

1 In the Matter of the
2 New York State Office of Indigent Legal Services
3 Public Hearing on
4 Eligibility for Assignment of Counsel

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6 **Location and Time of Hearing**

7 Albany County Courthouse
8 16 Eagle Street, Courtroom 427
9 Albany, New York 12207
10 Thursday, June 16, 2015, at 11 a.m.

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12 **Panel Members:**

13 John R. Dunne
14 Michael G. Breslin
15 William Leahy
16 Angela Olivia Burton
17 Joanne Macri

18 **Speakers:**

19 Albany County Executive Daniel McCoy
20 Robert Linville, Esq.
21 Greg Lubrow, Esq.
22 Hon. Dr. Carrie A. O'Hare
23 Lee C. Kindlon, Esq.
24 James Milstein, Esq.
25 Melanie Trimble, on behalf of NYCLU

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2 **MR. DUNNE:** Good morning. There's
3 nothing better than seeing a prompt full
4 courtroom. Delighted that you're all here.
5 My name is John Dunne. I'm one of the
6 directors of the Office of Indigent
7 Services, and just parenthetically, so that
8 you know we're all on the same team, I've
9 been involved with this issue even before
10 *Gideon vs. Wainwright*, if you can believe
11 that. And it's been a great half century
12 ever since Gideon, and your presence here
13 this morning indicates how important the
14 work is, but, in particular, how important
15 the legacy of Gideon is.

16 So I'm delighted to welcome you
17 here. And thank all of you for joining us
18 here today to discuss eligibility for
19 assignment of counsel.

20 Over 50 years ago, the supreme court
21 announced Gideon against Wainwright, that
22 any person who is, in their language, "too
23 poor to hire a lawyer must be provided with
24 counsel during the criminal court
25 proceeding." And I remember when 18B was

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2 debated and enacted back there in 1965. It
3 made New York one of the leaders in
4 implementing and making a reality out of
5 the message of Gideon.

6 I'm sure you're all familiar with
7 the various litigations that have been
8 pending since that time. Some of you are
9 also aware of some of the expressed
10 concerns of local government with regard to
11 carrying the increasing heavy burden of
12 providing proper counsel in criminal cases.
13 And the purpose of our hearing today is to
14 listen to you very closely, because, under
15 the statute, the office has a very serious
16 responsibility in further defining and
17 hoping to implement rational standards for
18 determining eligibility.

19 I'm not going to read further these
20 remarks that Bill Leahy has prepared, along
21 with his staff, but I would like to make
22 that part of the record. And before we
23 call upon the first witness, I'd like to
24 first say that our dear friend, Michael
25 Breslin, who is a very active and

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2 contributing member of the office, board
3 will be here. He's off attending to a very
4 personal responsibility to attend a
5 funeral, but I'm sure all of us would be
6 happy to have our very dear and respected
7 colleague here to join us. He's a very
8 active member of the board.

9 So all of you recognize the name, if
10 not the smiling Irish face, of our
11 executive director, Bill Leahy, who has
12 really breathed life into this office that
13 was created only three or four years ago
14 and has been a strong leader and has
15 assembled an extraordinarily capable staff.
16 Bill had a similar position in
17 Massachusetts with a responsibility much
18 like he's fulfilling now. And we've been
19 privileged to have him as our leader.

20 To my left is Angela Olivia Burton,
21 who is the director of quality enhancement
22 for -- for parent representation at -- in
23 our office. And you will be hearing from
24 her. Just be prepared. When -- when
25 Angela asks you a question, you better have

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2 the answer. Because no one knows much more
3 about the subject than she.

4 And to far right is Joanne Macri,
5 who is our director of regional
6 initiatives. And that's really what we're
7 talking about to a great extent here this
8 morning.

9 So if our director, Bill Leahy, has
10 nothing further to add, shall we request
11 the first witness?

12 **MR. LEAHY:** Please. And that's the
13 county executive, Dan McCoy.

14 **MR. DUNNE:** You do us great honor
15 being here, County Executive McCoy. I know
16 you have the burdens of your office, but I
17 also know you have an awareness of what's
18 involved in implementing this program that
19 we're trying to achieve. And I appreciate
20 you coming here and giving us your
21 thoughts.

22 **MR. MCCOY:** John, I appreciate that,
23 and I appreciate the opportunity to speak
24 in front of the board, because it is a
25 tough issue. It's not just about the five

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2 counties up north. It's about all 57
3 counties up north that are faced with this
4 problem. And I believe roughly it's about
5 \$174 million [inaudible] with Albany county
6 paid to the indigent defense fund.

7 But, first of all, may I thank the
8 Office of Indigent Legal Services,
9 especially the executive director, Bill
10 Leahy, for this opportunity to speak
11 regarding the ever increasing problem of
12 providing first-rate legal assistance to
13 indigent defense in both family and
14 criminal courts in our county and our
15 state.

16 While I fully understand and
17 appreciate the focus today is on
18 eligibility requirements, I trust and
19 understand how difficult it is to isolate
20 aspects from the multiple problems created
21 by constitute obligation under Gideon,
22 which was nice to hear that you're a part
23 of that. So I must begin by saying, though
24 it's my belief that providing a legal
25 defense to criminal indigent is extremely

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2 important. I've always believed that the
3 representatives must be first-rate and
4 failure to provide that would have a
5 dangerous consequence to the intercity and
6 our county, and I -- and for the whole
7 entire New York State.

8 It must be maintained, however, that
9 the state's decision to place the ownness
10 on constitute obligation on the counties
11 has created intolerant [inaudible] for
12 Upstate county budgets. As I was saying
13 earlier, for all 57 of us. It's with this
14 in mind that I have drafted and had
15 presented to the New York State Legislature
16 a bill that would require New York State to
17 absorb the cost of this representation and
18 share it fairly amongst all counties and
19 enhance -- we are talking legal and on
20 downward to ensure that *Hurrell-Harring's*
21 settlement, apply to all counties, not
22 mainly the five counties who brought the
23 litigation.

24 With that background in mind, I'll
25 attempt to address the issues of

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2 eligibility. For starters, the importance
3 of eligibility defense obtains -- obtaining
4 this help. I believe we're all aware, as a
5 general rule, criminal defense will hire
6 private attorneys to represent in the
7 unshaken belief that this will lead to a
8 better result.

9 However, I believe we all are aware
10 that the system can be abused. I believe
11 that ILS can help end the abuse by
12 suggesting or implementing certain
13 procedures. All courts should utilize the
14 same form to retain representation.

15 In Albany County there are a dozen
16 criminal courts with many using different
17 methods to decide on eligibility. ILS
18 shall profligate a form to be used
19 statewide. ILS shall provide some
20 investigation service for sufficient -- for
21 -- for applicants that might be -- have
22 some fraud behind it.

23 If the court, public defender,
24 conflict defender, or the district attorney
25 believe the system to be gained in a

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2 particular situation, there is a need to
3 have the matter investigated to see if
4 fraud has occurred in a given instance. In
5 -- in situations with large bails -- is
6 posted, courts must inquire as to where the
7 money came from. My suggestion is that the
8 bails of over \$20,000 is posted, ILS shall
9 propagate instructions with OCA approval
10 that the judges must inquire under oath as
11 to the source of the funds and with those
12 of the other funds were not utilized to
13 retain counsel.

14 The common practice of saving money
15 for bail and getting free legal service
16 should be closely examined. It is
17 certainly true by examples of suggestions
18 that I have made make a dent can be made
19 into an ever increasing and unbelievable
20 cost to the counties. It is my further
21 belief that this legislation that I have
22 opposed should become law. Our state will
23 probably defend those in need, providing a
24 needed collateral service and begin to
25 amend the major crisis in the criminal

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1 justice system in New York State. That --
2 that begins with the overburden of public
3 defenders, the horror of the mass
4 incarceration, and the extent of one system
5 of justice for the rich and one for the
6 poor.
7

8 Thank you.

9 **MR. DUNNE:** Well, you've given us a
10 great deal to think about, particularly
11 with regard to this -- the examination into
12 where did that bail money come from and
13 what opportunities might be available for
14 hiring counsel rather than going to public.

15 Bill?

16 **MR. LEAHY:** Yes. Executive McCoy, I
17 wonder if you could address the -- the
18 problem that we frequently hear about on
19 the other end of the spectrum of
20 eligibility and that -- to put kind of a
21 typical example to you, the use of the
22 federal poverty guidelines or some
23 multiplier of those guidelines as an
24 absolute decision point without regard to
25 the statutory requirement that question

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2 should be and legally is, can you afford to
3 hire a lawyer.

4 So to put that into perspective, a
5 hundred twenty-five percent of the federal
6 poverty guidelines, which is a common --
7 commonly used number, I believe, in the
8 courts throughout New York, amounts to less
9 than \$30,000 total income for a family of
10 four. So if you have a sole breadwinner
11 facing, let's say, a DWI charge, the
12 application of that -- and then let's say
13 it's a second DWI charge with the real
14 possibility of incarceration, loss of
15 license, and so forth, real ramifications
16 for the individual, is there any concern on
17 the other end that people who legally
18 cannot really afford to hire a lawyer are
19 being shut out from their access to the
20 Gideon right?

21 **MR. MCCOY:** I totally agree with
22 you. I think it does have a double-edge
23 sword effect, because if people are using
24 the system that really don't need it and
25 the people that need the system that we

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2 could put more time into and really
3 evaluate the case.

4 Because our public defenders are
5 overburdened. They handle more caseload
6 Upstate than Downstate. And, you know, to
7 really sit there and say you go to the
8 jail -- and our public defender might visit
9 16 inmates. A private attorney visits one.
10 So they're spending that one-on-one quality
11 time really getting to understand a case.
12 Wherein the other situation, we are trying
13 our best to give that person the best
14 defense that we can, but we just don't have
15 the resources.

16 So I totally agree with you that if
17 we get people that don't need the system
18 and we can focus on the people that do, the
19 outcome in court is going to be a lot
20 different.

21 **MR. DUNNE:** Thank you.

22 **MS. BURTON:** Thanks for your input,
23 Mr. McCoy. And with respect to your -- we
24 certainly agree that we want to make sure
25 that our focus is on those who cannot

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2 afford to hire an attorney and that we're
3 not subsidizing people who actually can
4 afford to hire an attorney. And I was just
5 wondering -- you mentioned -- and so one of
6 your main points was in terms of
7 identifying fraud and investigating that
8 and figuring it out.

9 Can you speak to the -- what you've
10 seen in terms of Albany County or anywhere
11 else as to the magnitude of that problem
12 and how instituting the suggestions that
13 you've made can help to alleviate that --
14 that problem?

15 **MR. MCCOY:** [Inaudible] across the
16 state and give the judges that right to
17 say, okay, I gave you \$20,000 bail; well,
18 how did you post that? If you had the
19 money and collateral to do that, it means
20 you might have the means to pay for some of
21 your legal defense coming from the system.

22 We don't want to hurt anyone from
23 getting fair representation, but we just
24 want to make sure -- you know, we have
25 defendants that come to court and they're

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2 driving -- they're driving, you know,
3 Jaguars or BMWs [inaudible]. What do you
4 need for me if you have this means of
5 transportation or you have money at your
6 disposable to really pay for your own
7 defense attorney. And in takes away from
8 the person that really needs it.

9 And the thing that bothers me with
10 the system, when we start looking at the
11 statistics of Albany County -- say I have
12 money and I come and I get the best DWI
13 attorney. I get out of it. Now, we have
14 someone that doesn't -- can't afford that
15 attorney, comes in with a public defender.
16 And I don't want -- I think our public
17 defenders in Albany County, all the public
18 defender do a great job.

19 But, again, their caseloads are
20 different. And the outcome is different.
21 Same judge, two different outcomes. Why is
22 that? You know, and if you really start to
23 look at the statistics, that's starting to
24 bother me, because I'm sitting there going,
25 they're not getting a fair shake. Not

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2 because the -- you know, it's kind of a
3 system set up against them, because they
4 can't fairly represent them fully, because
5 people are abusing the system that aren't
6 entitled to the system.

7 **MS. MACRI:** So just in terms of --
8 do you recommend any type of baselines that
9 might be something where we sort of have a
10 given where they should at least be
11 entitled to counsel at, say, for example,
12 the beginning of arraignment where that
13 baseline might be -- I don't know, someone
14 being incarcerated, for example? Would
15 that be enough to initially establish that
16 the attorney be provided immediately at
17 arraignment?

18 **MR. MCCOY:** You know, we came up
19 with \$20,000 because that's what we were
20 looking at the threshold, but that's why we
21 said we'll leave it to the board and judges
22 to really find out, you know, what really
23 works, you know, what would work across the
24 State of New York.

25 Because Upstate is going to be

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2 different than Downstate, you know, because
3 incomes are different. Up north is going
4 to be even different because the incomes
5 are typically lower, so you really got to
6 find that -- that medium that works across
7 the state.

8 But, no, I do think it will make a
9 difference. If -- you know, people that
10 are incarcerated, we can look at and we
11 have some of the statistics we can share
12 with the board that basically does show
13 that, you know, there are people that need
14 it and there's people that don't.

15 But we're wasting valuable resources
16 by investigating them, going after the
17 background, see if they have resources, if
18 they have money, if they have a home. You
19 know, this is taking away from things that
20 that we need to do to really defend that
21 person or defend someone else. It's just
22 time and, you know, resources.

23 **MR. DUNNE:** I know that your
24 position -- the responsibilities are so
25 broad and for you to have given this much

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2 attention to this aspect of it is really
3 gratifying. I'd really like to follow up
4 on the one point that you made about this
5 whole question of bail and inquiring the
6 source of it and cautiously say, after
7 discussions with OCA, I think we are very
8 fortunate that Judge Breslin is in an
9 administrator position today, and he
10 probably knows as much about the criminal
11 court as anyone in this room.

12 **MR. MCCOY:** Correct.

13 **MR. DUNNE:** Have you had any
14 discussion with him on any aspect of the
15 question of eligibility?

16 **MR. MCCOY:** We have. We've had our
17 kind of turn to talk to Judge Breslin. And
18 we've gone back and forth. This is data we
19 put together, you know, working within the
20 system. Obviously, we're in a unique
21 situation being here in the capital and
22 being so close to some of the great courts,
23 so we do have a little bit more dialogue
24 than, say, someone up north or out west.
25 So it's just that's why we looked at that

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2 number, what would work, what wouldn't work
3 here in the Capital Region. And I'm not
4 saying \$20,000 would work across the state.
5 Just that number, we felt, was the
6 threshold that if you can drop \$20,000 on
7 bail, then you can afford someone other
8 than a public defender -- your own
9 attorney.

10 **MR. DUNNE:** Well, you doubt noticed
11 that our board chairman just happens to be
12 the chief judge of the State of New York,
13 so --

14 **MR. MCCOY:** I did.

15 **MR. DUNNE:** -- we will -- we will
16 certainly take up your suggestion with him,
17 but I'm glad to know that you talked with
18 Judge Breslin.

19 **MR. MCCOY:** Oh, no, he's been very
20 helpful.

21 **MR. DUNNE:** Okay. Any other
22 questions?

23 **MR. LEAHY:** No more questions I
24 think, Mr. Executive, but I didn't want to
25 let you leave without repeating to the

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1 audience what I said to you earlier, which
2 is my congratulations to you and Albany
3 County on securing the grant for the
4 regional immigration assistance centers.
5 That puts Albany County in the position of
6 operating one of our six regional centers.
7 Shared with you an article that just came
8 out about New York State leading the nation
9 with respect to immigrant defense. And
10 Albany, we're very proud to say, is playing
11 a lead role in that by what we're seeing,
12 the advice and support of the attorneys,
13 not just in this county but in the whole --
14 what we call the north region -- north
15 country. Northern New York region --

17 **MR. MCCOY:** Yes.

18 **MR. DUNNE:** -- which Albany is -- is
19 a very southern extremity.

20 And also I want to salute you for
21 your leadership and your working with
22 Representative -- Assemblywoman, rather,
23 Fahy, and proposing a bill, which is
24 working its way through the legislature,
25 which would provide some very necessary

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2 state support, both in terms of the funding
3 and in terms of oversight. That would help
4 us all realize the dream, I think we all
5 share and you have articulated, that there
6 can't two systems of justice: One for the
7 rich and one for the poor; there needs to
8 be one system of effective representation
9 for everybody. So we thank you very much
10 for your testimony, sir.

11 **MR. MCCOY:** Thank you. I'm honored
12 to be here. Thank you for your time, and I
13 do appreciate you taking the time out of
14 your busy schedules to really hear this and
15 evaluate it and help us come to a point in
16 the system that maybe does fairly represent
17 everybody. So thank you.

18 **MR. DUNNE:** Unlike yours, ours is
19 not 365 days a year.

20 **MR. MCCOY:** Correct.

21 Thank you again.

22 **MR. DUNNE:** Particularly fortunate
23 to have, I'll call, one of the men in the
24 trenches. Robert Linville, who is the
25 Columbia County public defender and a

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2 long-term practicing attorney. And, Bob,
3 it's great to have you here.

4 **MR. LINVILLE:** It's a great pleasure
5 to be here. Hello to all of you. And I do
6 give you a view of all this from deep down
7 in the trenches, as you said there, John.

8 With the help of Bill Leahy and his
9 office and your help as well, we have an
10 unusually productive and potential position
11 in Columbia County today. Your office has
12 funded attorneys and arraignment in
13 Columbia County, and I'm happy to say that
14 I have two staff attorneys who go out any
15 time of the day or night for arraignments
16 around the county.

17 It becomes difficult in the far
18 reaches of the county when judges are
19 impatient in the middle of the night and
20 say, "Well, how long is it going to take
21 you to get here," and the answer is maybe
22 well over a half hour, at which point some
23 of them get impatient. And so we're
24 fortunate to do what we can over the
25 telephone while we have the judge's

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2 attention and have an opportunity to talk
3 to the defendant telephonically.

4 But in the majority of cases, with
5 your support, we have boots on the ground
6 in all courts around the clock. And that's
7 important in the context of our subject
8 today, because it's my policy to send
9 attorneys to every arraignment in the
10 county, every criminal arraignment and
11 violation arraignment, mostly criminal, in
12 the county, whether or not we keep those
13 defendants as our own clients. We have --
14 made a good effort to separate the inquiry
15 that occurs at an arraignment to as to
16 family status, roots in the county, the
17 likelihood of flight, and whether or not
18 they can make bail so as to attack the
19 issue of potentially prohibiting bail or
20 incarceration.

21 We then are -- tell them all if they
22 want to hire an attorney of their own, you
23 can do so, that we would turn over the
24 initial documents to that attorney. And
25 we're careful about the inquiry that takes

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2 place at arraignment because if we have
3 multiple defendant arraignments as a result
4 of a drug sweep, for example, we would only
5 be able to represent one of them only, and
6 we don't want to learn case-related
7 material from the other defendants at that
8 time. We limit what we say.

9 But we do believe, with your
10 support, that an attorney at arraignment is
11 absolutely critical because the decisions
12 that occur at that point are tremendously
13 important to everyone who's arrested. Jobs
14 go away. Lives blow up. The woman at home
15 says, "That's it. I'm out of here," and
16 children get kicked into the system. And
17 -- and there's no going back when those
18 things occur. So, with your help, we have
19 attorneys at arraignment now.

20 At the point when we reached a
21 decision of eligibility for our defense
22 throughout the case, different kinds of
23 considerations, come into play. I argue
24 strongly that we, public defenders, ought
25 to have the decision about eligibility.

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2 Statute, gives that, I think, to the courts
3 and in many counties it evolves upon the
4 attorneys, the public defenders, and that's
5 where it ought to be, because I submit to
6 that you the public defenders know the most
7 about the people, at least in Columbia, as
8 a result of our having an initial crack at
9 them and a crack at the case at the time of
10 arraignment.

11 **MR. DUNNE:** Now, do you come, then,
12 in confrontation with the judge? You're
13 saying you feel that the public defender
14 should have the final word on eligibility.

15 **MR. LINVILLE:** On the eligibility.
16 There is, in our county, a method for a --
17 a defendant to appeal to the courts, if
18 they are dissatisfied with our decision.
19 And the only one's that are really
20 dissatisfied with our decision is if we
21 decline. And the judges in our county have
22 not made an issue ever of our initial
23 determination of eligibility.

24 There are some cases in which we do
25 get into dialogue with the courts about

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2 whether or not this or that person ought to
3 be a client of ours, and there may be some
4 factors that they know about the defendant
5 that are brought to our attention for the
6 first time. So there is an occasional and
7 very courteous discussion about
8 eligibility, and we review our initial
9 decision if the court has a different view.
10 So it has never been a difficulty, Mr.
11 Dunne.

12 Now, I know that we repeat to
13 ourselves the phrase "ability to afford an
14 attorney." And I take a very relaxed and
15 flexible view of that. What is the -- the
16 ability to afford an attorney? It is much
17 more than a -- a -- an automatic
18 examination of the federal poverty
19 guidelines and whether or not the results
20 should, from looking at the guidelines and
21 the person's income is, makes eligibility
22 or denies somebody eligibility. It's much
23 more than that. And I submit to you that
24 the -- when someone is able to afford
25 counsel, I look at it as meaning that when

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2 you get a careful evaluation of their
3 income and their liabilities and their debt
4 load, that you should look at only the
5 disposable income.

6 I don't want anybody to have to go
7 out and borrow to afford a lawyer. And, of
8 course, as we all know, if the case is a
9 really serious one and a defendant goes on
10 the marketplace to get a lawyer, the
11 retainer is going to be higher if it's
12 complex or multi counts or serious upper
13 level felony. So I look to disposable
14 income.

15 And we have tried -- and we keep
16 refining our application documents to smoke
17 out all the information about these
18 different elements, all streams of income,
19 debt to debt load, debt on real property,
20 for example, on automobiles. If somebody
21 has a doublewide house and it's maybe worth
22 around a hundred and eighty thousand
23 dollars and it's mortgaged to the top or
24 the guy's underwater, it doesn't matter a
25 bit in my calculation that they have this

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2 house. There's no place they can go to get
3 money.

4 And the timing issue is critical,
5 because when somebody's arrested, it's
6 always a surprise -- almost always a
7 surprise. And as a surprise, people have
8 not put a little money aside for their
9 eventual legal needs. They're hit with the
10 demand right away which cuts into their --
11 their economic stream.

12 Yes, sir?

13 **MR. DUNNE:** May I interpret you for
14 a moment?

15 We are graced by the presence of my
16 colleague, the executive president.
17 Michael, great to have you.

18 **MR. BRESLIN:** Good to see you.
19 Sorry to arrive late. Good to see you.

20 (A discussion was held off the
21 record.)

22 **MR. LINVILLE:** Good morning, sir.

23 **MR. BRESLIN:** Good morning. I
24 apologize for coming in late.

25 **MR. LINVILLE:** I'm pleased to see

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2 you here. I wanted to say, what I have to
3 say will be of interest, I hope. We'll
4 see.

5 And so back to the -- the analysis
6 of able to afford counsel, as a phrase. I
7 was just saying, disposable income, to me,
8 is a very critical element of one's
9 analysis of whether or not they can afford
10 an attorney. I don't want anybody to have
11 to remortgage a house or go get a loan on
12 an automobile if they have an automobile,
13 particularly if it's essential to their
14 work. It's never realistic to say, well,
15 you can go out and borrow some more money
16 on your car or you can borrow some more
17 money on your doublewide house.

18 I was beginning to develop the idea
19 of timing. Back when the person was
20 arrested, it's a shock, and the need for
21 money, the need for bail money is
22 immediate. And the need for an attorney,
23 in my view -- and I believe in the view of
24 all of you -- the need for an attorney is
25 immediate and goes right back to the moment

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1 of arraignment.

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3 You can't have an economic argument
4 at arraignment about whether a guy can
5 afford -- or a woman can afford an
6 attorney. As I said to your other members
7 of the panel before you came, we have an
8 attorney in Columbia County -- a system
9 developing still because some courts are
10 not quite there yet. We have an attorney
11 at arraignment at every occasion around the
12 clock, seven days a week. And I have a --
13 a dedicated telephone that I've bought for
14 assignment to one of the other attorneys,
15 of the two attorneys that I have. So they
16 carry the phone, and judges are encouraged
17 and asked to call that number. It's not an
18 office number. It's not a hard line
19 number. It's a cell phone. And it is the
20 arraignment phone for people arrested in
21 Columbia County.

22 But back to timing. When a person's
23 arrested, the needs are immediate for an
24 attorney and for money. And getting money
25 and then getting into this inquiry about

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2 eligibility for counsel is a -- a -- an
3 inquiry with no time at all. They need an
4 attorney right now. They need -- they're
5 forced into accommodation decisions.

6 And I have seen in other counties
7 that there's a tremendous and detailed
8 inquiry that the public defenders go
9 through to determine eligibility. There is
10 lines of paper. They -- some counties ask
11 for tax returns and ask for employment
12 stubs and material that's not easily
13 available -- not readily available,
14 anyways, at the time an attorney is needed
15 and the decision for representation is
16 needed.

17 I think that's -- my own view. I
18 think that's demeaning and unnecessary,
19 particularly if you keep in mind the -- the
20 concept of disposable income. And so that
21 people do not have to go in deeper in debt.
22 Many are -- of our clients, my clients are
23 very much in debt at the beginning. And if
24 they get caught in the criminal justice
25 system and need to have more money, it's

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2 very hard with an ongoing debt load that
3 they're trying to service, they're trying
4 to stay afloat in this economy. It's very
5 hard for them to borrow, to get more money.
6 In some cases, do go to family members, do
7 go to employers. Sometimes that works out
8 so that the bail or money for a lawyer can
9 be borrowed. But it's not a -- a regular
10 thing. It's certainly nothing you can
11 predict. I mean, nothing you can put an
12 expectation on.

13 So in my mind and my belief is that
14 we need to be flexible. We need to be --
15 need to have all the detail we can. Gotten
16 off the application forms, that I eluded to
17 before to make a reasonable decision about
18 whether a person can afford an attorney and
19 -- is -- satisfy the statute by being able
20 to do so without harm.

21 And so there does come a time in
22 many cases that I have had where it's a
23 close call and you say, well, maybe they
24 can get it; maybe they can get the money
25 for an attorney if they try really hard.

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2 And I think it's demeaning when a person
3 is in bad need of a supportive attorney
4 whom they can trust with a serious -- very
5 significant decisions in their life. It's
6 demeaning to squeeze at them. I think it
7 does damage to the relationship.

8 And so I recommend to my attorneys
9 and I say to you that when it comes down to
10 that close call -- and we have spirited
11 discussions about cases from time to time
12 where it is a close call. My policy is to
13 tip toward the defendant and take the case,
14 because the alternative is worse. We're
15 righteous if we say no. We're righteous
16 about it, well, you didn't qualify. And a
17 person's without a lawyer. And I think
18 that's fundamentally at odds with what we
19 all stand for and what we believe people
20 ought to have. That's all I have to say to
21 you.

22 Yes, ma'am?

23 Sir?

24 **MR. BRESLIN:** When you make that
25 final decision --

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2 **MR. LINVILLE:** Yes.

3 **MR. BRESLIN:** -- and you have a,
4 quote, close call --

5 **MR. LINVILLE:** Yes.

6 **MR. BRESLIN:** -- what are the two
7 factors or three that will push you to say,
8 yep, he's entitled or, no, we shouldn't do
9 that? What are the -- just two or three
10 factors that are most likely to push you
11 one way or the other if you were in charge
12 of this whole process?

13 **MR. LINVILLE:** It is so case
14 specific, Mr. Breslin. I...

15 **MR. BRESLIN:** Is there specific
16 number one of how serious and what it is
17 and what the problem is?

18 **MR. LINVILLE:** Well, depending on
19 the situation of the defendant, every case
20 is serious. Even a low grade misdemeanor
21 is serious if it blows up a job, it blows
22 up your household, and causes your kids to
23 be put in foster care or some other social
24 institution.

25 One of the main factors that I

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2 present to you is that in the course of
3 this inquiry, we get to know a great deal
4 about -- not only from the paper, but from
5 interviews, repeated interviews with the
6 defendant, and so we have a good sense of
7 not only the strength of the case, but we
8 have a good sense of how cooperative they
9 are and how they're trying and how badly
10 they want our help and how badly they want
11 to be defended because of the position they
12 have on the case.

13 So it's a read of the person. If
14 you have the steps, as others have said --
15 and I think the county executive before,
16 that the person is driving around in a BMW
17 and you see them on the street after the
18 case is closed and you've got them released
19 release on his own recognizance and he goes
20 outside and gets into an expensive car, it
21 raises questions.

22 And so at the next contact, you run
23 that down and try to find out if there are
24 resources that ought to be applied. Again,
25 back to the -- the concept of disposable

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2 income. With a big automobile, it may well
3 be that there are other disposable assets.
4 I'm not suggesting that a person with a BMW
5 needs to go out and borrow against the car.
6 That may not be his car. Maybe he newly
7 bought it and 99 percent except for the
8 bumper is owned by the car company. Still.
9 And so --

10 **MR. BRESLIN:** And those facts come
11 up later; they don't come up at the
12 first --

13 **MR. LINVILLE:** I'm sorry?

14 **MR. BRESLIN:** Invariably, those
15 facts only come up later, in retrospect.

16 **MR. LINVILLE:** They do. They do.
17 And we have repeated interviews with the
18 defendant about that, when it comes to our
19 attention that maybe he's trying -- he or
20 she is trying to snooker us on assets.

21 But it's a read of the person. It's
22 a read of the family. And in Columbia
23 County, as my good friend, John Dunne,
24 knows, in Columbia County, everybody knows
25 everybody. I come from outside Columbia

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2 County, and I'll never get inside the old
3 boy network. I try and I try and I try and
4 I learn that so and so is a brother-in-law
5 of someone else, and it always surprises
6 me. But I do try to get to know the
7 defendant and what his situation is and
8 whether or not he can afford an attorney.

9 But underneath it all is the -- the
10 iron requirement that they have a lawyer.
11 And so if my decision is made wrongly and
12 they don't have a lawyer and they don't
13 have the money for a lawyer and I turn them
14 down, they don't have a lawyer. And that
15 to me is -- is obscenity. So I hope that
16 answers part of your inquiry. Okay.

17 **MS. BURTON:** Thanks, Bob, for your
18 input. I just want to go back to -- you
19 mentioned several times that one of the
20 possible consequences for litigants is kids
21 going into foster care and various things
22 that impact their family life.

23 And so I wanted to just switch over
24 to the family court side, and if you could
25 just speak a little bit to how the process

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2 works on the family court side. I mean,
3 there's an analogy, at least in the child
4 abuse and negligent cases, where a person's
5 child has been removed and now they're in
6 court. Is it a similar sort of analysis
7 and philosophy that you take in those
8 cases?

9 **MR. LINVILLE:** [Inaudible] before,
10 and the way I've structured to the family
11 court matters and I do have a large
12 responsibility to -- to give counsel to
13 parties in family court issues. And I have
14 dedicated attorneys for the family court,
15 and frequently at arraignments, we learn
16 that this is evolving into an integrated
17 domestic violence case or family court
18 matter, and the inquiry essentially is the
19 same. I feel that family court is not a
20 secondary forum. It is equivelent to
21 criminal court in the impact it has on the
22 lives of the people who are caught up in
23 the gears. People who are facing explosion
24 in their lives.

25 Now, as we all know, in particular,

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2 though, with the family court experience,
3 family court situations grind on and on and
4 on. It's not like many criminal cases in
5 which there's a collision of facts once --
6 or in one case a collision of facts.
7 Family court issues are in the court over
8 and over again for months at a time, and at
9 every step, there's the danger that there's
10 going to be an adverse decision in the
11 court, which will explode the family if
12 you're trying to hold it together. And
13 it's one of my sub philosophies that we do
14 what we can when there's elements of
15 family -- to help to hold it together and
16 not have it explode.

17 And so the vigorous representation
18 is the same as an equal value to me in
19 family court because the damage is
20 tremendous. If there's
21 underrepresentation, less than all possible
22 vigor and investigation into the facts
23 surrounding, allegations that are being
24 aired. Is that an answer for you?

25 **MS. BURTON:** Thank you.

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2 **MS. MACRI:** I have one question.
3 Thank you for sharing your insight with us
4 today. In terms of the process that you go
5 through determining eligibility -- I know
6 that some of this information you learn
7 about your clients is certainly gained
8 through confidential communications. Are
9 you required in your county to share the
10 information with respect to eligibility
11 with the courts when you make a
12 determination, or is it something that
13 remains confidential?

14 **MR. LINVILLE:** I have always taken
15 the position that it's between the
16 defendant and my office. I don't -- unless
17 there's a contest. Unless there's a --
18 essentially an appeal of the decision we
19 made as to eligibility. The -- the
20 application facts don't -- don't go to the
21 court. Or if the court brings to me
22 something new, they share that with me.
23 That's their decision, the judge's decision
24 to do so, but we do not give out the data
25 on our clients and you never know down the

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2 road what's coming.

3 **MS. MACRI:** Thank you. And I just
4 have a follow up to that. An appeal
5 process, is that something where -- do they
6 just show up to court and day, "I've been
7 denied," or, you know, "Can you reconsider
8 this request," or how does this work out?

9 **MR. LINVILLE:** The way it normally
10 surfaces for me is that I'll get a -- I'll
11 be in the courtroom and the judge will
12 bring me up to the bench and say that
13 there's a question about your decision to
14 not to represent this person; I'll give you
15 all the time you need to inquire further to
16 whether or not you can represent them;
17 they're saying they don't have the money to
18 get an attorney, but you still turned them
19 down. And it appears that way, sometimes.

20 **MS. MACRI:** Okay.

21 **MR. LINVILLE:** Sometimes when we're
22 in the middle of a proceeding and something
23 arises, most -- most -- in the instance of
24 contest, something arises in some of the
25 testimony or some information we get, all

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2 of a sudden I realize that I have got a
3 conflict immediately because I represent
4 someone else already that's meshed in this
5 tangle and have to pull out.

6 I go; I do a disqualification with
7 the court; and they'll assign conflict
8 defenders in sequence. We have three
9 others in Columbia County at the moment.

10 **MR. DUNNE:** Well, thank you, Mr.
11 Linville.

12 **MS. MACRI:** Thank you.

13 **MR. LINVILLE:** Thank you.

14 **MR. DUNNE:** Our next witness is Mr.
15 Greg Lubow. With a rich background in this
16 area, since he's been a former chief public
17 defender in Greene County and now is a
18 practicing attorney.

19 **MR. LUBOW:** Thank you, Mr. Chairman.

20 **MR. DUNNE:** Good morning.

21 **MR. LUBOW:** Thank you, Chairman
22 Dunne and members of the panel. My name is
23 Greg Lubow. I'm an attorney. I practice
24 law in Tannersville, New York, just south
25 of Albany. I've been practicing since

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2 1977. Doing the math, that's about 38
3 years. For the first 27 years of my
4 practice, which is a private practice, I
5 was also the part-time chief public
6 defender of Greene County. It was a
7 position I was appointed to in
8 September 1977 and held until
9 February nineteen- -- 2005.

10 The -- in that capacity, I became
11 intimately familiar with the eligibility
12 requirements and decision-making process
13 of -- for public defender or assigned
14 counsel services. I was the de facto
15 determinant of that eligibility. There
16 were no guidelines, other than the ones I
17 imposed. There were no judicial reviews,
18 other than on occasion when a judge might
19 ask what's going on. If the client is
20 deemed not to be eligible, based on their
21 perceived assets, we brought that to the
22 judge's attention, and the judge made that
23 final decision.

24 But I'd like to talk to you today
25 about is the process that we went through.

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2 And this is primarily in the justice court,
3 in the town and justice courts that these
4 decisions are made in the first instance.
5 Most cases where there's an assignment of
6 counsel, that assignment continues on, if
7 it's a felony, to the county court, without
8 question by the county court judge.

9 In the rare case where the -- an
10 indictment is unsealed -- the felony
11 indictment is unsealed at the county court
12 level and those -- that commences the
13 criminal case where there's no assignment
14 of counsel, in Greene County, at least, the
15 county court judge will make a brief
16 inquiry and make a decision at that point
17 on their own to assign counsel or not
18 assign counsel, if the person appears
19 without counsel.

20 The arraignment is the town and
21 justice court is governed by Article 70 --
22 170 of Criminal Procedure Law. 170.10
23 requires the arraignment judge to do a lot
24 of things. The judge has to inform the
25 defendant of the charges against him.

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2 There's no lawyer present. There's no
3 lawyer assigned at time. The judge is
4 required under subdivision 4 -- under
5 subdivision 3 to advise the defendant he
6 has a right to counsel and if he can't
7 afford counsel that counsel could be
8 appointed for him. More importantly,
9 170.10, subdivision 3 requires the court
10 not only to advise the defendant of his
11 right to counsel but to take such
12 affirmative steps as the court deems
13 necessary to effectuate that situation.

14 And in my private practice, I've
15 appeared in town and village courts
16 throughout Greene County on this. Here in
17 Columbia County; here in Albany County;
18 here in Rensselaer County; here in Saratoga
19 County. I've appeared as far north as
20 Malone. I've appeared as far south as the
21 town of Hancock, which is on the Delaware
22 water gap. I've appeared in Suffolk County
23 in several justice courts. I've appeared
24 in Nassau County, as well in their justice
25 courts, and throughout the Hudson Valley.

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2 Hundreds and hundreds of courts. I've seen
3 thousands and thousands of different town
4 judges perform their arraignments.

5 When you are developing your
6 criteria, there are several things I think
7 you have to keep in mind. One, for the
8 most part in a town and justice court,
9 especially here in the upper Hudson Valley,
10 especially throughout much of rural New
11 York, you're going to be dealing --
12 developing criteria for lay judges. In the
13 county court, you're dealing with a judge
14 who has had at least ten years of practice,
15 has been elected to the bench, and for the
16 most part, we hope, has developed and
17 exhibited an understanding of the law,
18 especially when you're talking about
19 criminal court.

20 On the other hand, the vast majority
21 of town and village judges are not lawyers.
22 In Greene County, we now have 6 out of
23 approximately 30. My concern is that with
24 all that is done, especially at that
25 so-called midnight arraignment, which I

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1 think, by the way, should be done away
2 with -- you know, I think the entire
3 justice court system doesn't need to be
4 reformed; it needs to be replaced with the
5 district court system, but that's neither
6 here nor there with dealing with
7 [inaudible].
8

9 At that midnight arraignment, you
10 need to have guidelines that are clear,
11 that are easy to understand so that a judge
12 making that determination will have
13 something to fall back on. Because at that
14 midnight arraignment, you're not going to
15 have verifiable statements from the
16 defendant. In fact, putting the judge in
17 that position creates some type of issue.
18 The defendant is now accused by -- accused
19 of crime, a misdemeanor, perhaps a felony.
20 And the judge is starting to ask questions.
21 You have a police officer there. You asked
22 about confidentiality. There is no
23 confidentiality. There is no
24 confidentiality.

25 In fact, all town and village courts

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2 are now -- now have and now are outfitted
3 with or are supposed to, whether they do or
4 not is another story. Are supposed to
5 record every proceeding, including those
6 midnight arraignments. So that you're
7 going to have a recorded statement
8 accessible to the prosecutor. You're going
9 to have a defendant accused of a crime
10 who's just been read, not only the
11 charges but is now being told that you have
12 a right to an attorney, and if they -- if
13 the client says, "I would like an
14 attorney," the next thing that happens in
15 open court is that a judge starts asking
16 questions about, "Well, do you own a house?
17 Are you" -- the judge might even put that
18 person under oath.

19 And if those statements are false,
20 you may find yourself with additional
21 charges of perjury, the judge being a
22 witness. The criteria -- in Greene County,
23 when I became the public defender, the
24 system was in place. The town and village
25 courts were ill equipped and didn't want

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2 the responsibility that the statute places
3 on them, which is to assign counsel. They
4 didn't have it. They didn't want it. It
5 -- it -- they didn't have the resources to
6 do it. Unlike in New York City where you
7 have an independent agency doing those
8 intakes and determinations in some
9 instances, here, in -- in the rural
10 counties, it's left to Mr. Linville in
11 Columbia County, Greg Lubow in Green
12 County, and now my successor.

13 We have -- when someone's in the
14 jail, the way we did this, was I have an
15 investigator go every day to the jail. He
16 would call the jail in the morning say,
17 "Are there any new inmates?" If there
18 were, he would walk down to the jail with a
19 financial form that was very basic: What
20 is your income; do you have income; do you
21 have a job; what assets do you have. Two
22 pages, very simple. What's -- what are the
23 charges against you.

24 That investigator was someone I
25 trained, someone who is skilled. In fact,

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2 there's several investigators and they were
3 able to, in the first instance, make that
4 determination as to whether or not a person
5 was eligible or not, for the most part.
6 Most cases, if not the vast majority of the
7 cases are clearly obvious in that
8 determination.

9 Clearly, someone who is collecting
10 social service benefits -- and those have
11 changed throughout the years. When I
12 started, welfare was welfare. Now there's
13 all sorts of different types of social
14 service benefit. But if you were receiving
15 welfare, as we called it back then, you had
16 no income; you had no money; you had no
17 assets. You were clearly eligible for
18 services and we took the case.

19 We would -- it's the questionable
20 case that Mr. Linville has mentioned that
21 raises some issues, but those cases didn't
22 come up all that often. It was fairly
23 obvious. When pressed by my county
24 legislature -- which was a hostile
25 legislature, just so you are aware. It's a

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2 very hostile legislature for the notion of
3 assigning counsel. Very hostile to the
4 funding of public defender offices.

5 When I was pressed by them one year
6 as to what my eligibility requirements, you
7 know, what were the criteria, I was able to
8 call up my good friend Jonathan at -- at
9 the New York State Defenders and say, "What
10 is the criteria I'm supposed to be using?"
11 And he handed me the federal poverty
12 guidelines, \$214 a month -- and -- or a
13 week, and we went from there. And we
14 applied that flex, is what -- we applied
15 that in a flexible manner. Flexible.

16 If the person makes \$200, is a
17 single person, can they afford someone --
18 can they afford an attorney on that income
19 after paying their rent, paying for their
20 food, with no luxuries in their life; they
21 have no children? What attorney is going
22 to represent them on a felony in Greene
23 County if they make \$215 a week? There are
24 none.

25 Being in private practice, I was

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2 able to have a good sense of what the
3 market costs were, what attorneys charge --

4 **MR. DUNNE:** Excuse me. I
5 just wanted to -- you mentioned that the
6 judges typically do not want to get
7 involved in the determination of
8 eligibility and kind of falls to the
9 defender, as it did in your career as
10 public defender and Mr. Linville so
11 testified, and I contrast that with the
12 many studies -- the Brennan Center studies
13 from six or seven years ago and others that
14 pointed out that it's a bad idea for public
15 defenders to be involved in eligibility
16 determinations because it sets up a
17 conflict with their clients; it's a threat
18 to confidentiality; there are pressures to
19 either control caseload on the one hand to
20 please your county employer or on the other
21 hand to avoid the obscene result Mr.
22 Linville mentioned and to maybe kind of
23 break and allow the person representation
24 that may or may not be legally entitled to.
25 So a host of potential conflicts for

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2 the defenders to be doing this, and the
3 recommendation of the Brennan Center study
4 and others to say there needs to be someone
5 who is not the judge and someone who is not
6 the defender, an independent body, to
7 conduct eligibility determinations without
8 these risks of conflict of interest. What
9 would your response be to that as, as a
10 path for us to potentially...

11 **MR. LUBOW:** My initial response is
12 time and money. Who's going to pay? And I
13 can tell you in Greene County, the county
14 legislature would not pay. Number one.
15 Number two, time. When is that
16 determination going to be made? Case
17 law -- the reason you're here says you need
18 a defender at arraignment. Well, who's
19 that -- who's that -- who's making that
20 determination at 2 o'clock in the morning?
21 Honestly, I'm -- I was all in favor of the
22 litigation that -- that litigation, which
23 imposed on the state, which recognized the
24 state has obligations to properly fund
25 defense services at all stages.

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2 My personal preference, quite
3 frankly, would have been to just throw out
4 the existing system, the justice court
5 system, and replace it with a Monday
6 morning 9 a.m. arraignment by -- in a
7 district court in every county. And that
8 way -- you should have holding rooms
9 instead of arraignments. And, yes, there's
10 a problem with that too; if someone gets
11 arrested at midnight, they have to stay in
12 court for -- in jail for eight hours before
13 they're -- someone comes in. But you have
14 a unified system, a centralized system here
15 in the city of Albany. That's how it
16 works. Does it work in -- why don't it
17 work in rural counties? Time and distance.

18 **MR. DUNNE:** Let me follow up with
19 another question, based upon your long
20 experience as a public defender, and that
21 is: What percentage would you estimate is
22 the problem identified by the county
23 executive in his testimony of client fraud
24 or the attempt to get a free lawyer when
25 actually you could afford to hire one

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2 yourself? In what percent of clients would
3 you say this is a potential issue?

4 **MR. LUBOW:** One to two percent.

5 **MR. DUNNE:** Extremely low.

6 **MR. LUBOW:** Here's the issue comes
7 -- the question comes up in -- and I've
8 seen county court judges make these
9 determinations. What happens when a drug
10 -- drug defender, someone accused of
11 selling drugs, has no visible means of
12 income but everybody knows that gold chain
13 on his neck costs a couple of thousand
14 dollars and everybody knows that he walks
15 around town flaunting his leather coats.
16 Yeah. There's that possibility and there's
17 the potential for that.

18 Can we weed it out entirely? No.
19 Is it worth the risk to try not to make
20 those determinations based on what we
21 perceive, as opposed to what we can prove?
22 I think so. I think that the people
23 gaining the system are not -- it's not that
24 significant an issue. It's more an issue
25 to counties that do not want to provide

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2 services, in my opinion.

3 Let's put it this way: There's
4 another side to all that. Most of the
5 public defender clients that I've seen in
6 my life don't want a public defender. They
7 want the quote, unquote real lawyer. In my
8 private practice -- as a part-time public
9 defender, I have a full-time criminal
10 practice. There are times that people
11 would come into my office and say, "Mr.
12 Lubow, I'd like to talk to you. I got
13 arrested. I'd like to talk to you."

14 And I'd have them come in. And
15 somewhere in the course of the interview,
16 they would say, "Oh, you're the public
17 defender." At that point -- and this is
18 what I've imposed on myself and imposed on
19 my entire office. The interview stops.
20 And I said, "You're looking for a public
21 defender?" And they would say, "Yes." And
22 I'd say, "Look, I'm a public defender. You
23 know that. I'm also a private lawyer. I'm
24 going to send you down to Catskill, which
25 is where our office is. You can complete

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2 the interview and the intake process, since
3 I may not be the attorney assigned to the
4 case, and they'll process you, and we'll
5 determine if you're public defender
6 eligible, which you may be" -- because I
7 haven't talked to them about money at that
8 point, in general.

9 Then there comes, "Mr. Lubow, I
10 heard you're a good lawyer" -- and I'm not
11 patting myself on the back here, but, "I
12 heard you're a good lawyer. I would like
13 you to represent me. Can I pay you?"

14 "No, no. At this point you've made
15 a request, and I'm not -- you're not going
16 to be able to pay me to be your lawyer. And
17 you're not going to be able to -- that's
18 just not going to happen."

19 I walk away from that one fee to
20 pre- -- to avoid the potential of someone
21 saying to me, "You turned someone down as a
22 public defender client to take them in your
23 private practice." And I impose that
24 because we were all part-timers back then.
25 I impose that on each of my assistants. It

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2 made sense, if someone talks to us and
3 says, hey, you're a public defender, we're
4 not -- it's not worth that aggravation. So
5 what people seeking out a public defender
6 because we're such great lawyers, I like to
7 think so in Greene County. I like to think
8 that our representation in the 27 years I
9 was the public defender there that we built
10 a reputation that I've heard private
11 lawyers --

12 **MR. DUNNE:** I think -- I think
13 you've made your point very clearly.

14 Are there other questions, perhaps,
15 of Mr. Lubow before he steps down?

16 **MS. BURTON:** I do have one question
17 with respect to your thoughts or
18 suggestions about how to handle the
19 eligibility determination. Or let me put
20 it this way: How to handle the issue of
21 representation at arraignment vis-a-vis a
22 liability.

23 So you were discussing a number of
24 issues that could occur at that point in
25 terms of confidentiality and the judge

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2 inquiring and the police officer being
3 there. Would it be -- and this just
4 occurred to me. Would it be your
5 suggestion that perhaps there be sort of
6 automatic assignment for purposes of
7 arraignment pending the determination of
8 eligibility as opposed to digging into that
9 issue at that point?

10 **MR. LUBOW:** The attorney-client
11 relationship gets formed at that -- at that
12 first meeting. The client has to believe
13 that the attorney has their best interests
14 at heart. You will be speaking to that
15 attorney on many, many things beyond just
16 the eligibility issues they're going to
17 represent you in. They need to know many
18 things about you beyond how much money do
19 you have and can you afford an attorney.
20 That one half hour, that one 15 minutes,
21 creates an attorney-client relationship
22 that your next court appearance may be
23 broken, may be substituted with a different
24 attorney. I don't believe that you can
25 have that type of circumstance, that

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2 situation, when -- once you create the
3 attorney-client relationship. What's -- "I
4 like that lawyer. I want that lawyer to be
5 my lawyer. I want to continue in that
6 area."

7 Just one other point, Mr. Dunne, if
8 you will, my concerns are that -- my belief
9 is that the criteria must be flexible
10 enough and the judges must have a very
11 clear sense of how flexible they are. You
12 can't -- there's not -- one size does not
13 fit all when you're making eligibility
14 determinations. And since these are made
15 in justice courts, again, by lay judges,
16 there are -- I've appeared in front of
17 judges -- I've seen this happen more often
18 than not. There are two types: There's
19 the one judge that says, "Well, I'm going
20 to assign the public defender to everybody
21 who asks me because I want someone
22 represented. I don't want people appearing
23 in my court unrepresented. And that's just
24 the way I'm going to be." And that's
25 unfair to the public defenders' office

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2 because they get overwhelmed. It's unfair
3 to the other people, and it's unfair to the
4 private bar, if a person can -- my first
5 job in 1974, I was a law student. I worked
6 for Kings County Criminal Bar Association.

7 **MR. DUNNE:** Could you try to bring
8 this to a --

9 **MR. LUBOW:** I watched -- I watched
10 lawyers hustling outside of courts in
11 Brooklyn, New York, hustling for
12 arraignments because they wanted the case.
13 I was hired to -- the private bar was
14 concerned that the Legal Aid Society was
15 taking too many cases to bolster their
16 numbers. Mr. Linville and I have no need
17 to bolster our numbers. We're not well
18 paid -- I wasn't well paid. He may be
19 better paid. I haven't asked him.

20 But, generally, they're not --
21 public defenders' offices are underfunded
22 and understaffed, so I think that we need
23 to -- they don't need more cases. The
24 other side of that, the flip side of that,
25 there are judges in -- that -- that take

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1 the attitude -- they're more [inaudible].
2 They're more concerned with people gaining
3 assistance, and may be, in fact, reluctant
4 to assign counsel in questionable cases.
5 "I don't think you're eligible." I've seen
6 judges, "I don't think you're eligible for
7 a public defender. You go out and hire a
8 lawyer and come back at your next
9 arraignment." While there are six attorney
10 judges in Greene County, there are also six
11 former law enforcement personnel in Greene
12 County as town and village judges.

13 I will be submitting something in
14 writing so you will have a much more
15 in-depth statement from me, but I thank you
16 for the opportunity.

17 **MR. DUNNE:** Appreciate you coming.

18 **MR. LEAHY:** Appreciate you coming.

19 **MR. DUNNE:** The Honorable Dr. Carrie
20 O'Hare, who is town justice of Stuyvesant
21 Town Court and also is an elected director
22 of the New York State Magistrates
23 Association.

24 **HON. DR. O'HARE:** Good afternoon.

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2 **MR. DUNNE:** I think good afternoon.

3 **MS. MACRI:** I think we just did.

4 **HON. DR. O'HARE:** Dangers when they
5 give me a microphone.

6 Mr. Breslin, I hope that was not a
7 family member you had attend today. I'm --

8 **MR. BRESLIN:** It was a dear
9 friend, but it was not a family member.
10 Thank you.

11 **HON. DR. O'HARE:** Good afternoon. I
12 am the Hon. Dr. Carrie A. O'Hare, and I am
13 town justice in the town of Stuyvesant,
14 Columbia County, and I have been a
15 Stuyvesant town justice since March 2001.
16 I am the past president of the Columbia
17 County Magistrates Association, and as
18 mentioned -- you folks have mentioned
19 already, I am the current director of the
20 New York State Magistrates Association. We
21 represent 1872 town and village judges
22 presiding over 1277 town and village courts
23 across the State of New York. And I'm
24 proud to do that.

25 I want to thank you this morning --

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2 or this afternoon, folks, the New York
3 State Office of Indigent Legal Services,
4 for the opportunity to speak today, before
5 you develop the criteria and procedures to
6 guide the courts when determining
7 eligibility for mandated legal
8 representation in criminal court
9 proceedings.

10 As a local criminal court justice
11 serving a rural community in Upstate New
12 York, my objective today is to lend some
13 insight with respect to the current
14 procedures followed, as well as
15 respectfully presenting suggestions as to
16 how the system might be improved. Upon
17 review of the *Hurrell-Harring* Stipulation
18 and Order of Settlement, it appears there
19 are four main objectives that the parties
20 to the lawsuit sought to achieve: (1)
21 counsel at arraignment regardless of
22 eligibility, (2) caseload relief for
23 attorneys providing mandated
24 representation, (3) quality of mandated
25 representation, and (4) eligibility

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standards for representation.

Today I will specifically address items one and four, counsel at arraignment and eligibility standards.

Criminal Procedure Law 170.10 sets forth the current requirements for the arraignment of a defendant on an information, simplified traffic information, prosecutor's information, or a misdemeanor complaint. Criminal Procedure Law 180.10 has comparable language for arraignments on felony complaints. These statutes contemplate that the defendant may be appearing without the assistance of counsel, and, in that instance, is entitled to (a) an adjournment to obtain counsel, (b) an opportunity to communicate free of charge for the purpose of obtaining counsel and informing a relative or friend that he or she has been charged with an offense, and (c) have counsel appointed free of charge by the court if he or she is unable to afford the same.

These statutes direct that the court

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2 must take such affirmative action as is
3 necessary to effectuate a defendant's right
4 to counsel. Moreover, the statutes provide
5 that the court must be certain that the
6 defendant understands the significance of
7 proceeding without counsel; the court must
8 engage in a pro se colloquy, and that to do
9 so is not deemed a waiver of her or her
10 right to counsel at a later time.

11 Prior to *Hurrell-Harring*, there were
12 additional safeguards in place to protect
13 the defendant's constitutional rights at
14 every stage of the proceedings. In
15 addition to the following -- in addition to
16 the following statutorily proscribed
17 process for an arraignment, town and
18 village judges -- justices were taught to
19 provide the defendant with a public
20 defender application.

21 By the way, folks, I did provide --
22 bring one with me from Columbia County.
23 You are so -- he is one of the best public
24 defenders. I actually brought it with me.
25 I don't have ten copies for you. I

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1
2 apologize, but it is a front and back
3 and --

4 **MS. MACRI:** Thank you.

5 **HON. DR. O'HARE:** -- so you
6 appreciate that. What I do have, I have
7 for the TV-1 and TV-2. I will get to that
8 in just a moment.

9 Now, in addition to following that,
10 the town and village justices, they do
11 make, at this point, an assessment as to
12 eligibility at the time of arraignment. If
13 counsel is assigned at arraignment, the
14 court is instructed to issue a form
15 referred to as TV-1, order assigning
16 counsel; if counsel is not assigned at
17 arraignment, the court is instructed to
18 issue a form referred to as TV-2, a notice
19 that there was no assignment of counsel.

20 Pursuant to Title 22 New York Code
21 of Rules and Regulations §200.26(c), the
22 court is required within 24 hours of
23 arraignment to notify the public defender,
24 conflict defender, legal aid, et cetera,
25 and pretrial services agency/unit by

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2 telephone and fax of the issuance of the
3 Order of Assignment, TV-1, the notice of --
4 excuse me, the Order of Assignment, TV-1,
5 or notice that there was no assignment of
6 counsel, TV-2.

7 You folks have a copy of those, both
8 of those forms with you there.

9 I just want to stress that I am a
10 town judge, and if do an arraignment at
11 2:00, 3:00, 4:00, doesn't make a difference
12 what time it is. I do -- before I leave
13 that court, regardless of the time, I do my
14 very best to make sure that it's faxed at
15 that time. Mr. Linville's office -- and
16 again I can speak because he's here, but
17 his office has it available so that when I
18 do fax it, it's there. Okay. And they
19 have it. I also follow up the next morning
20 to make sure all parties have this
21 information. All right.

22 Now, the sole purpose of the TV-1 or
23 TV-2 is to inform the aforesaid agencies
24 that the defendant has been incarcerated
25 with or without bail so that they can

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1 promptly take whatever steps they deem
2 necessary to protect the defendant's
3 rights.
4

5 As part of the arraignment process,
6 the court is directed to consider the bail
7 factors set forth in CPL 510.30 to
8 determine whether the defendant is a flight
9 risk. The question of bail is what degree
10 of control or restriction is necessary to
11 secure the defendant's future court
12 attendance. The factors to be considered
13 are (1) the defendant's character,
14 reputation, habits, and mental condition;
15 (2) defendant's employment and financial
16 condition; (3) defendant's family ties and
17 length of residence in the community; (4)
18 defendant's criminal record; (5)
19 defendant's record as a juvenile
20 delinquent; (6) defendant's record of
21 responding to the court appearances when
22 required -- the history of that; (7) the
23 weight of evidence against the defendant in
24 the pending criminal action; and (8) the
25 possible sentence that might be imposed.

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2 After *Hurrell-Harring*, as a result
3 of increased funding, steps have been
4 instituted by public defenders' offices and
5 legal aid offices to protect the right to
6 counsel at the time of arraignment,
7 regardless of eligibility. The Columbia
8 County Public Defender's Office has
9 notified the town and village courts that
10 their office is available to appear for the
11 arraignment of all defendants at any time,
12 day or night. The procedure is that upon
13 receiving a callout by a police agency, to
14 court is to contact the public defender's
15 arraignment phone number. It is a cell
16 number, and it is now programmed in my cell
17 phone, so that --

18 **MR. DUNNE:** I wonder if you could
19 move on to your portion of your remarks
20 about eligibility because we've had many,
21 many conversations with members of your
22 association about counsel arraignment, and
23 we look forward to having many, many more,
24 but the purpose of today's hearing and our
25 limited time is focused on the eligibility

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2 and like to make sure you have time to make
3 a presentation on that.

4 **HON. DR. O'HARE:** I'll be glad to do
5 that, sir. All right. So moving right
6 along, then. And I timed this to be just
7 exactly ten minutes, because that's what
8 you folks gave me.

9 With respect to the issue of
10 eligibility, the Columbia County Public
11 Defender's Office has a designated
12 application form. Again, I didn't make
13 copies, but we do have it here. It is my
14 opinion that the court needs to
15 examine/question eligibility on a
16 case-by-case basis and make a determination
17 whether the defendant can afford to hire
18 counsel or not, taking into account not
19 only the defendant's income but also cash
20 on hand, expenses, liabilities, liquidity,
21 anticipated cost of counsel, et cetera.
22 Perhaps it would be instructive for the New
23 York State Office of Indigent Legal
24 Services to develop a statewide application
25 form that incorporates the factors set

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2 forth in the *Hurrell-Harring* stipulation
3 and order of -- stipulation.

4 Specifically, the form should
5 include language indicating whether the
6 defendant can afford the actual cost of
7 retaining a private attorney in the
8 relevant jurisdiction for the category of
9 the crime charged. Also, the form should
10 provide a means whereby the defendant can
11 segregate the amount of income needed to
12 meet the reasonable living expenses of the
13 applicant and any dependent minors within
14 his or her immediate family, or a dependant
15 parent or spouse, as well as identify
16 assets that are necessary to maintain their
17 employment. Non-liquid assets and assets
18 of family members should be characterized
19 separately.

20 Furthermore, application should
21 allow a defendant to set forth whether
22 their income is below federal poverty
23 guidelines, whether they reside in a mental
24 health or correctional facility or receive
25 public assistance. The defendant's debts

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2 and obligations should be identified, as
3 well as income and assets so that the court
4 may make an informed decision as to whether
5 the defendant possesses disposable income
6 sufficient to afford to retain private
7 counsel.

8 The court should err on the side of
9 assigning counsel since the public defender
10 has a remedy if they disagree with the
11 court's assessment, in that they can bring
12 a proceeding pursuant to County Law 722-d
13 to force the defendant to pay all or part
14 of the cost of representation. The
15 defendant does not have a similar remedy
16 under that statute.

17 Lastly, I want to dispel any
18 misconception that the current system of
19 justice in the town and village courts is
20 the genesis of the problem addressed *in*
21 *Hurrell-Harring*. Our current system is not
22 broken. It is simply needs to be tweaked.
23 Town and village courts are the courts
24 closed to the people and charged with the
25 responsible of protecting a defendant's

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2 fundamental right to an immediate
3 arraignment. The right to an immediate
4 arraignment is the hallmark of the right to
5 liberty as guaranteed to each person under
6 the United States and New York State
7 Constitutions.

8 In Upstate New York, town and
9 village justices are the only judges in the
10 Unified Court System that are on call
11 24-hours a day, 7 days a week, and 365 days
12 a year. And that does mean every holiday,
13 too, folks. Doesn't make a difference.
14 The significance of that fact is not lost
15 on the average defendant, faced with
16 spending a night or two in jail while
17 waiting to be arraigned. Certainly a
18 defendant, given a choice, would choose
19 appearing before a town or village justice,
20 with or without counsel, to discuss the
21 issue of bail rather than sitting in a
22 holding cell until counsel can be present
23 for an arraignment.

24 While the right to counsel is a
25 fundamental right we swear to preserve, so

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2 is the right to one's liberty. My hope is
3 that the State Office of Indigent Legal
4 Services will consider both when proposing
5 a solution to this vexing problem. I will
6 say, folks, the last thing this judge ever
7 wants to do is take anyone's liberty away.

8 **MR. DUNNE:** Thank you very much.

9 **HON. DR. O'HARE:** I thank you very
10 much for your time.

11 **MR. BRESLIN:** I have no questions.

12 **MS. MACRI:** Can I ask one question?

13 Thank you. Thank you, Dr. O'Hare,
14 for spending your time with us this morning
15 and providing your insight. Just a quick
16 question. I know that the Magistrates
17 Association is a large membership. Do you
18 have opportunities to provide trainings and
19 mentoring on how to address these issues in
20 terms of eligibility, how new judges come
21 in? Does that happen?

22 And also my second question, real
23 quickly, is: Have you, within the
24 association, talked about baseline criteria
25 where it should be a determination whether

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2 it's, for example, somebody in public
3 housing or what have you?

4 **HON. DR. O'HARE:** First, training,
5 yes, there is a significant amount of
6 training. There is a taking-the-bench
7 training when they first come in, and part
8 of that is understanding not only the bail
9 situation itself, but the eligibility for
10 counsel. All right? And that is being
11 brought -- as a matter of fact, I believe
12 that we have another program that is set
13 up, because we have the -- once a year the
14 state magistrate holds a conference, and
15 that is being held at Niagara Falls in
16 September of this year, and I believe we
17 have part of that on one of our programs
18 agendas there. All right?

19 So, yes, there is training ongoing,
20 and there is also -- we do have, as -- Mr.
21 Breslin, as you know, we have a supervising
22 judge, who is outstanding. He provides a
23 lot of information to us through our
24 different representatives there, so we do
25 try to provide that information and

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2 training on an ongoing basis.

3 Because Mr. Linville brought up a
4 good point: It's on a case-by-case basis.
5 You cannot -- and that would defeat the
6 purpose of justice to make it a blanket
7 statement that, based on this, then all
8 things would be this way. I appreciate you
9 want to have some kind of a quote, unquote
10 benchmark, but at the same time, you need
11 to look on a case-by-case basis. Because
12 rarely have I ever seen it be the same set
13 of circumstances for each defendant. You
14 know, there's no two defendants that are
15 alike. And you have to really look at it
16 and understand what's going on.

17 Lastly I will say, these are
18 probably some of the most challenging times
19 I've ever seen. And see folks coming to
20 court before us, they're working one, two,
21 three, four, five -- if they even have a
22 job. All right. So we have to take all
23 that, and we do our very best to take that
24 under advisement. I know you folks are
25 great. Thank you for your time. I

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1 appreciate it very much.

2 **THE BOARD MEMBERS:** Thank you.

3 **MR. DUNNE:** Lee Kindlon, practicing
4 attorney with the Kindlon Law Firm, and
5 happy to have you with us.
6

7 **MR. KINDLON:** Good afternoon,
8 everybody. I snuck in the back a few
9 minutes ago. I've not had the opportunity
10 to listen to everyone testify today. I
11 will do my best not to repeat what you may
12 have heard already.

13 For those of you who do know me --
14 or whom have never met me before. Some of
15 my brief background: I was a -- initially
16 a prosecutor in the Marine Corp. And moved
17 back to Albany in 2006 and joined my firm.
18 Part of a legal family. The first six
19 years I was back, that was probably six of
20 the best years of my legal career so far.
21 I has worked as either a public defender or
22 assistant public defender or an alternate
23 public defender with Mr. Alhern [phonetic],
24 my old colleague who sits in the back.

25 I've been in a hundred different

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2 local courts a thousand different times.
3 The night my second son was born, I was
4 actually in Colonie Town Court as an
5 assistant conflict defender, as my wife
6 called and said she was in labor, and I
7 said, "I just have a couple more cases.
8 I'll be home in a bit." So I like to think
9 that, you know, I've been working in the
10 trenches for a long time. Even now I do my
11 best to represent clients; although, I'm
12 not working in the public sector anymore,
13 for as little money as I can possibly do to
14 get by with my own practice.

15 So I come today hopefully with some
16 real practical knowledge about what a
17 defendant may see when he or she confronts
18 the criminal justice system for maybe the
19 first time or maybe the hundredth time.

20 **MR. DUNNE:** I think we might be
21 familiar with that. Could you focus,
22 please, on eligibility standards.

23 **MR. KINDLON:** Well, let me join the
24 previous two speakers in saying that the
25 uniform rule, I think, would be uniformly

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2 terrible. There is no one size fits all
3 criteria for a defendant who steps in front
4 of the bar. I think there should be two
5 default positions when a defendant first
6 comes in front of the court.

7 First should be the automatic
8 assignment of a public defender, at least
9 for purposes of arraignment. I think here
10 in Albany, frankly, the court system I
11 practice in the most I think the public
12 defender's office gets it right. They're
13 the ones who steps forward and says I will
14 stand with you for the purposes of
15 arraignment; unless there's a glaring
16 conflict like when two defendants are
17 arraigned together, and then an alternate
18 public defender steps in. Those things,
19 that is a good place to be.

20 The second default position should
21 be the release status of the defendant.
22 Because I think when bail is factored into
23 the mix, I think it creates a Hobson's
24 choice for a defendant of -- who needs to
25 decide do I need to pay bail money, do I

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2 need to pay a lawyer? I think the that
3 release status, unless it's -- I know in
4 New York we don't take into, you know,
5 whether or not the defendant poses a danger
6 to the community. I agree with Judge
7 Lippman, that should be changed outright,
8 but I think more often than not, a
9 defendant, especially accused of a
10 low-level nonviolent offense, misdemeanor,
11 should be released or at least released on
12 the supervision of probation in extreme
13 circumstances.

14 I think financial ramifications on
15 many, many defendants are so great that,
16 you know, to -- to lock them up and -- and
17 ask questions later, would be -- would be
18 really detrimental to that individual.

19 So in terms of what the criteria
20 should be for an individual to be
21 assigned -- and I know this question was
22 asked a few minutes ago. I have seen, I'll
23 say in the past 10 years, one defendant,
24 and I just saw it a couple weeks ago. One
25 defendant who was clearly, clearly not

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2 eligible for indigent counsel. I think
3 that the local judges here -- sorry, the
4 local level and the county level have it
5 right when they look to see what kind of
6 criteria and what kind of facts exist. And
7 I think the public defender system here
8 does a very good job in figuring out
9 whether or not you should be eligible for
10 their services or not.

11 But -- and I'm sure other people
12 have said this, but I think it bears
13 repeating, as every person who comes up to
14 this podium probably says, the answer is
15 not just simply dumping more defendants
16 onto the public defender and the alternate
17 public defender's office. What is
18 ultimately the answer? The answer is more.
19 And what do people need? They need more.
20 The public defender's office needs more
21 bodies, more resources, more money, more --
22 you know, not just lawyers, but support
23 staff. I know that. I -- again, I
24 experience that even today.

25 So, you know, in terms of the

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2 individual having indigent defense services
3 assigned, you know, it should be a very
4 basic question to get them counsel as a
5 default. And then from there, decisions
6 are made by that individual and by the
7 public defender's office and secondary by
8 the court system, that individual should be
9 -- should have the opportunity to get
10 counsel assigned to them.

11 **MS. BURTON:** May I ask?

12 I think, you know, given your status
13 as, you know, having worked both as a
14 private attorney --

15 **MR. KINDLON:** Yes.

16 **MS. BURTON:** -- and as a public
17 defender and conflict defender, you're sort
18 of in a good position to speak to the issue
19 of ability to pay --

20 **MR. KINDLON:** Yes.

21 **MS. BURTON:** -- for an attorney --

22 **MR. KINDLON:** Yes.

23 **MS. BURTON:** -- in various types of
24 cases.

25 **MR. KINDLON:** Uh-huh.

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2 **MS. BURTON:** And so my question goes
3 to -- in terms of, you know, sort of using
4 the federal poverty guidelines or some
5 multiplier thereof as a baseline or, you
6 know, sort of a place to start, what are
7 your thoughts with respect to increasing a
8 range in our research from a hundred -- in
9 New York State, as well as around the
10 country, from a hundred twenty-five percent
11 to 350 percent rate? So given your
12 understanding of the actual cost of
13 retaining an attorney in these cases, what
14 suggestions might you make along those
15 lines?

16 **MR. KINDLON:** Well, and that --
17 also, at this point, I run a business and I
18 have employees and I -- I tell clients,
19 "Look, truly I'll take your case for a
20 dollar. This is what I enjoy to do," and I
21 had a brief thought that I might do
22 something else with my career, but at end
23 of the day, I think I was intended to do
24 this. So it's -- it's truly a market-based
25 thing, because I will take a case for X

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2 and, I think, do a good job, but I always
3 find that there are people out there who
4 are willing to undercut my price. And I
5 know it's not exactly the answer to your
6 question in terms what you're looking for a
7 baseline in terms of what people should be
8 able to pay.

9 There are only a few situations in
10 which I've ever heard of people having
11 money sitting around for paying for an
12 attorney when they come into contact with
13 the criminal justice system. And most of
14 those are horror stories from the US
15 Attorney's Office, you know, drug cartels
16 and mules and whatnot, so I don't actually
17 think that people plan, you know, a rainy
18 day fund for lawyers.

19 But that being said, you know, who
20 ultimately -- the federal poverty guideline
21 of 125 percent, I've seen that benchmark as
22 well. I think that that's a very good
23 idea. I've seen that that's used, you
24 know, couple cases down in federal court in
25 which I often work closely with public and

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1 assigned counsel. And their -- you know,
2 their system is a little different in terms
3 of how the individuals are assigned and how
4 bail is set, and that's one of the things
5 I -- [inaudible] -- how actually bail and
6 release status is done. I know it's not
7 the point of today, but I think that's a
8 very important thing to look at here.
9

10 But who ultimately makes that call?
11 Is it up to the public defender, once they
12 realize that, you know, their client drove
13 a -- was arrested in a Porsche? You know,
14 it is up to the public defender to then cut
15 that person out of their services? And can
16 an attorney do that? I mean, that's
17 always, I think, the practical matter that
18 comes in, is, you know, as an attorney can
19 you fire your client unless something
20 happened and then you need court approval
21 and then it gets into a lot of really hairy
22 situations.

23 So you know what ultimately is the
24 solution? Much bigger brains than I, so I
25 look to the five of you, but, you know, in

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2 terms of the assignment of counsel and -- I
3 think, again, the default position should
4 be, yes, absolutely. But with all respect
5 to today's inquiry, I don't think -- and I
6 doubt it does, but I don't think the
7 inquiry should end there, because what else
8 can be done in the interest of defendants
9 of the state of New York.

10 **MR. LEAHY:** I want to follow up with
11 one of your points earlier.

12 **MR. KINDLON:** Yes, sir.

13 **MR. LEAHY:** To the two default
14 positions, one being automatic assignment
15 of counsel in the early stage and,
16 secondly, that the -- what I take to be a
17 kind of presumption of release under
18 cognizance.

19 **MR. KINDLON:** Yes.

20 **MR. LEAHY:** What -- just like to ask
21 you to elaborate on whether it comes a
22 sense of bail is utilized and cases where
23 it's not necessary. I'm thinking about the
24 New York City proposal now, where really
25 making a strong effort to eliminate or at

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2 least dramatically reduce the use of cash
3 bail and bonds and detention, and then the
4 question about what to replace it with.

5 But leaving that aside, is -- are
6 you suggesting that we should take a
7 serious look at a proposal that addresses
8 not just eligibility but the overuse of --
9 of money bail that puts people in this
10 Hobson's choice that you mentioned?

11 **MR. KINDLON:** Yes, yes. Absolutely.
12 And I was making a veiled reference to what
13 New York City has recently done
14 unfortunately because of course tragic
15 defense, but sometimes tragedy makes us
16 take a second look. I was [inaudible]
17 Judge Lippman's discussions about bail and
18 misuse of bail and have stated the
19 judiciary for 2013, I believe. A few
20 months ago I had the pleasure of arguing in
21 front of the court of appeals. I lost four
22 to one. The one that [inaudible] voice was
23 Judge Lippman, and he supported my
24 argument, so I'm hoping you're in favor of
25 supporting his arguments today.

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2 [Inaudible] but I think Judge Lippman's
3 comment on the use of bail -- or misuse of
4 bail to a lot of people I think should --
5 should be looked at. And I think his
6 comments should carry some serious weight.

7 Because, again, I've been in local
8 courts where, you know, a woman stole
9 diapers from the local Walmart was -- you
10 know, so petty larceny, which is a
11 misdemeanor, was suddenly locked up on
12 \$10,000 bail she had some old failures to
13 appear, you know, and then, you know, the
14 case kind of bubbles along and public
15 defender can't get assigned right away
16 because the public defender is overworked;
17 there were a hundred and eighty cases on
18 that night, and, "We'll get to you at some
19 point." And then she's in jail and the
20 kids are in foster care for the next month.

21 I mean, it's just -- it's -- the
22 problems compound and exacerbate one
23 another, and we all wonder what's going on.
24 And it's just -- [inaudible]. You know,
25 what are the other resources? We have

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2 probation. We just have a person's word.
3 You know, we have personal progress
4 response in federal court, which you just
5 sign and promise to come back otherwise you
6 have civil judgment against you. And there
7 are -- there are other solutions here that
8 go beyond the use of cash money bail and,
9 you know, financial interest for bail
10 bondsman. As much as I personally enjoy
11 local bail bondsmen here, I think the
12 system is upside down.

13 **MR. DUNNE:** Any other questions of
14 Mr. Kindlon?

15 **THE BOARD MEMBERS:** No.

16 Thank you very much.

17 **MR. KINDLON:** Thank you all very
18 much. Have a nice day.

19 **MR. LEAHY:** Thank you.

20 **MR. DUNNE:** Is James Milstein here?

21 James is Albany County's public
22 defender, and, once again, good to have
23 somebody who's in the trenches.

24 **MR. MILSTEIN:** Pleasure to be here
25 [inaudible] speaking as well. This

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2 committee is charged with the important
3 task to determine under what circumstances
4 a person should be deemed to be unable to
5 afford counsel and thereby entitled to
6 representation at the cost of [inaudible].
7 My comments are designed to suggest that
8 there could be a myriad of factors and
9 circumstances that must be considered
10 before arriving at what would appear to be
11 a simple decision. There are two issues
12 that should be addressed and clarified by
13 this. The first is who determines whether
14 a client is eligible for representation and
15 the second issue is what criteria should be
16 utilized to determine if a person meets
17 eligibility criteria.

18 In Albany County, we're confronted
19 on a daily basis whether or not a client is
20 eligible to be assigned counsel at the
21 county's expense. Within Albany, there are
22 more than 35 judges that could potentially
23 assign a client in family court or criminal
24 court to our office. Some judges will
25 request we represent a client subject to

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2 his later qualifying for our services, and
3 others will rely on our office to make the
4 determination as to whether a client is
5 eligible. Other judges believe that it's
6 the court's responsibility to determine if
7 the client is eligible, and will assign us
8 the cases. And then other courts will
9 automatically assign our office to any
10 client that's committed to the county jail,
11 as I heard a previous speaker [inaudible],
12 as pursuant to an order pursuant to 22
13 NYCRR 220.26.

14 When our attorneys appear with the
15 accused at their arraignment, it is
16 sometimes unclear whether our
17 representation continues throughout the
18 case or is just for the purposes of the
19 arraignment. For example, the court may
20 mark the court file with the public
21 defender as the counsel of record and
22 advise the client to go to our office to
23 have eligibility determined. If the client
24 doesn't come to our office, does not
25 communicate with the office, the court and

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2 district attorney will frequently assume
3 that our office still represents the
4 client, and we're considered obligated to
5 reach out, find this client, who has never
6 come to our offices, to complete financial
7 questionnaires or intake.

8 If the client does apply for
9 representation to our office, we apply the
10 constitutional and statutory standards in
11 determining whether a person is financially
12 unable to afford counsel. Income measures,
13 such as percentage of poverty guidelines
14 are used to make an initial eligibility
15 determination, but they are not the sole
16 criteria utilized. Certainly, if a person
17 is receiving public assistance benefits,
18 that would be proof of an inability to hire
19 an attorney. Other factors the committee
20 may choose to consider in determining if a
21 person is financially able to afford
22 counsel are the income and expenses of the
23 client, the potential funds needed for a
24 retainer of private counsel, the assets or
25 debts of the client, the amount of bail

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2 posted by or on behalf of the client, and
3 the complexity of the case and the cost of
4 private representation in the community.

5 In addition, the public defender is
6 frequently the first attorney to appear in
7 court and the last to leave. As a result,
8 there is a temptation by courts to assign
9 our office to individuals in order to get
10 the cases moving. An accused may come to
11 court with the belief that their charge is
12 not that serious, even though it's a
13 misdemeanor. The court does not believe it
14 can give legal advice to the accused and
15 will sometimes tell the person to go speak
16 with the public defender. This will result
17 in individuals being assigned who may not
18 otherwise be eligible, but it ensures that
19 the client's rights are protected.

20 A public defender's DNA is to help
21 who are accused of crimes. We don't turn
22 people away that easy. If a person appears
23 in court and is unfamiliar with the
24 process, the accused will often seek formal
25 or informal guidance from the public

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2 defender. Sometimes clients come to court
3 believing that their first appearance is
4 their trial or their opportunity to be
5 heard on the case, in which case they want
6 to start telling the judge what happened in
7 their domestic violence situation.
8 Frequently judges will stop them and say,
9 "Go talk to the public defender."

10 Sometimes people have travelled at a
11 great expense or distance in attempt to
12 resolve the case in one appearance, and the
13 court is sympathetic to that person and
14 asks the public defender to assist the
15 person.

16 Thus, there is a spectrum of
17 circumstances and factors that will
18 determine when a public defender will be
19 appointed; sometimes regardless of
20 financial eligibility.

21 Another issue for the committee to
22 consider is whether a person -- I haven't
23 heard this discussed yet today. Is whether
24 a person who is a dependent on another's
25 income tax return should be eligible for

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2 assignment. These cases would include when
3 a child or spouse is arrested. In cases
4 where a spouse or family member is the
5 complainant, it would be unfair to require
6 that the person that actually made the
7 complaint would then have to pay for the
8 representation of the person they accused
9 of a crime. In those cases, the accused
10 may believe the attorney is not serving
11 their best interest because they perceive
12 the attorney is getting manipulated by the
13 complainant who hired them. So the public
14 defender sometimes is the best choice to
15 make sure the person is best represented.

16 If the courts are going to liberally
17 assign public defenders in cases where the
18 accused may not necessarily be eligible,
19 this committee should consider examining
20 whether partial payment to the county could
21 be justified pursuant to Section 7.82(B)
22 [phonetic] of the county law. When a
23 person's liberty is taken at the
24 arraignment, there should be a presumption
25 that the client is financially unable to

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2 afford counsel and the public defender
3 should be assigned.

4 In Albany County, our attorneys are
5 usually at the arraignment and can assist
6 the client in communicating with family and
7 posting bail. These steps will be critical
8 for the client --

9 **THE COURT REPORTER:** I'm sorry.
10 Excuse me, I couldn't hear that.

11 **MS. MACRI:** If you would just speak
12 up.

13 **MR. MILSTEIN:** Significant
14 collateral or direct consequences to the
15 accused, such as citizen status --
16 citizenship status or license suspension.
17 However, if a client is not in custody and
18 is above the poverty guidelines, the court
19 should give the accused a brief adjournment
20 to demonstrate what efforts were made to
21 obtain counsel. Frequently, the accused
22 may have cash flow problems or they're
23 living paycheck to paycheck. There could
24 be a myriad of other circumstances for the
25 court to consider, which may make it

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2 unlikely that the client is able to hire an
3 attorney, especially when accused of a
4 felony.

5 In conclusion, this committee has an
6 important mission to establish clear
7 eligibility standards for New York.
8 However, it must be remembered that there
9 are numerous factors, based upon of the
10 nature of the offense and the nature of the
11 offender that should be considered in order
12 to determine whether a client is deemed to
13 be financially unable to afford counsel.
14 Thank you.

15 **MR. DUNNE:** Mr. Breslin?

16 **MR. BRESLIN:** Jim, what's your
17 notion of how this system could better
18 work, given all of the -- of the various
19 procedures that you have encountered with
20 judges, what you do you think is the best
21 way?

22 **MR. MILSTEIN:** Well, I think,
23 especially under the offices of indigent
24 services is highly the importance of
25 arraignment. And our office has

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2 fortunately received a grant and we've been
3 doing arraignments outside the regular
4 presence of the court. And what we've
5 determined, I think, is arraignments are
6 critical. They're dramatic. They're
7 important. Because at that point, a
8 person's liberty can be taken from them,
9 and then there's a waterfall of effects
10 that could occur if that liberty's taken.

11 **MR. BRESLIN:** We all agree to the
12 importance. And there's a question of
13 whether do you have a standard across the
14 board or who makes the decision and who has
15 the discretion? Who do you think is the
16 one who should be reviewing this discretion
17 and how that decision should be made?

18 **MR. MILSTEIN:** Well, I think
19 initially the presumption should be the
20 court should contact the public defender
21 for an arraignment, because if they're not
22 certain, unless the person accused says, "I
23 called Mr. Jones, he's my lawyer, and he's
24 going to be here any minute." And that's
25 fine. But other than that, I think our

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1 office takes the position we should be
2 contacted for the arraignment. It's a
3 critical stage; however, once you reach
4 that stage, I think, there's a time where
5 you can step back, especially if the person
6 is released, to say, well, who now -- what
7 is going to be the criteria? Should it be
8 done by one intake office for the whole
9 county? The judges from -- when I've
10 spoken to them, believe it's the inherent
11 authority of the judge to determine who is
12 appointed. And sometimes once they're
13 appointed, well, if you learn factors that
14 are new and different, bring them to my
15 attention and we will reconsider the
16 appointment of counsel.

17
18 So I think it's -- in theory, the
19 judges still have to be the people that
20 make that determination, but I think we
21 have to have some type of guidelines that
22 will request the judges or implore the
23 judges to not necessarily automatically
24 appoint us where there is potential mole in
25 the action to give people an opportunity to

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2 go out and hire an attorney.

3 We've had cases where people have
4 posted bail in the amount of \$60,000,
5 hundred thousand dollar bonds, and we're
6 the attorney of record. And you walk in
7 the court and everybody in the private
8 party is saying to you, "Why are you
9 representing this person?"

10 "We've been appointed."

11 And then it creates issues as to
12 what we're allowed to question the client
13 about, and a lot of times it's not the
14 client has the money. It's the people
15 around the client, the parents; the spouse;
16 family members, who pooled their resources
17 together, whether it's to post bail or hire
18 an attorney.

19 **MR. LEAHY:** Jim, do you see an
20 overuse of bail in minor cases,
21 misdemeanors and violation cases, along the
22 lines of Atty. Kindlon mentioned?

23 **MR. MILSTEIN:** I would say -- and I
24 think probably speaking as a defense
25 attorney, I would say, yes. I'm sure if we

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2 polled certain judges and prosecutors,
3 they're probably saying there's not enough
4 use of bail because there's --

5 **MR. LEAHY:** I'm just speaking from
6 the defense perspective.

7 **MR. MILSTEIN:** I would say, yes. I
8 think there should be a presumption that
9 people are people, bail should be
10 reasonable, and it should be reasonable not
11 just based on the charges but reasonable to
12 a person who -- might be reasonable to set
13 a thousand dollars bail for a person who
14 has a job that can easily post a thousand
15 dollars bail, but if you set bail for a
16 thousand dollars for a person who's
17 unemployed it would be equivalent to
18 setting bail at \$500,000.

19 **MR. LEAHY:** Thank you.

20 **MS. MACRI:** I have one question.

21 In terms of this idea of having
22 attorney arraignment to possibly determine
23 eligibility, for example, do you have any
24 concerns about the attorneys sharing that
25 information with the court when it is the

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2 court that is obligated the assign, or do
3 you feel that the court should basically
4 just ensure some confidence in the public
5 defender, for example, in making that
6 determination?

7 **MR. MILSTEIN:** I think the court,
8 you know, should -- should have some
9 confidence in our office as to what we do.
10 I don't think we've ever gone and divulged
11 what the person has. It tends to be fairly
12 obvious to -- to the court. Sometimes it's
13 obvious by how the person is dressed, what
14 they're wearing, what pocketbook they have,
15 and how they approach, or what car they
16 drove up to court in. Word gets back to
17 the judge, and they'll say, "Why are you
18 representing this person?"

19 And I think -- so it's hard to set
20 up a full set of standards that will cover
21 everything. But I think we certainly don't
22 want to do any -- have any standards that
23 will result in people being unrepresented
24 for significant periods of time, and more
25 importantly, specifically, at arraignments

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2 or when they're incarcerated and can't make
3 bail.

4 **MS. MACRI:** Thank you.

5 **MR. DUNNE:** Thank you very much.
6 Appreciate that.

7 **MR. MILSTEIN:** Thank you.

8 **MR. DUNNE:** Melanie Trimble is here
9 with us representing the New York Civil
10 Liberties Union Albany chapter. Welcome.
11 You've been very patient for staying.

12 **MS. TRIMBLE:** And thank you very
13 much for doing this. I really appreciate
14 everything. It's been, you know, very
15 educational for me and also to the
16 [inaudible] to establish a good statewide
17 standard.

18 I'm Melanie Trimble. I'm the
19 director of Capital Region chapter for the
20 New York Civil Liberties Union. We cover
21 eight counties in the area, including
22 Washington County, which is part of our
23 *Hurrell-Harring* suit. I speak today to
24 emphasize the need to develop statewide
25 standards for determining who's eligible

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2 for public defense services in criminal
3 cases. The NYCLU's litigation,
4 *Hurrell-Harring* --

5 **THE COURT REPORTER:** Excuse me,
6 would you speak up, please.

7 **MS. TRIMBLE:** Okay.

8 **MS. MACRI:** Thank you.

9 **MS. TRIMBLE:** The NYCLU's
10 litigation, *Hurrell-Harring vs. The State*
11 *of New York*, resulted in an historic
12 agreement invoking new guidelines and
13 requirements for public defense in five
14 counties: Onondaga, Ontario, Schuyler,
15 Suffolk, and Washington. The litigation
16 also -- also gave rise to the mandate for
17 the Office of Indigent -- sorry, Indigent
18 Legal Services to create statewide
19 eligibility standards, which is the focus
20 of this hearing today.

21 It is commonly asserted that every
22 defendant who cannot afford a private
23 attorney eventually gets a public defender.
24 Even if this assertion were true, it is
25 often the case of too little too late.

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2 Time and again our investigations across
3 New York State have uncovered wrongful
4 denials of counsel and uncounseled guilty
5 pleas that were accepted.

6 In my office's region, we have found
7 that these problems have particularly
8 pervasive in Washington County. The
9 Washington County Public Defender's Office
10 relies on eligibility guidelines that
11 ignore such crucial factors as debt
12 payments, regular monthly bills, credit
13 worthiness, or job loss due to arrest or
14 incarceration. And by its own admission,
15 the office does not appear in a large
16 number of arraignment sessions; thereby,
17 knowingly violating the right of counsel to
18 indigent defendants. Sadly, we have found
19 that similar circumstances exist in other
20 counties that are not covered by the
21 *Hurrell-Harring* agreement.

22 The ILS must also not overlook the
23 number of -- the large number of indigent
24 defendants who are not incarcerated at the
25 time of their arraignments. Generally

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2 speaking, they are not presumptively
3 represented by public defense counsel, yet
4 misdemeanor defendants at liberty should
5 have no lesser right to counsel than any
6 other criminal defendant.

7 Even when judges eventually appoint
8 public defense counsel, initial denials
9 result in delays. Thus, in itself, it is
10 deprivation of the right to counsel during
11 the critical pretrial stage immediately
12 following the arraignment. Unfortunately,
13 New York has engaged in a decades-long
14 failure to ensure meaningful counsel for
15 poor people accused of crimes. Too often
16 this is resulting in public defenders'
17 offices that are underfunded and mismanaged
18 by cash-strapped and politically unwilling
19 county governments.

20 Although ILS now issues important
21 and laudable standards and although the
22 state has now agreed to provide necessary
23 resources to the five *Hurrell-Harring*
24 counties, the state continues to make
25 decisions that cause deprivations of the

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1 right to counsel in the forgotten 57
2 counties outside of New York City that are
3 not beneficiaries of the *Hurrell-Harring*
4 settlement. Access to justice should not
5 depend on which county a defendant is in.
6

7 Without an increase in state
8 funding, those forgotten counties will bear
9 the cost when state standards increase the
10 workloads of county defenders. In other
11 words, new standards may be more inclusive
12 to the populations they cause workload
13 increase.

14 Counties may object, but their
15 complaints, valid though they may be, do
16 not justify lower standards that fail to
17 ensure counsel to those that cannot afford
18 attorneys. Standards governing public
19 defense should drive -- drive funding, not
20 the other way around. While ILS will no
21 doubt have many assertions from those who
22 oppose higher standards, we would strongly
23 urge you not to accept representations and
24 theories unless they are backed up by
25 verifiable data, as those of the NYCLU are.

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2 We thank the ILS for the opportunity
3 to testify today on the importance of
4 statewide eligibility standards. We look
5 forward to working with the ILS to ensure
6 that our criminal justice system does not
7 punish people simply because they are poor.

8 I have also offered you an expanded
9 testimony version so that you get more
10 detail.

11 **MR. DUNNE:** It will be part of the
12 record.

13 **MS. TRIMBLE:** Thank you very much.
14 I appreciate that.

15 Any questions?

16 **MR. BRESLIN:** One quick question:
17 Are you aware of any procedure set up in
18 any county which you think really hit the
19 button or is much closer to the idea in the
20 way they determine who does and doesn't get
21 a public defender?

22 **MS. TRIMBLE:** You know, I -- I
23 wasn't the lead attorney in the case, and
24 so I would have to refer back to the
25 attorneys that handled it.

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2 **Mr. BRESLIN:** Okay.

3 **MS. TRIMBLE:** Because I know they
4 did a lot of research into many, many
5 counties and dropped a few out because, in
6 fact, the provision of indigent defense
7 services was above certain standards. The
8 five counties that we chose were
9 representative of different systems of
10 public defense and also different levels of
11 care.

12 **MR. LEAHY:** I should mention that
13 the time period for public comment on our
14 eligibility requirements, it runs through
15 August 26th, so further information becomes
16 available that is responsive to Mr.
17 Breslin's question as to --

18 **MS. TRIMBLE:** Yes, I be talking -- I
19 believe you have another one in New York
20 City, so at that point in time I will try
21 to get an answer to that.

22 **MR. LEAHY:** Thank you.

23 **MS. BURTON:** I have a question.

24 So one of the key issues that many
25 people have talked about is the issue of

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2 who determines eligibility regardless of,
3 you know, at what point.

4 **MS. TRIMBLE:** Uh-huh.

5 **MS. BURTON:** Do you individually or
6 are you aware of any position by the NYCLU
7 with respect to whether or not that should
8 be an independent or the PD or...

9 **MS. TRIMBLE:** I know what's
10 essential to my organization, is that
11 people are represented at arraignment and
12 that they get the most consistent legal
13 advice throughout their trip through the
14 criminal justice process, whatever way that
15 has to be determined. I mean I understand
16 the arguments that the public defender
17 deciding whether or not they're eligible
18 may actually be sort of a conflict of
19 interest in that they either want clients
20 or don't want clients, their case loads are
21 of a concern, so looking at an independent
22 body would be great, but then there are
23 political ramifications, who's on this
24 independent thing. And then judges,
25 actually I think in general across the

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2 state, have been the ones deciding it,
3 so -- but our main focus is that people be
4 represented at arraignment and then
5 throughout the criminal process to make it
6 as streamline as possible.

7 **MS. BURTON:** Okay.

8 **MS. TRIMBLE:** Thank you very much.
9 Appreciate it.

10 **MR. DUNNE:** See you in New York.

11 **MS. TRIMBLE:** Yes.

12 **MR. DUNNE:** If there are no further
13 members of the public who would like to
14 testify, we will close this hearing and
15 thank you very much for your attention.

16 Mr. Leahy?

17 **MR. LEAHY:** If I could, just with a
18 closing note, extend our special thanks to
19 the Office of Court Administration and
20 specifically two people: the district
21 director for the third judicial district,
22 Beth Diebel; and chief clerk of the Albany
23 County Supreme Court and County Courts,
24 Charles Diamond; as well as all the OCA
25 staff here and our court reporter for

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2 allowing us the opportunity to access this
3 court and its facilities and have a record
4 of the proceedings. Thank you very much.

5 **MS. BURTON:** Thank you.

6 **MS. MACRI:** Thank you.

7 (Whereupon, at 12:51 p.m., the
8 record was closed.)
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2 **CERTIFICATION**

3
4 I, **Tara M. Drake**, a Court Reporter and
5 Notary Public in and for the State of New York,
6 do hereby certify that the foregoing record
7 taken by me at the time and place herein stated
8 and the preceding testimony is a true and
9 accurate transcript hereof to the best of my
10 ability and belief.

11
12 
13 **TARA M. DRAKE**

14
15 Dated: July 28, 2015

16
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