conflict counsel requires supervision and yearly evaluations with consequences for not meeting performance standards.

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