

COUNTY OF WESTCHESTER
STATE OF NEW YORK

-----X
9TH JUDICIAL DISTRICT PUBLIC HEARING
IN THE MATTER OF HURRELL-HARRING

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July 23, 2015

111 Martin Luther King Boulevard

White Plains, New York

11:00 a.m.

B E F O R E:

PANEL MEMBERS:

ANDREW DAVIES

RISA GERSON

WILLIAM LEAHY

JOANNE MACRI

Marci Loren Dustin, Court Reporter

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2 MR. LEAHY: Welcome everybody. This is
3 the third of our series of public hearings, which will
4 number eight in all, on eligibility for assignment of
5 counsel as part of the Office of Indigent Legal
6 Services' responsibility under the Hurrell-Harring
7 lawsuit settlement. Can everyone hear me? It's on.
8 I have to speak right into it, we're told, and we'll
9 try to do that.

10 I want to wish everyone a good morning: Our
11 panel members and presenters, and those who are here
12 just to learn about the issue. We thank each of you
13 for joining us here today to discuss eligibility for
14 assignment of counsel.

15 Over 50 years ago, the Supreme Court announced
16 in Gideon versus Wainwright that any person who is too
17 poor to hire a lawyer must be provided with counsel
18 during a criminal court proceeding. Moreover, New
19 York was a pioneer among the states in providing a
20 statutory right to counsel for litigants in a range of
21 family court proceedings.

22 As early as 1975, the New York State
23 Legislature noted that because of the possible
24 infringements of fundamental interests and rights,
25 including the loss of a child's society and the

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2 possibility of criminal charges, family court
3 litigants have a constitutional right to counsel in
4 certain family court proceedings. Despite the
5 acknowledgement of these principles, New York State,
6 as well as many other states, continues to struggle
7 with its obligation to provide adequate support to
8 ensure access to the courts for those unable to afford
9 to pay for an attorney on an equal basis with those
10 who can afford to pay for counsel.

11 We're pleased to report that measures, which
12 will be informed by your input here today, are being
13 taken to begin addressing many of these unresolved
14 issues. As many of you know, a settlement agreement
15 was approved on March 11th of this year in
16 Hurrell-Harring versus the State of New York, in which
17 the state acknowledged responsibility for ensuring
18 quality mandated representation. The New York State
19 Office of Indigent Legal Services, known as ILS, has
20 been vested with the authority to fully implement the
21 terms of this historic settlement agreement.

22 As part of that agreement, ILS must develop
23 and issue recommendations that will be distributed
24 statewide to guide courts in counties located outside
25 New York City to determine whether a person is unable

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2 to afford counsel and therefore is eligible for
3 mandated representation in criminal court proceedings.

4 The purpose of this public hearing is to
5 solicit your views, opinions, and comments on the
6 criteria that should be used and the process or method
7 that should be implemented in determining eligibility.

8 We are also interested in hearing about any expected
9 advantages and/or disadvantages that you see in
10 developing uniform and comprehensive guidelines, as
11 well as any recommendations you have concerning the
12 review or appeal of eligibility determinations. We
13 also welcome any information you wish to share with us
14 regarding the related social and/or economic impact
15 you foresee that these standards may have on your
16 communities.

17 Before we begin, we wish to extend our thanks
18 to our panel members and our guests for taking time to
19 be with us here today and to share your expertise,
20 insight, and recommendations with us.

21 We would also like to extend a special thanks
22 to the Office of Court Administration, and
23 specifically to the district director for the 9th
24 Judicial District, Nancy Mangold, as well as the OCA
25 staff here in White Plains for allowing us the

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2 opportunity to access this court and its facilities.

3 MS. GERSON: And the free parking.

4 MR. LEAHY: We welcome each of you, and
5 we'd like to introduce you to each of the members of
6 the panel.

7 My name is Bill Leahy. I'm a graduate of the
8 Univer -- I'm the director of the office. I'm a
9 graduate of the University of Notre Dame and Harvard
10 Law School. I have a history of practicing law as a
11 public defender in Massachusetts, and then leading the
12 Massachusetts Committee for Public Counsel Services.
13 In February 2011, I began my term as director of the
14 Office of Indigent Legal Services. And with that,
15 I'll proceed to our other members of the panel:
16 Joanne Macri, to my left, is the director of regional
17 initiatives at ILS. She oversees the implementation
18 of a statewide network of regional immigration
19 assistant centers.

20 Prior to joining ILS, she served as director
21 of the Criminal Defense Immigration Project and the
22 Immigrant Defense Project of the New York State
23 Defenders Association and taught immigration law at
24 SUNY Buffalo Law School.

25 Risa Gerson, immediately to my right, and the

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2 beneficiary of free parking, has been the director for
3 quality enhancement for appellate and post-conviction
4 representation at ILS since January 2013. Previously,
5 she was the director of the Reinvestigation Project at
6 the Office of the Appellate Defender in New York City,
7 a wrongful conviction review unit. Risa has taught at
8 New York Law School and New York University Law
9 School. She received her BA from Barnard College and
10 her JD from Brooklyn Law School.

11 Andy Davies, to my far right, is director of
12 research at ILS. His job is to track data on those
13 services and to push a research agenda for their
14 improvement. He earned a PhD in criminal justice in
15 2012 from SUNY Albany, and he has published research
16 on public defense in a variety of books, academic
17 journals, and law reviews. Prior to coming to ILS, he
18 also worked for several years as a researcher for the
19 New York State Defenders Association and spent a short
20 informative time as an interim gathering mitigation
21 evidence in capital cases in Atlanta, Georgia.

22 So with that, we would call our first witness
23 who is Clare Degnan, the executive director of
24 Westchester Legal Aid Society. Good morning, Clare.

25 MS. DEGNAN: Good morning. Good morning,

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2 everyone. For those of you to my back, I apologize.
3 Couple of different things. The first is, just so
4 everyone's clear, Westchester Legal Aid is a little
5 different than a lot of other counties in that the
6 Legal Aid Society in Westchester County represents
7 individuals who are charged with felonies, which is
8 different from a lot of other locales that might have
9 public defenders or otherwise. The 18B panel is
10 charge with representing conflict felonies, family
11 court issues, parole issues, and any misdemeanors. So
12 Legal Aid does not represent those individuals.

13 So the very first thing that -- for us that
14 becomes important is the level of the charge, because
15 felonies are more serious, they are more complicated.
16 But it's also more than that. The very first thing
17 I'd say is eligibility standards really have to be
18 resolved in favor of eligibility at all times. That
19 there can't be a default that says they're not
20 eligible, the default must be that they're eligible,
21 and that takes into account the constitutional aspect
22 and everything else.

23 And then what really becomes of issue are the
24 differences between the cases that are very clearly
25 eligible, those cases that are very clearly not

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2 eligible, it's our middle ground.

3 It's our middle ground that may be a scenario
4 for you: Harrison Court meets on a Tuesday; you have
5 a person who's picked up on a DWI over the weekend and
6 given a desk appearance ticket. It ends up being a
7 felony. There's also an AUO involved in it. And
8 Joanne might like this. I'll add a few more twists to
9 it. We don't know if this person is a citizen. They
10 may be a derivative citizen. They may be an LPR.
11 They may be just someone else.

12 Hearings -- refusal hearings in Westchester
13 County are held in Yonkers in the afternoon, on
14 Wednesday afternoon, at 1:00. And they're supposed to
15 be assigned as soon as the arraignments are done. And
16 this person is out on bail or out on a desk appearance
17 ticket that requires the money being put up but their
18 car is in the impound. This person also makes 45,000,
19 \$50,000 a year. On paper it would seem that this
20 person should not be eligible. But I've just outlined
21 at least four different portions of this person's life
22 that is going to be terribly impacted by this criminal
23 case, and they don't necessarily have the contingency
24 funds to hire an attorney.

25 So you have immigration issues, you have

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2 hearing issues, and -- oh, by the way, with the
3 hearing and the DMV regulations, you have a potential
4 for this person to lose the right to have a license in
5 New York State for the rest of their lives. All of
6 these things are extraordinarily impactful on the
7 individual's life, on that client's life.

8 That person in my office would deem to be
9 eligible for representation. There's just too many
10 aspects of this case and too many collateral
11 consequences and too much involved. And the
12 complexity of that case is such that we felt that even
13 with a salary of \$45,000, and not even taking into
14 account debt ratios or what kind of liquidity they
15 have, we would say we should stay on this case.
16 The question then will be who's determining this.
17 Well, thankfully, in Westchester County, anything
18 that's a felony that's coming to Legal Aid, we get to
19 determine it. We get to do as part of our interview
20 process, an eligibility evaluation of someone.
21 Now, I do believe, although I have not heard it or
22 seen it, that there's a report that may question
23 whether or not the defender should be the one who's
24 actually doing the determination, that there's some
25 other competing interest in that evaluation.

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2 I would still respectfully suggest that it is the
3 defender who should be doing so. And if there is a
4 denial, that the appeal should then go to the court to
5 determine the denial of that, whether it's an
6 appropriate denial or not. But again, I come back to
7 the original, to really air on the side of having
8 representation and going with the representation,
9 avoiding the hard-and-fast rules of 300 percent of the
10 federal poverty line or some other calculation along
11 those lines.

12 We also have to take into account regional
13 areas and what would be the cost of representation in
14 various parts of even Westchester County. There's a
15 significant difference in the cost in representation
16 in Yonkers or Mount Vernon and the northern
17 Westchester areas of Lewisboro or North Salem.

18 There is a question also of immediacy. We've been
19 implementing counsel's first appearance. Counsel's
20 first appearance requires counsel to be there without
21 ineligibility questions. It is one that is such an
22 important right, and it's such an important aspect,
23 and we've determined that it is a -- at the point at
24 which an attorney should come in. That evaluation is
25 almost impossible to determine prior to the attorney

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2 getting there. Even if you ask the court to do that,
3 will the courts actually go through that evaluation
4 and then call an attorney at 10 or 11:00 at night, or
5 is it better to air on the part of saying, yes, bring
6 an attorney in, have that attorney there for
7 arraignment and all of the areas -- aspects of
8 arraignment that are so important and then make the
9 determination thereafter.

10 There may be some instances where people are
11 talking about having an independent body determine
12 eligibility. I'll come back to, no, I believe it
13 should be the defender, and the reason why, again, is
14 timing, the timing of that evaluation, how that
15 evaluation is brought about, what levels they concern,
16 and do the -- does the independent body -- can they
17 really understand all of the nuances that might come
18 about with a criminal case.

19 Family court, I can't speak to. I don't
20 practice in family court. There may be more time to
21 determine whether or not someone is eligible. It may
22 not be as much of a consideration for that. But
23 again, I would still say that the defender or the
24 person who could be sitting in for that individual is
25 really in the position to determine how complex the

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2 issues are, how expensive the market rate would be,
3 and is in a much better determination, much better
4 ability to say, no, this is one that should be
5 assigned or, no, it is one that should not be
6 assigned.

7 There are, I'm sure, any number of
8 complications to that. Whether or not there's a
9 question of an inherent bias with, let's say, an 18B
10 attorney would prefer to have someone retain them
11 rather than have an assignment. I choose to believe
12 that everyone who's doing this kind of work is there
13 for purpose and believes in representing the best
14 representation of the client and believes that those
15 kind of potential issues are actually very minimal,
16 and that we should not put a tremendous weight on
17 those potential problems when there's a much more
18 fundamental constitutional right for people to have
19 representation, and that straw man is not one to
20 really take into account.

21 MS. GERSON: Clare, can I ask you a question
22 on that point?

23 MS. DEGNAN: Sure.

24 MS. GERSON: In your assigned counsel
25 program, is there an ethical bar to the assigned

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2 attorney taking a retained client to whom he has
3 originally been assigned?

4 MS. DEGNAN: I'm going to ask you to hold
5 that question --

6 MS. GERSON: Okay.

7 MS. DEGNAN: -- because I don't know the
8 answer to that. However, I'm hoping that the assigned
9 counsel administrator will be able to address that.

10 MS. GERSON: Okay.

11 MS. MACRI: Can I ask a question, Clare?
12 Thank you, Clare. In terms of the process, I have two
13 questions, right. When you are involved in
14 determining eligibility, are you required to share any
15 of that information with respect to how you determine
16 eligibility with the courts? And then the second
17 question is: Let's say you come to a determination of
18 a denial of eligibility, what happens next? How does
19 that individual get to the court to be able to -- is
20 there some formal process, or is it just the next
21 court appearance?

22 MS. DEGNAN: Two questions I'll answer two
23 different ways. When there's a felony, the courts
24 across the board assign counsel whether it be 18B
25 conflict or my office. They don't seem to go through

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2 the same procedures that they would do for a
3 misdemeanor. In poling a number of local courts, each
4 of them have a different form that you fill out, and
5 the form the that they fill up for the 18B for the
6 misdemeanors and violations would may very well have
7 confidential information in there. But the courts
8 that I've appeared in ask the 18B attorney to review
9 it with the client and then one or two things happens:
10 Some courts request the form back and they look at it.
11 Some courts say, in your opinion, is this person
12 eligible. So because we have 40-some-odd local
13 courts, there's a different procedure in all of those
14 courts. That's for misdemeanors.

15 For the felony charges for our office, there
16 have been a few occasions where judges have asked
17 whether or not we have found somebody eligible who may
18 drive a fancy car, who may live in a more affluent
19 area of that county. And we will answer the courts
20 honestly, yes, we've found them eligible or, no, we
21 have not. I've never had a court ask us to go into
22 further information. They have taken our position as
23 a court officer as being acceptable information.
24 On the few occasions -- I should not say few
25 occasions, on those occasions where I do have people

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2 who are not eligible, that conversation is not brought
3 to the court, that conversation is one that we've had
4 and have been trained over the years to sit and talk
5 to someone where they are -- again, I'll give you a
6 caveat. If they're absolutely clearly not eligible,
7 the interview would stop. We'll say to someone, you
8 are clearly not eligible. You do need to retain
9 private counsel, and you are not eligible for any kind
10 of representation within this office. And the
11 interview will stop, and we'll ask the person to go
12 find counsel. We'll ask them to contact us or have
13 the counsel contact us when they have received them so
14 that we can provide them their felony complaint and
15 the supporting documentation that we have.

16 We have on other occasions had people who we
17 consider to be not eligible, and yet they say they are
18 eligible, they don't have the finances, they don't
19 have the wherewithal to do this. The attorneys are
20 then asked to make a judgment call during the
21 interview, continue the interview so that you have all
22 that information and all that documentation that you
23 will need for further representation. But then we ask
24 the people to go and solicit private attorneys and ask
25 them to come back to us after they have solicited

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2 private attorneys and show that they have done so. So
3 if they don't have the funds available, and it's true
4 that they don't have the funds available, and they
5 come back and they verbally tell us, I went to John
6 Smith, Mary Adams, whomever else, and they are saying
7 that for this type of felony they will not accept it
8 unless there's a \$10,000 retainer. Then we'll say --
9 we can document the file that says we've asked this
10 person to retain counsel, we've looked to them to do
11 so and the market value for this type of charge is so
12 high that they cannot achieve that.

13 Something that was brought up in Albany that
14 should be reiterated here, as well, is when you're
15 talking about the children who are treated as adults
16 but are, in fact, still minors under the law. That
17 becomes a much more difficult situation. It is clear
18 that we will accept the young person, especially if
19 the parents or the family members are the victims.
20 The difficulty comes when you might have someone who
21 are 16 or 17 and clearly the family is of the means to
22 attain counsel and yet is telling us that they refuse
23 to. I can think of two occasions where that had
24 caused problems, but that's over a course of 25 years.
25 And those two occasions it was impressed upon the

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2 parents that they needed to retain counsel. It took a
3 few times to explain to them the nature of their
4 responsibilities and then to have them retain counsel.
5 In both of those occasions, the young person was not
6 incarcerated. If a person is incarcerated and the
7 family is refusing to post bail, I would not have that
8 kind of conversation with the parents. I would be
9 representing that young person while they were in jail
10 and not having them languish without proper
11 representation.

12 So all of these things get to be involved, and
13 there's a whole plethora of issues that run the gamut;
14 so it becomes very difficult to suggest to you a
15 hard-and-fast rule. What I've heard in Albany any
16 number of times is flexibility. I've heard
17 simplicity. I don't envy you. I don't think that
18 either is possible when you're talking about the wide
19 variety of types of representation that comes across
20 our desk and in the county.

21 MR. LEAHY: Let me go back to something you
22 said earlier about the study, and I think you're
23 probably referring to the Greenwich Center study,
24 among others, that recommends strongly against public
25 defenders or assigned counsel, for that matter, being

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2 involved in eligibility determinations. And if recall
3 the basis for that position correctly, it is a sense
4 that there's a conflict of interest that public
5 defenders are, you know, perhaps overloaded with cases
6 and have to choose between adding to their present
7 caseload or -- and denying -- by accepting eligibility
8 or denying it and saving their resources, although it
9 can certainly cut the other way. It can be we really
10 protect everybody we possibly can and so we have an,
11 let's say, an overgenerous, I think that's less
12 articulated, but conceivably could be part of it, but
13 the point is, that they identify a conflict of
14 interest. You seem not -- you seem to believe that
15 that's more a theoretical concern than a real concern
16 with respect to your office; is that right?

17 MS. DEGNAN: Yes. From my perspective, it
18 would only be theoretical. I don't believe that
19 there's been any occasion that it is abused.

20 MR. LEAHY: And then we go to the difficulty
21 of having a statewide application, because what may be
22 true for your office as seen through your eyes may not
23 be true for another office under very different
24 circumstances.

25 MS. DEGNAN: I can give you an example that I

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2 know that an individual who was arrested in northern
3 Westchester that also had a case in Putnam. We had
4 the individual first. We found them eligible. Putnam
5 was not as inclined to do so until I called them up
6 and gave them the rest of the information, and that's
7 when they said, Oh, we understand why you found him
8 eligible, we believe that he's eligible as well. I do
9 believe in those circumstances if we have the court
10 stepped in to review, that may be the point where you
11 have an appellate process or an appeal process to say
12 if someone has been denied and feels that they are
13 wrongfully denied. And that kind of protects both and
14 yet still relies on the statutory requirement for the
15 courts to determine eligibility.

16 MR. LEAHY: I had another follow-up, if I
17 could, about the people for whom you say you need to
18 go out and see certain lawyers and determine whether
19 you're able to actually hire a lawyer. Are those
20 people represented by your office in the interim, in
21 other words, during the days it may take for them to
22 go out and investigate.

23 MS. DEGNAN: Absolutely. Absolutely. We will
24 not leave anyone unrepresented. There's no -- for
25 example, if a grand jury notice came in, I don't want

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2 someone not to be represented, be spoken to about the
3 consequences of that and what to expect; so we will
4 not ever leave someone without representation. It's
5 just epithetical to who we are and what we do.

6 MR. LEAHY: And yet I assume also, the other
7 side of that coin though, you will not go out and do
8 an active investigation on behalf of that person.

9 MS. DEGNAN: If an investigation is required,
10 that investigation will be done. We will represent
11 that person fully, even if we believe they are not
12 eligible. There are time limitations on tapes, on 911
13 calls, on videos that may be taped over in seven days.
14 That time constraint doesn't change. That requirement
15 doesn't change. So we will absolutely represent that
16 person completely in the interim time frame. We can't
17 leave it so that there's not a proper representation
18 of them.

19 The question will be -- that's the person who
20 we've done the complete interview with and said you
21 are -- we don't know if you're eligible. The
22 individual who is absolutely cleared is not
23 appropriate for us. We may not do a complete
24 interview of them, but if we believe that there's a
25 video or there's a 911 tape or there's something that

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2 we need to preserve or there's a 45010 notice where we
3 need to have photographs, we will still follow through
4 with those, but we will not be interviewing this
5 person doing coordination as to what direction we
6 should take with the case. We won't be advising them
7 as to whether or not we need to plea bargain on this
8 or what needs to be done next. What we will do is do
9 everything we can to make sure that there's been no
10 harm to the person but not -- not actively counseling
11 them as to the outcome of the case.

12 MR. LEAHY: And finally, for me, would you
13 have a rough estimate or any estimate for us as to
14 what percentage of clients fall into the three
15 categories that you've mentioned, clearly eligible, in
16 the gray area, or clearly ineligible?

17 MS. DEGNAN: I haven't read the statistics, I
18 don't know. I will give what I believe it to be the
19 case at this point --

20 MR. LEAHY: And you can supplement it with
21 statistics --

22 MS. DEGNAN: Right. And it could be that I'm
23 completely off. So I will give you that caveat, and
24 if we're talking about that caveat, I would say 95
25 percent of the people who come through our office are,

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2 in fact, eligible and are clearly eligible. There is
3 a five percent -- by the way, when I say "clearly
4 eligible," it means kids incarcerated, unable to make
5 any kind of bail. I didn't discuss that because, in
6 my opinion, if someone is incarcerated, they need
7 representation, and I'll get back to that in just one
8 minute. But the five percent that's left over, it is
9 -- there's an awful lot of self-evaluation by the
10 defendants and the clients, who will say, thank you,
11 but no thank you, just retain counsel. And there is a
12 much smaller percentage that will say, I'm not sure
13 where I am in this, but I need your help. So I would
14 on a yearly basis say perhaps two percent, and as I
15 say, that's anecdotal, that's from my years of working
16 in Mount Vernon City Court. I don't know if that is
17 true across the board for the entire office. I have
18 not checked those statistics.

19 I will say when it comes to an incarcerated
20 individual, there were some discussion in Albany about
21 a bail being set at \$20,000. I believe it was by the
22 executive of the county. If somebody has to choose
23 between representation or bail, that's a conundrum,
24 and that's a choice they should never have to make.
25 Freedom is the ultimate issue, and if bail is being

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2 posted at \$20,000, that may be every cent that a
3 family can pull together either by bond or by cash.
4 That should have no bearing on eligibility standards.
5 And it also should not be a carte blanche situation
6 where you have to have a hearing on every bail
7 posting. Because, as you do that, it means that
8 there's an individual who should not be incarcerated
9 who is incarcerated for days longer than perhaps
10 necessary. That is one -- it's why I've been limiting
11 my conversation to those people who are out versus
12 those who are in.

13 MR. LEAHY: Understood.

14 MS. DEGNAN: I think that's all I have, unless
15 you have other questions.

16 MR. LEAHY: I think one of us does.

17 MR. DAVIES: I just have a couple if I may.
18 Thank you, Bill, and thank you, Clare. I just wanted
19 to seek additional thoughts and elaboration on a
20 couple of things that you said. The first was that
21 one of your arguments, as I inferred, for having the
22 defender do the evaluation is that the assignment can
23 be made more speedily as a result. I just wanted to
24 get a sense, a specific sense, of what the timing is
25 like between when you first meet the person and then

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2 the ultimate decision about whether they're eligible
3 or not. Is it virtually instantaneous, or is there a
4 process there.

5 MS. DEGNAN: For the easy cases it's
6 instantaneous. When you're speaking to someone and
7 they are receiving benefits, then it's not a difficult
8 decision. When you're speaking -- what I'm talking
9 about is appearance at arraignment. Every attorney
10 will take a few moments to see what criteria is
11 necessary for bail. Do we need to make an argument
12 for bail to the judge, or is it something that we know
13 the judge will ROR immediately, but we still need to
14 have contact information. You need to know who
15 they're living with. And all the criteria that you
16 have for bail lead into eligibility and feed into
17 eligibility standards: Who do you live with, where do
18 you lived, are you working, what are your family ties,
19 what are your connections to the area, all of those
20 things are part of it, what is your history, what is
21 your criminal history, are you on probation, parole or
22 otherwise.

23 You get a very good sense from speaking to a
24 person at an arraignment as to what they are in a
25 socioeconomic status. And when you do that, you can

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2 pretty much know early on that this is someone who's
3 going to be eligible. You can also know that if, for
4 example, I'm being called to a late-night arraignment
5 on a DWI and you speak to the person, they will tell
6 you, well, I work Skadden, Arps, let's go -- go big.
7 I work at Skadden, Arps and I'm a paralegal there and,
8 you know, you have a fairly good idea that this person
9 may not be eligible for continued representation, but
10 you're not going to step away from them at the point
11 of arraignment. You're going to stay there and speak
12 from them at the point of arraignment and you're going
13 to say to them -- if the person is out, you're going
14 to make an appointment, come to my office and we're
15 going to go through eligibility. If the person is in,
16 I'm still assuming that they will need our help,
17 because, obviously, they don't have enough liquid
18 assets to get out, and therefore, they will need our
19 help. But at the interview at the jail -- the jail
20 interviews are done when everything works out well
21 within 48 hours, so that we know very early on in the
22 case if somebody needs assistance. And if they're in
23 the jail, even if they have assets and they can't get
24 to them, we will still represent them.

25 So taking the jail out of it and just talking

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2 about someone who is on bail, someone on bail, at that
3 point at the arraignment that they're walking out of
4 the courtroom and going home, you'd say, I'm not sure
5 you're eligible, please look to retain counsel and
6 come in and talk to us. It's usually and/or come in
7 and talk to us.

8 MR. DAVIES: Right.

9 MS. DEGNAN: Most attorneys I know can make
10 those evaluations in the first few moments of speaking
11 with them to see which category they fall in,
12 absolutely, yes, absolutely, no, it's the middle
13 ground that we need to take time with.

14 MR. DAVIES: Thank you very much.

15 MR. LEAHY: Thank you.

16 MR. DAVIES: I have one more, Bill. The very
17 last piece -- thank you. That was a very
18 comprehensive answer that got to my issue.

19 The last piece was, in your little
20 hypothetical about the potential non-citizen with the
21 car impounded, there were a couple of factors that you
22 noted. Particularly this was a complex and serious
23 and multifaceted case --

24 MS. DEGNAN: Yes.

25 MR. DAVIES: -- and therefore, in spite of this

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2 slightly higher income would be considered eligible.
3 And secondly -- oh, you mentioned the idea of the
4 market rates of the attorneys, which you have spoken
5 to. I just wandered on the case seriousness piece, do
6 you have -- as part of your eligibility determination
7 process, do you have a way for that -- for all of
8 these issues to somehow be factored in in your
9 determination, or is that a judgment call made by the
10 attorney at the time?

11 MS. DEGNAN: It's made -- it's a judgment call
12 made by every attorney. And remember that for our
13 office, the best thing about our office is that we
14 have a number of attorneys who oversee this kind of
15 thing. If someone has a question, if one of the
16 younger attorneys is not sure about this, they have a
17 person to go to ask those questions to and say, this
18 is what I'm coming up with, is this person eligible or
19 not eligible. Every interview is reviewed, and then
20 part of the attorney comment, it may be borderline
21 eligible or a question, is this person eligible so
22 that it can be evaluated and seen in-house before we
23 go and say to a judge or someone else, this is
24 something -- this person may or may not be eligible.

25 So, yes, it is a judgment call on the part of

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2 the attorneys. The attorneys will have to know the
3 nuances of what they're dealing with, but that's what
4 I expect of my staff.

5 MR. DAVIES: Thank you very much.

6 MR. LEAHY: Thank you very much.

7 MS. DEGNAN: Thank you.

8 MS. MACRI: Thank you.

9 MR. LEAHY: Tracey Alter is our next
10 testifier.

11 MS. ALTER: Good morning.

12 MS. MACRI: Thank you for bringing some folks
13 here. And anybody who can't hear, please feel free to
14 move up if you can't hear. We want people to hear.
15 So don't hesitate. Don't be shy. Thank you.

16 MS. ALTER: Hi. My name's Tracey Alter. I'm
17 an attorney and the director of the Family Court Legal
18 Program at the Pace Women's Justice Center. We're
19 not-for-profit legal service organization affiliated
20 through Pace University School of Law right here in
21 White Plains. Our mission is to prevent abuse and to
22 seek justice for victims of domestic violence and
23 elder abuse. We do so through high quality civil
24 legal services and innovative programs, community
25 partnerships, education, and awareness.

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2 Many Pace Women's Justice Center clients are
3 low-income residents and members of growing immigrant
4 populations --

5 MS. MACRI: Put the mic right to you.

6 MS. ALTER: Okay.

7 MR. LEAHY: Speak right into the microphone.

8 MS. ALTER: Many Pace Women's Justice Center
9 clients are low-income residents and members of
10 growing immigrant populations of the greater
11 community. The Family Court Legal Program offers
12 emergency legal services free of charge to victims and
13 survivors of intimate partner violence at our two site
14 offices in the White Plains and Yonkers Family Courts.
15 Our center staff attorneys, pro bono attorneys, and
16 law students interview victims of abuse, file family
17 offense, custody, and child support petitions, and
18 regularly appear before family Court judges,
19 especially on order of protection cases.

20 Beyond our Family Court Legal Program walk-in
21 site offices, the Pace Women's Justice Center
22 additionally provides holistic and comprehensive civil
23 legal services to victims and survivors of domestic
24 violence throughout the counties of Westchester and
25 Putnam.

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2 As available, not-for-profit legal resources
3 are limited to the many litigants that cannot afford
4 the high cost of private counselors. It is vital for
5 our office to have the capacity to effectively inform
6 the public as to eligibility requirements for assigned
7 counsel 18B representation, whether for orders of
8 protection, custody, or Article 10 abuse and neglect
9 cases, among others.

10 Eligibility guidelines and criteria for 18B
11 representation should be more specific and transparent
12 than they currently appear to be. No formula seems to
13 exist for calculating potential financial eligibility.
14 Thus our office is unable to explain with any
15 particular degree of certainty whether a litigant may
16 or may not qualify for counsel assigned by the court.
17 In addition, callers to the center's legal helpline,
18 seeking information and guidance regarding 18B
19 representation, express frustration to us that more
20 details regarding eligibility for court-appointed
21 counsel are not available. Center staff --

22 MS. GERSON: Can I ask you a question?

23 MS. ALTER: Absolutely.

24 MS. GERSON: Is it the individual 18B attorney
25 who makes the eligibility determination in each

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2 particular case?

3 MS. ALTER: That is not completely known to
4 me, but I would say that the way that my understanding
5 of how it works in the family courts that I appear in,
6 it appears to be an individual family court judge's
7 decision.

8 MS. GERSON: The judge is making the decision?

9 MS. ALTER: That's my understanding. Again, I
10 don't know any guidelines regarding that. On a
11 practical basis, my understanding is that there's a
12 financial disclosure affidavit that is used more often
13 in child support cases. But this financial disclosure
14 affidavit is completed by a potentially eligible
15 litigant and it's submitted to the family court
16 clerk's office, and then that is submitted to the
17 family court judge for the next appearance. Beyond
18 that, I actually do not have any awareness of how that
19 process works.

20 MS. GERSON: Thank you.

21 MS. ALTER: You're welcome.

22 As I said, in addition, calls -- excuse me.
23 I'm sorry. As the people we speak to often may be in
24 personal danger, and their children may likewise be in
25 danger, it becomes even more imperative that timely

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2 provided information be as accurate and useful as
3 possible. The current criteria used to determine a
4 litigant's eligibility for assigned counsel seems to
5 include a number of broadly relevant financial factors
6 affecting a person's ability to afford private
7 counsel. These may include personal income, expenses,
8 assets, such as homes, car ownership, and bank
9 accounts, as well as consideration of debts and loans,
10 but no specific income and asset guidelines are
11 offered.

12 Also, any financial analysis should include an
13 awareness and special consideration for victims of
14 domestic violence seeking assigned counsel who may
15 currently be cut off from access to financial means
16 and access by their abusers.

17 Presently, eligibility criteria for the court
18 appointment of assigned counsel seem to differ among
19 counties, among courts within the same counties, and
20 even among judges within the same courts. This
21 inconsistency creates disparity across the state, to
22 those most harmed, to those most vulnerable, members
23 of the greater community who may face not only
24 financial barriers to access to counsel, but also
25 language, education, and disability barriers.

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2 Access to counsel is access to a more fair and just
3 legal system for all its residents. And this state
4 deserves a transparent and reliably streamlined
5 process for appointment of assigned counsel. Such
6 criteria will benefit not only the public, but also
7 the members of the bar and the bench.

8 In closing, eligibility for assigned counsel
9 should be clear and consistent across the state,
10 regardless of whether you live in a county further
11 upstate or in New York City or in Putnam or
12 Westchester County.

13 Thank you for giving me this opportunity to
14 speak on behalf of the Pace Women's Center.

15 MR. LEAHY: Thank you for your testimony. I
16 don't think anyone could disagree with either of your
17 critical points that there needs to be a clear and
18 consistent guidelines, clearly and consistently
19 applied, I might add, or that currently there is just
20 rampant disparity in every aspect of the eligibility
21 determination process.

22 I wanted to ask a question though about
23 whether in your experience there is ever a
24 consequence, a negative consequence, other than being
25 denied counsel, in other words, whether people that

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2 your lawyers might encourage to go to court and apply
3 for counsel, get into trouble because something they
4 put down on the application is not treated in
5 confidence, but is used to somehow retaliate against
6 them or have some adverse consequence against them.

7 MS. ALTER: To that point, when I was thinking
8 about what to speak about today, I really do think
9 about what happens in our walk-in offices in the
10 family courts, because we have a number of people come
11 into our office who may not be eligible for our
12 services. We may not be able to go up to court with
13 them and start the order of protection process. We go
14 up on ex parte order of protection cases and those are
15 child support and custody matters. So we may be
16 sending someone to the -- you know, to go through the
17 court process without counsel at the very beginning
18 and encouraging them to fill out that financial
19 disclosure affidavit. Where possible, we may actually
20 take that time to help them fill out that form to make
21 sure that they do what you're speaking to, to make
22 sure that they put reasonable information, but not
23 information that can be used to retaliate in some way
24 against them. Because they're filling out -- you
25 know, pro se litigants are filling out that form, as

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2 far as I know, without any assistance regarding the
3 criteria or the guidelines or what the court's going
4 to be looking at to determine if they're eligible for
5 counsel. And we are very hopeful when every person
6 who leaves our office with our assistance of us
7 helping them fill out that form, will actually get
8 that counsel. But again, without guidelines or
9 criteria, we, on our end, cannot give them, you know,
10 very effective support for that matter.

11 MS. MACRI: I appreciate that. Thank you very
12 much for coming down and sharing this experience with
13 us in terms of how that is working. And I'm
14 wondering, have you had scenarios where you've seen or
15 in effect your agency's seen or organization seen the
16 opportunity people being denied counsel? And if so,
17 what can they do or what do they do; is there any
18 particular criteria or guidelines they're told about
19 this what you need to ask again to get counsel? How
20 does that work?

21 MS. ALTER: That's a very great question, and
22 again, when we are providing brief advice, our counsel
23 to people who are going to seek help before the
24 courts, beyond filling out that form, we are trying to
25 teach pro se litigants to advocate for themselves

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2 regarding this process, advocating as to what their
3 needed, as to what their limited means are, you know,
4 just to orally advocate what's beyond, what's on a
5 piece of a paper.

6 I will say that I think there is certainly
7 anecdotal experiences in our office and among my
8 colleagues that it seems somewhat random among
9 particular judges whether they do or do not assign
10 counsel. So to that, I can't really speak beyond
11 that. But, you know, we do hear back from, you know,
12 from pro se litigants who may have been denied that
13 access, and again, we don't actually have any basis to
14 judge that.

15 MS. MACRI: Thank you.

16 MR. DAVIES: I have just a couple, which are
17 about sort of hypothetical concerns that I've
18 occasionally had when looking at the Family Court Act
19 and the entitlements therein. And the first was in
20 the -- you noted in your testimony, I think it's worth
21 returning to, your point about survivors of domestic
22 abuse may not have access to resources that are in the
23 home anymore. And not only that, but as I read
24 Article 8 of the Family Court Act -- excuse me, as I
25 read Section 262, when it comes to Article 8 cases,

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2 both the alleged abuser and the alleged victim have a
3 right to counsel. And it seems to me that there is a
4 hypothetical possibility given the point that you made
5 about both these complex disparities and who in the
6 home has access to the resources, and also the fact
7 that people who have different lawyers, there's a
8 possibility that the abuser may get counsel and a
9 victim may not or some other strange combination of
10 factors. I was wondering if you have come across and
11 can speak to some complexities in that area.

12 And then the other point, which is separate
13 and you may or may not address, but is this issue of
14 confidentiality information, particularly in violation
15 of child support obligations. I was wondering about
16 the fact that the assessment of a person's child
17 support obligations are made on the basis of financial
18 information. The assessment of a person's eligibility
19 of counsel is also made on the basis of financial
20 information. Is information -- is eligibility
21 information ever leaked over into the assessment of a
22 child support obligation also?

23 MS. ALTER: I'll try to speak to those two
24 points separately.

25 So to your first point, I guess in my

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2 experience I've seen it both ways. Since we are often
3 representing the person who comes to us and says
4 they've suffered abuse at the hands of the other
5 party, we've gone to court with our clients. They've
6 had counsel, and the other side may not have counsel.
7 So I do want to speak to that first because we do
8 feel, as attorneys, that we understand that it is best
9 for people to have the representation of counsel on
10 both sides so there can get a full understanding of
11 the law and a fair resolution of issues before the
12 court. And we do our best in that situation where
13 it's ethically permitted to -- you know, if the
14 respondent wishes to do so, we will explain our
15 understanding of the process to that respondent as
16 well to make sure that that process does go the way
17 that it should go before the court.

18 The other scenario is the scenario where
19 somebody may be a victim of abuse and goes before the
20 court, and the other side has retained counsel or
21 assigned counsel. And those are, you know, those are
22 the cases we really don't want to hear about in our
23 office because that really concerns us. We understand
24 that if our client -- if a victim of abuse does not
25 have the support of an attorney from the point of view

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2 of my office, they don't have an effective voice in
3 that courtroom. They need to have that zealous
4 advocate who is speaking to their point of view. And
5 the other side has an attorney, and that attorney's
6 job is to represent their client, not my client. So
7 we don't expect them to fully explain the law to our
8 client, but they may very well, but that's not our
9 expectation. And again, it really has to do with
10 having less of a voice because that person may be
11 afraid, not able to speak up for themselves
12 effectively.

13 We also see -- sometimes with the clients in
14 our office that they -- they want to make sure both
15 sides are okay. That's sort of a -- becomes sort of
16 -- sometimes the dynamic there. So they're not really
17 looking all the time in their own best interest, and
18 that is what we do as attorneys, as advocates of
19 victims of domestic violence. Does that answer that
20 first point.

21 MR. DAVIES: It does. Thank you.

22 MS. ALTER: Okay. Thank you. So to your
23 second point about child support cases, actually, a
24 point I would make there is, I think, you're speaking
25 to when -- my understanding of the child support law

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2 is that the only time a person is actually eligible to
3 get an attorney for a child support case is when it's
4 a respondent, a non-custodial parent who's facing
5 possible incarceration. So at this point I must add
6 an additional point from my professional point of
7 view, that I wish that there were attorneys on both
8 sides of that equation, an attorney for the petitioner
9 in a violation proceeding, as well as the attorney
10 that the respondent gets. Because before we get to
11 your point, what happens is when there's an attorney
12 for the respondent in a child support violation case
13 is that the attorney for the respondent then has that
14 opportunity to have the conversation with the
15 petitioner and say, you know, do you really want this
16 person to go to jail, what about the kids, you know,
17 aren't they going to miss, you know, if it happens to
18 be mom or dad who's going to jail, you know. So there
19 becomes a real disparity in the law itself where the
20 respondent gets an attorney for that kind of
21 proceeding.

22 So I don't know how much further I can speak
23 to the point of the financial disclosure affidavit. I
24 would say that I do tell my clients whenever they're
25 filling them out for a child support proceedings that,

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2 again, they should be careful what they write down on
3 those forms. They should provide what is necessary to
4 the court unless the form asks for it. But if they
5 need something kept confidential, they should keep it
6 confidential. They should say it's confidential, get
7 it to the court, if possible, in some other form to
8 keep the information private. I don't actually know,
9 to your point, if eligibility for assigned counsel, if
10 they use that form for only that purpose. I don't
11 know if there's access by the opposing side to that
12 form. I know that if I was a child support attorney
13 for the petitioner, I'd probably be seeking to get
14 that form. So to your point -- but again, if I'm
15 representing the person who's filling out that form,
16 you know, fill it out accurately, fill it out what you
17 need to do for the court to process, but be aware that
18 it might be accessible to the other party.

19 MR. DAVIES: Thank you.

20 MS. MACRI: Can I ask one follow-up question?
21 Is the form -- I know you mentioned it was an
22 affidavit, so it's signed or executed under the
23 penalty of perjury; is that correct?

24 MS. ALTER: It is, but it actually is a long
25 legal form, front and back, with a lot of boxes that

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2 asks for all the information. At least that's the way
3 it's done in Westchester County. So the real question
4 becomes do people know they're swearing -- you know,
5 that they're completing an affidavit and swearing to
6 it. I think that becomes a real question, again, one
7 that -- if we're helping someone fill out that form,
8 we're explaining that to them as well.

9 MS. MACRI: Thank you.

10 MR. LEAHY: Thank you very much for your
11 testimony.

12 MS. MACRI: Thank you.

13 MR. LEAHY: Joanne Sirotkin, please.

14 MS. SIROTKIN: Hello, how are you.

15 MS. MACRI: And feel free to pull the
16 microphone as close as you want.

17 MS. SIROTKIN: No problem.

18 MS. MACRI: All right.

19 MS. SIROTKIN: And I'll try to project as
20 well.

21 MS. MACRI: Thank you.

22 MS. SIROTKIN: So -- okay. I have a copy of
23 the form from Westchester. Would you like to have it.

24 MS. MACRI: If you have it, we'll take it.
25 Thank you very much. I appreciate it.

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2 MS. SIROTKIN: I'm not used to being able to
3 approach the bench.

4 MR. LEAHY: We're not used to it either.

5 MS. MACRI: We're not used to being on the
6 bench, so thank you very much.

7 MS. SIROTKIN: If I refer to you as your
8 Honor --

9 MS. MACRI: You know, thank you.

10 MR. LEAHY: The spot really is much more alien
11 to us than the spot you're in --

12 MS. MACRI: Exactly.

13 MS. SIROTKIN: I understand completely.

14 MS. MACRI: Thank you very much.

15 MS. SIROTKIN: As you know, my name is Joanne
16 Sirotkin. I am an attorney in charge at Legal
17 Services of the Hudson Valley. We provide, as you
18 probably know, free legal services to those who cannot
19 afford an attorney where basic human needs are at
20 stake. We are the only provider of comprehensive
21 civil legal services in six of the seven counties we
22 serve, and one -- and I'll name the counties we're in.
23 We're in Westchester, Putnam, Dutchess, Rockland,
24 Orange, Ulster, and Sullivan, and we're one of two
25 legal services providers in Rockland, just to give you

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2 sort of an overview of where we practice.

3 We handle 12,000 cases annually. And our work
4 provides justice for those who have nowhere else to
5 turn, including protecting survivors of domestic
6 violence, defending seniors against abuse, serving
7 veterans on the home front, working with the disabled,
8 ensuring that LGBTQ individuals are free from
9 discrimination and keeping family in their homes.

10 We are in a unique position to assess the availability
11 of assigned counsel in family court proceedings.

12 Obviously, we don't do criminal work. We do a lot of
13 domestic violence, family law work across the various
14 counties. And I think that I'm going to skip the part
15 of my testimony that talks about the reason that we
16 can all agree that assigned counsel should be
17 available and is available in the state of New York.

18 Because it feel a little like I'm preaching to the
19 choir, but I will say that it's -- having a lawyer in
20 family court is essential to protecting people's
21 right. And it just -- it leads to better outcomes.

22 And I can give you an example of -- about why better
23 outcomes for both the victim of domestic violence, as
24 well as the survivors, and in regular custody cases
25 not involving domestic violence, it's just better.

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2 And it means that judges have to spend less time
3 explaining the process to the unrepresented litigants.

4 In the case of domestic violence, survivors
5 can explain to the counsel process can impact a
6 victim's safety. And without an attorney, clients
7 just don't know the right thing to tell the judge,
8 they don't know the law, they're unfamiliar with the
9 court. They don't know what facts the judge needs to
10 hear to make that initial decision. And in family
11 court, a lot of times those temporary orders end up
12 living through the life of litigation and sometimes
13 become part of the final order, so there is -- those
14 temporary orders are important.

15 You know, and I agree with Tracey and other
16 folks who have spoken, the regulations are -- the
17 guidelines are just very unclear. It's difficult for
18 us to predict when someone's going to be provided an
19 attorney and when someone's not going to be provided
20 an attorney. And it makes it challenging, as legal
21 services providers, to guide people who come to us and
22 it's hard to say, oh, you might get an attorney, you
23 know, it's just we can't predict, and so oftentimes
24 we're guessing based on our experience as a given
25 county and court and judge.

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2 In addition, county-by-county in the 9th
3 Judicial District, the standard or the big standard
4 actually varies. So a person with the precise same
5 income and expenses and family composition might get
6 an attorney in one county and not in another. So that
7 seems also rather, again, both unfair, unpredictable,
8 you know, hard for us to guide people. You know, we
9 think that having -- and I agree with the prior
10 speakers, and I don't envy you in your position, but
11 we do think that clear guidelines would make an
12 enormous difference.

13 We hope that the guidelines would take into
14 consideration not just the percentage of poverty,
15 which is something that we do in legal services, we
16 assess percentage of poverty because we're guided by
17 federal regulations, which permit certain levels of
18 representation and certain levels of income, but not
19 others. So we think that those poverty guidelines and
20 perhaps even a higher percentage that we can use would
21 be useful, but at the same time to take into
22 consideration, fixed debt, obligations, medical
23 expenses, you know, the number of children that
24 someone is supporting, child support obligations. You
25 know, all of the obligations of life that reduce the

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2 likelihood that someone will be in a position to hire
3 private counsel, including the cost of living in a
4 particular county.

5 We hope that these guidelines could become
6 very transparent. I mean, post them on the website,
7 in court, so that everyone who comes to court will
8 know the likelihood of whether or not they're going to
9 get an attorney.

10 Predictability, I think, is really the key
11 here. An assignment of counsel, I would also say,
12 without language access is sort of meaningless, and
13 this is an issue that we see a lot of. You know,
14 members of the 18B panel who are assigned to assist
15 clients are performing a service to the community, and
16 there's no consistent translation service available.
17 So if you can't talk to your client, then your
18 representation is not really meaningful. So we
19 frequently see clients are bringing family members or
20 friends to the court to translate for them or trying
21 to tap into some court-based resources that are not
22 part of the attorney-client privilege overview, and so
23 that presence of the attorney-client privilege, which
24 obviously is damaging to the client. And it makes it
25 difficult to -- we, at legal services, we have

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2 translators, we use language lines, we think that
3 really helps to promote that attorney-client privilege
4 and the building of trust.

5 So I would also, since you're at it, would
6 encourage you to think about the language access
7 issues because that's a significant aspect of this
8 work.

9 And then finally, to ensure high and
10 consistent standards statewide, free training to be
11 available to members of the panel. You know, the pay
12 is far less, as you know, for people who have private
13 practice and, you know, with members of the panel are
14 performing important work. So if we have universal
15 training, that would ensure the highest quality of
16 legal representation.

17 So thank you very much. I did want to just
18 answer one question that you had asked the prior
19 person. Is that okay.

20 MS. MACRI: Yes.

21 MR. LEAHY: Yes. Please.

22 MS. SIROTKIN: So, you know, I checked with
23 the attorneys who -- you know, to confirm. The form
24 that I gave you, I believe, is the one that's being
25 used in Westchester. I can't confirm that's being

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2 used in other counties, but I can find out. I did ask
3 the attorneys because we do -- we represent on a wide
4 range of issues. So if we have a client who's a
5 domestic violence survivor and we're representing them
6 on child support and custody as well, have you ever
7 seen that financial form pop up in the file when
8 you're reviewing the file, they told me no, which is
9 not -- that's purely anecdotal, right, but there may
10 be a way in which the form can be deemed confidential,
11 you know, as part of this process. Of course, it does
12 create an interesting conflict though, because if you
13 are a support judge and you've appointed counsel for
14 someone who -- you know, this is an enforcement
15 situation and jail is the potential, so they filled
16 out a form and it's confidential, but then you notice
17 it conflicts with the financial affidavit that gets
18 submitted to the court, that can be a concern. So
19 just a practical consideration, it may be a different
20 form, it may be a different process.

21 MR. LEAHY: Quick question. What percentage
22 of the federal poverty level do you follow?

23 MS. SIROTKIN: Okay. So, for -- so it depends
24 on the funder. Legal Services generally covers 125
25 percent of the poverty level. Where somebody is

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2 between 125 percent and 200 percent of poverty level,
3 their expenses and their types of expenses are very
4 specific can be taken into account. We actually have
5 a database that helps us calculate this information in
6 a way that's quick so that we can give someone an
7 answer quickly. In our domestic violence practice,
8 fortunately, the grant allows us variability. We can
9 defer from -- we can alternate from that, those strict
10 guidelines, because we recognize that -- well, it is
11 that, oftentimes, the person is separating, from their
12 family, their financial situation. You can take into
13 consideration the fact that their rent maybe X but
14 their partner was recently paying it until they were
15 excluded from the house or the partner's income was a
16 considerable part of their supporting income, so we
17 have some exceptions to those rules. We have some
18 grants that can go up to 200 percent too, you know,
19 for the state monies we receive.

20 MS. MACRI: Just to clarify, so the grants
21 actually specify to you, this is the --

22 MS. SIROTKIN: Percentage of poverty.

23 MS. MACRI: -- percentage of poverty guideline
24 minimum that you can -- and the highest you said, for
25 example, would be 200; is that the --

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2 MS. SIROTKIN: 200 percent, although with
3 domestic violence, we can go higher. And there are
4 some nuances to the various grants, because the grant
5 designates the area that we're allowed to occupy, the
6 outcome measure, the percentage of poverty. But we
7 use these calculators that are built into our database
8 that help us figure out, you know, how to calculate
9 the guidelines. So for example, the makeup of the
10 household; if the person is responsible for supporting
11 children, that will automatically be calculated in.
12 Because a single person making \$40,000 is a very
13 different person than a single mother with three
14 children making \$40,000. And it also calculates
15 assets as well. But again, assets, you know, somebody
16 may not be able to gain access to their assets. Their
17 assets may be a home that is shared with another party
18 and that oftentimes, even if it's not a domestic
19 violence situation, you're in family court because you
20 disagree with the other person that you're sharing
21 parenting with or, you know, neglect cases too, you
22 may be on different side of the fence. So it's those
23 assets may not be available for seeking an attorney.

24 MS. GERSON: Is it the attorneys in your
25 office who make the eligibility determination, or do

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2 you make a determination and then the judge then
3 decides?

4 MS. SIROTKIN: So -- okay. So we're not
5 appointed counsel. We are considered to be retained
6 counsel, so we have an intake process, and the
7 financial screening form allows us to screen very
8 quickly. So we have an intake, but it's always
9 reviewed by a supervisor. So as a supervisor, I
10 review every case that comes to someone that I
11 supervise, and I make sure that the financial criteria
12 are met for the particular grant. And, you know, in
13 any given office there might be 20 different grants,
14 so there's, you know, a lot of moving pieces. But the
15 initial screening is very clear, and the process of
16 financial criteria is gathered very quickly.

17 In terms of the family court, I'm with Tracey
18 on this, I think it's the family court judges who are
19 making the determination, and it is so, you know,
20 variable. You know, I can sometimes guess based on
21 the judge, the -- you know, but there are times where
22 cases have come back to us where a client has had no
23 legal representation, possibly could have been
24 eligible under some guideline, and you know, there
25 weren't good outcomes. And similarly, we're

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2 representing clients who are survivors of domestic
3 violence and there may be nobody representing the
4 party on the other side, and that can make for a more
5 chaotic court experience because when -- even when
6 respondent's representative or a respondent's attorney
7 can say to them, here's what to expect in the court
8 process, here's what a good settlement looks like,
9 here's -- you know, your position is reasonable, your
10 position is not reasonable, it just goes better.

11 MS. GERSON: Do you have a view on whether it
12 should be the judges who are making the eligibility
13 determinations or whether it should be a neutral party
14 or counsel?

15 MS. SIROTKIN: So I think the idea of a
16 neutral party makes a lot of sense, because, you know,
17 when you have all of the stakeholders making the
18 decisions, you know, it's hard. But I mean, I think
19 that -- I'm a legal services provider; so I'm not in
20 the position of the assigned counsel or the judges who
21 are in the difficult position of having to figure out,
22 is this somebody who we should assign or not assign.
23 I don't think that's an easy job for anybody; so I
24 don't envy that position. But, you know, it might be
25 -- if there were some process where somebody, you

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2 know, when somebody comes on a return date, I'm not
3 sure what the solutions is here, but, you know, I
4 think even if it were the judges, if there was -- you
5 know, I think that there's a great deal of discretion
6 when it is the judges as to whether or not to assign.
7 So I think in a way, everyone's hungry for those
8 guidelines. Even if it's the judge's decision, then
9 they would have more information too. So --

10 MS. GERSON: Thank you.

11 MS. SIROTKIN: Thank you.

12 MR. LEAHY: Thank you very much.

13 MS. MACRI: Thank you.

14 MR. LEAHY: Judge Steinberg, please.

15 JUDGE STEINBERG: Good afternoon everyone.

16 Can you hear me.

17 MS. MACRI: Yes. Thank you.

18 JUDGE STEINBERG: I'm David Steinberg. By way
19 of introduction, I'm a judge in Hyde Park, town
20 justice in the town of Hyde Park. I'm in my 12th
21 year, a longtime defender prior to that, former
22 Dutchess County chief assistant public defender and
23 chief appellate attorney in that office. And in the
24 last century, I was with the Legal Aid Society
25 Prisoners' Legal Services. I've also been in the

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2 private sector. I've been paid for my services to do
3 trials and appeals. So I have that perspective. I
4 just want to make two or three very brief points, and
5 then I'll be happy to answer any questions that I can.

6 Through the grants of the New York State
7 Indigent Legal Services, Dutchess County has provided
8 lawyers at arraignments in some of the courts,
9 including Hyde Park, since the beginning of last year.
10 So for the past 18 or 19 months, we've had lawyers at
11 arraignments at all hours in Hyde Park, and that has
12 been of great benefit. I'm very happy that that has
13 happened.

14 After-hours arraignments, which are combined
15 generally between 6 in the evening and 9 in the
16 morning, Monday through Friday or all weekends, 24
17 hours during the weekend, we are -- you know, the
18 judges have to come out in the rain and the lawyers
19 are available. I have performed -- I have conducted
20 over a hundred arraignments in those after-hour
21 arraignments in the last 18 or 19 months with counsel
22 being present provided through the Dutchess County
23 Public Defender's office. I do not believe I've had a
24 single private lawyer appear. I do not believe I've
25 ever had a situation in those more than 100

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2 arraignments where the defendant has indicated that
3 they want their lawyer or they want to hire a lawyer
4 for the purpose of that arraignment at 2 a.m. or 3
5 a.m. 2 a.m. is the great equalizer. Nobody generally
6 has a lawyer at 2 a.m. when they've been arrested.
7 And if they did, of course, and they wanted that
8 private attorney, either whom they already had or whom
9 they wanted to hire, then, of course, I would adjourn
10 the arraignment, but I am obligated by law to issue a
11 securing order or a release order.

12 So I would urge in any deliberations you have
13 regarding this first-appearance-type situation at
14 arraignment -- again, going back to the last century
15 when I started my legal career at legal aid in
16 Manhattan Criminal Court, assigned sometimes to
17 arraignments hearing parts at 100 Centre Street, fond
18 memories. We would go into the back, the bullpen. We
19 would face dozens of individuals behind those bars who
20 were waiting for the arraignment and we would
21 generally introduce ourselves, saying that we're
22 lawyers, ask them whether they would allow us to
23 represent them. They universally said yes unless
24 there were some individuals and some private lawyers
25 who did show up in Manhattan, of course. That's

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2 Manhattan, that's not Dutchess County. But by and
3 large, you know, it all worked. I think it all
4 worked. I mean, lawyers were provided at arraignment
5 at that time.

6 When I moved 40 years ago up to north of the
7 Bronx to Dutchess County, it was foreign to me that
8 you didn't have a lawyer at an arraignment. It was
9 foreign to me many things, that you didn't have court
10 reporter, that these reports not of record. There
11 were many things foreign to me. We've come a long
12 way. But I don't think we need to be too stringent in
13 terms of any eligibility guidelines at that first
14 appearance at 2 a.m.

15 MS. GERSON: I have a question about that.

16 JUDGE STEINBERG: Yes.

17 MS. GERSON: What is your view about
18 recruitment if it turns out that the person is not
19 eligible, getting the money from the defendant or
20 the --

21 JUDGE STEINBERG: My simple answer is, it's --
22 generally should be much a do over nothing and, I
23 think, not worth the time and expense. I worked in
24 the Dutchess County Public Defender's office for 13
25 years, and our policy is we were not in favor of

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2 recruitment once a person was eligible. I just think
3 it's somewhat of a red herring. I may be wrong. I
4 mean, I may be wrong. There may be anecdotal
5 information. There may be some egregious examples of
6 someone being discovered with a lot of money or maybe
7 one day wins Mega Millions while they're being
8 represented by an institutional provider or something.
9 Generally speaking, I don't think you run into that
10 problem or should you.

11 The only other point, we are talking about
12 eligibility and the standard, of course, unable to
13 afford counsel, but we all know that the appellate
14 courts have defined the right to counsel is something
15 more than a person with a law degree. We all know
16 that they defined it as the effective assistance of
17 counsel, and, in fact, our courts have instructed us
18 that it involves an attorney who must investigate the
19 facts and the law. So I have a concern, these are the
20 eligibility requirements that when you make -- when
21 the providers are making the decision, whoever is
22 going to make the decision, about how that person, not
23 only is going to afford counsel, but in some instances
24 are going to have to afford an investigator, they're
25 going to have to afford a consultant, they're going to

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2 have to afford possibly a transcript, or even going to
3 have to afford as basic hire someone to go out and
4 serve process to get their witnesses into court to
5 have that subpoena served. And so when we're talking
6 about eligibility and what it's going to cost to hire
7 a lawyer, let's not forget about the cost that cases
8 need to be investigated. And in my blessed view on
9 the bench, I find that the public defender's office in
10 Dutchess County which has three full-time
11 investigators who go out there and investigate, I
12 don't see a lot of that in the private sector. I
13 don't see a lot of privately retained lawyers who have
14 their clients in a financial position to also go out
15 and hire an investigator. And, of course, we're are
16 not dealing with the most serious cases with the
17 highest volume, but even on your basic DWI or domestic
18 violence cases or some other cases, sometimes you
19 really need to investigate, you need to go out there,
20 you need to speak to witnesses, you need to go out
21 there, you need to go to the scene, you need to do any
22 number of things that the lawyers aren't necessarily
23 uniquely qualified to do. In fact, it should be
24 better done by someone other than the lawyers.
25 So I want you to consider all those ancillary services

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2 that may be rolled into what we refer to as the
3 effective assistance of counsel.

4 And my last point, which I hadn't planned to
5 talk about, but with Ms. Gerson here and my thinking
6 about things, is when we do about assigned counsel on
7 appeals -- because I've done a lot of appeals in the
8 public sector and private sector, they are expensive.
9 They cost a lot of money to hire a lawyer, purchase a
10 transcript, pay for the printing cost of an appeal.
11 So it is -- it is the really well-financed defendant
12 who can afford to hire an appellate lawyer. The vast
13 majority of people can't get their -- they won't be
14 able to.

15 Back when I was at the public defender's
16 office and we were applying for the assignment of
17 counsel to the Appellate Division, most of our clients
18 were incarcerated, it wasn't a close call. We
19 provided an affidavit of indigency to the court they
20 assigned. My recollection is that when the defendant
21 was not in custody, it took a little more. You know,
22 we would qualify them and then we would apply to the
23 Appellate Division, and I can't recall anybody was
24 being denied counsel by the court. And the appellate
25 term, where, of course, the misdemeanor appeals went

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2 from Dutchess County, they did not require much for
3 the incarcerated. They required somewhat more of an
4 affidavit of indigency and financial information for
5 those who are out, but it wasn't -- there weren't a
6 lot of close calls.

7 MS. GERSON: I'm really glad you brought up
8 this point, and I'm wondering if you wanted to speak
9 to the efficacy of requiring an incarcerated defendant
10 whose been incarcerated the entire course of the
11 proceedings, whether it be a plea or trial, having to
12 reapply for counsel to be assigned and have a
13 reassessment of eligibility, and whether -- I mean, I
14 know it's statutory, so we might have to change the
15 statute, but whether it makes any sense and whether
16 such a client could perhaps have his lawyer certify
17 that so far as a lawyer's aware that his financial
18 circumstances have remained unchanged, similar to the
19 rule in family court and for (indiscernible)
20 guidelines.

21 JUDGE STEINBERG: You know, we're dealing with
22 public monies and we're dealing with different --
23 different public pools of money so that the trials at
24 the trial level -- the funding which is in Dutchess
25 County, of course, is a county-funded defender and

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2 oftentimes, you know, if there's going to be assigned
3 private counsel at the appellate level, it comes from
4 a different revenue. I personally have no problem
5 that at the time of the appeal; the person has to
6 recertify or swear under oath that they still are
7 indigent. I mean, the affidavit we used in Dutchess
8 just simply said I've been previously and throughout
9 these proceedings represented by assigned counsel,
10 found to be indigent, remained indigent, remained not
11 owning any property, remained not being able to hire a
12 lawyer. I don't see that it's a burden at all to have
13 the person just swear again that they cannot afford
14 counsel, particularly the cost of an appeal, which
15 again, having been involved in it for a while now in
16 my current position here in the court, but it's a very
17 costly process and only those with significant funds
18 generally can finance their own appeal. And I'll
19 leave it at that unless there are questions.

20 MS. MACRI: So we've had this come up at a
21 couple of different times in our discussions, this
22 idea of the potential. I mean, so based on what you
23 had said earlier, the opportunity of having a
24 steadfast rule, for example, I'll use that term
25 lightly, of having the determination of eligibility if

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2 somebody gets incarcerated and it's their arraignment,
3 that there should be the counsel available at that
4 particular instance unless, you know, the individual
5 wants an attorney, a private attorney, but they should
6 have assignment of counsel and that the eligibility
7 determination should be perhaps minimal in those
8 particular instances. Do you agree with that, this
9 idea that --

10 JUDGE STEINBERG: Yes. I think it's
11 presumptive -- I think it's a presumption that anybody
12 in custody who says, I cannot get a lawyer here,
13 whether I can afford one or not, whether it's
14 Dutchess, I work for IBM or whatever, it's 2 a.m. I
15 can't get a lawyer here. I'm in custody. What do I
16 do? I think it's critical that the lawyer be provided
17 and then the eligibility can take place after that.
18 There's no -- again, from my experience, if you had
19 the means to get a lawyer to the court at 2 a.m., you
20 would. I haven't seen it. I don't think any of my
21 colleagues have seen much of that. And anybody who
22 wants to be represented by private counsel certainly
23 can, and, you know, the arraignment process can be
24 adjourned. I've certainly done that, but we have to
25 do something at that hour in terms of assuming

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2 jurisdiction, advising them of the charges.

3 Fortunately, we have counsel available in Dutchess.

4 That's been a blessing. I hope it spreads, obviously,
5 throughout the county, as Dutchess, right now in more
6 busy courts and it's working.

7 MR. LEAHY: Judge, we appreciate your
8 testimony, and I have one question: We've heard an
9 abundance of conflicting testimony as to who should be
10 responsible for the eligibility determination, and
11 having been a defender in your career, having been a
12 judge, both for many years, I wonder if you have any
13 reflections upon that or any guidance for us.

14 JUDGE STEINBERG: I have thought about it, and
15 I would join with, I think the majority of those who
16 have spoken on it to say that, I think, it should rest
17 with the institutional provider. If there are issues
18 that have to be addressed regarding concerns about that
19 ability to regulate caseload or improperly reject or
20 whatever, those should be addressed, of course. But
21 to inject another person or office or bureaucracy into
22 that process, that has to be done pretty quickly, I
23 don't really think is the way to go. I think,
24 generally speaking, it has worked in the past and, I
25 think, it should continue. You know, if it's not

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2 broken, don't fix it.

3 I really think that we have to vest that
4 responsibility generally with the institutional
5 provider and address any problems that exist with
6 particular institutional providers. There's obviously
7 means to do that, and you're working hard to come up
8 with guidelines, and that's a wonderful thing that's
9 happening now in our state, so I would --

10 MR. LEAHY: When you refer to "institutional
11 provider," would you include in that definition, that
12 term, "institutional provider," the administrator of
13 an assigned counsel program as opposed to each and
14 every member of an assigned counsel program.

15 JUDGE STEINBERG: Yes. I mean, whoever is in
16 charge of providing that counsel, however it has
17 existed within the framework, I favor it continuing.
18 And whatever anecdotal information has come up that
19 has created problems that concerns the Brennan Center
20 or others, let's address it. I would say let's not do
21 away with it entirely, create a new bureaucracy,
22 perhaps, throughout the state for purposes of trying
23 to get that quick -- you know, we speak a lot about
24 early entry of counsel, early entry of counsel, but
25 how do we do that if we're going to create this whole

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2 new layer of bureaucracy to qualify someone, so I
3 can't speak in favor (indiscernible).

4 MR. LEAHY: Point well taken. Thank you.

5 MR. DAVIES: I just have one question about
6 whether you were concerned about any possible
7 drawbacks of guidelines which implicitly render
8 eligibility determination more uniform. I would
9 imagine, but I don't know, because, as a judge sitting
10 in Hyde Park, your decisions might be different if you
11 were in Poughkeepsie City Court or here in Fishkill or
12 something like that, do you worry that the guidelines
13 might take away the ability of discretion of people in
14 low-income places to make locally informed decisions?

15 JUDGE STEINBERG: No. I don't worry about it,
16 because there's a lot of discretion built in now in
17 Dutchess County. The determinations are made by the
18 public defender's office, and so there's always that
19 right of an individual who's been told that if he or
20 she is ineligible, to go to the judge and ask for a
21 review of that. In Dutchess County my understanding
22 remains that they're given a written reason at the
23 interview. If they're ineligible, they can come to
24 court with that written statement. I ask them to
25 please show me what they've been given, whatever it

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2 might be, excessive income, et cetera, and try to do,
3 you know, gauge that and make a determination.

4 MR. DAVIES: As a follow-up, are they also
5 explicitly guided in the event that they're denied
6 they could come back to the court? Do you know if
7 they're told about that review process?

8 JUDGE STEINBERG: My understanding since I was
9 in the office and several years since, that they are
10 told. And I believe it's on the form that's given out
11 as to the reasons denied that they can extensively,
12 you know, have this reviewed by the court and invited
13 to do so if they wish. The follow-up on the appeals,
14 which is interesting, is also in Dutchess County,
15 again, which I'm most familiar with. On violations of
16 probation, the probationer facing a violation has to
17 go and qualify again also. So the notion being that
18 whenever they were found eligible, this is a new
19 proceeding and then they should qualify for public
20 funds to be extended on their defense, and they do.

21 MR. LEAHY: Thank you very much for your
22 testimony.

23 MS. MACRI: Thank you.

24 JUDGE STEINBERG: Thank you.

25 MR. LEAHY: Merbel Reagon.

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2 MS. MACRI: I just want to say hello, Merbel.
3 It's good to see you again.

4 MR. LEAHY: Very nice to meet you.

5 MS. REAGON: My name is Merbel Reagon, and I
6 want to thank the New York State Office of Indigent
7 Legal Services for this opportunity to provide oral
8 testimony at this public hearing on eligibility for
9 assignment of counsel.

10 Today I want to talk about what it actually
11 cost to live and work in the various counties of New
12 York State and what income makes it possible for New
13 Yorkers to meet their basic needs, in other words, to
14 make ends meet. I work for the Women's Center for
15 Education and Career Advancement in New York City, and
16 we have spearheaded the development of the New York
17 State and New York City self-sufficiency standard
18 report since the year 2000. The most recent report
19 for New York State was developed in 2010 and for New
20 York City in 2014. The self-sufficiency standard
21 calculates what is the necessary income based on the
22 number of people in a family, their ages, and the
23 county in which they live.

24 The purpose of these hearings is to assist
25 your office in establishing criteria and procedures to

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2 guide courts when determining eligibility for mandated
3 legal representation in criminal and family court
4 proceedings. Our goal at the Women's Center and the
5 goal of our partner, organizations around New York
6 State, has been to inform and shift the public policy
7 deliberations from who's above poverty to who in New
8 York State earns enough money to take care of their
9 families' basic needs. And that's the basis on which
10 I want to direct the rest of my testimony.

11 I will address the question of what are
12 reasonable living expenses, and we can start with what
13 cast makeup a family's basic needs: Housing,
14 childcare, food, transportation, healthcare, taxes,
15 including income taxes, payroll taxes, and sales
16 taxes, as well as a ten percent of miscellaneous
17 expenses, which we add, which includes household
18 products, telephone, clothing, shoes, and other
19 household expenses. There is no recreation, there is
20 no entertainment, there is no savings, and no debt
21 repayment in this budget. In other words, we're
22 talking about bare-bones budget, a no-frills budget
23 with no extras.

24 Because the most recent New York State
25 self-sufficiency standard report was developed in

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2 2010, I'll reference those numbers:

3 That report calculates for all New York State
4 counties the necessary income for 70 different family
5 types. So for example, we make a distinction that
6 most other budgets don't among the ages of the
7 children, because the cost categories are different.
8 So would have four categories of children: Infants,
9 preschoolers, school-age children, and teenagers. So
10 I would like to ask you to indulge me for about three
11 minutes of my ten minutes and ask you to do the --

12 MR. LEAHY: You have 15.

13 MS. REAGON: -- the exercise that you have
14 before you. I would like for you to focus on Cayuga
15 County, which is a county where the costs are just
16 about in the middle for New York State, and ask you to
17 indicate what you think this particular family, a
18 married couple with a three-year-old and an
19 eight-year-old, need to earn per hour to meet all of
20 their basic expenses. I'd like for you to estimate
21 the cost of housing, we're talking about rent,
22 childcare, food, transportation, healthcare, and then
23 miscellaneous expenses as well as the taxes that I
24 described, and then estimate what you think they need
25 to earn on a monthly basis as well as an annual basis.

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2 And I'll give you about two minutes. I'm sure you'll
3 whip right through it.

4 MS. MACRI: This is good. This is a test.

5 MS. REAGON: And then I'm going to show you
6 the actual numbers for 2010, and I'm happy to answer
7 any questions that you might have.

8 MS. MACRI: And you said the kids were three
9 and eight years old; right?

10 MS. REAGON: Say that again.

11 MS. MACRI: The children were three and eight
12 years old.

13 MS. REAGON: Three and eight.

14 MS. MACRI: Okay.

15 MR. LEAHY: And a moderate cost --

16 MS. REAGON: So you're assuming full time for
17 the three-year-old because they're not ready for pre-K
18 yet, and after school and maybe before school
19 childcare for the eight-year-old.

20 MR. DAVIES: The transportation, they have a
21 personal car or is that --

22 MS. REAGON: I'm sorry. What's your question.

23 MR. DAVIES: The transportation, are we
24 assuming they have a car or is that --

25 MS. REAGON: I'm sorry. I can't hear you.

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2 MR. DAVIES: I was wondering if we're assuming
3 they own a car.

4 MS. REAGON: In Cayuga County, yes. I would
5 say in New York City, not so much. And then if you're
6 done, I'll now ask you -- where did she go? I'll wait
7 until you're done though.

8 MS. MACRI: Okay. I'm not going to do the
9 per-hour wage. I'm terrible at that.

10 MS. REAGON: That's all right. Does anybody
11 want to just throw out where you came out in terms of
12 monthly income.

13 MS. MACRI: We'll let our director start.

14 MR. LEAHY: Yeah. Sure. I'll start out.
15 I have monthly costs, you said?

16 MS. REAGON: Uh-huh.

17 MR. LEAHY: Okay. Yeah. I have - I came up
18 to 5200 monthly --

19 MS. REAGON: Okay.

20 MR. LEAHY: And so if my multiplication is
21 correct, 62,400 annually.

22 MS. REAGON: Okay. Yes. Anybody else.

23 MR. DAVIES: I came to 4800 monthly, and I
24 didn't do the math yet.

25 MS. MACRI: I did 4250 monthly.

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2 MS. REAGON: Okay. Great.

3 MS. GERSON: I came out real low.

4 MS. REAGON: Look at the second page of our
5 fact sheet and look at the fourth column over, which
6 is two (indiscernible) school age. In 2010, it came
7 to \$4200 a month or \$50,000 a year. So that's five
8 years ago. So your numbers are not that far off. In
9 fact, they're probably closer to what the actual cost
10 is. So if this a county -- if you look on the first
11 page, you'll see that Cayuga County is somewhere in
12 the middle, that the lease expensive county in New
13 York State is Orleans County, and the most expensive
14 is Suffolk County. And so the point being that
15 there's a range of what it cost to meet your basic
16 needs in New York State. And what we would like to
17 recommend is that we pitch it some place in the middle
18 for the purposes of your deliberations.

19 So it's clear that one size does not fit all,
20 but it doesn't make sense to think of our 62 counties
21 having different eligibility criteria; it's just not
22 practical in general. But doing the math that you
23 just did and then doing the simulation to other
24 counties, I think it just that a multiple of the
25 poverty measure could come closer than we are today in

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2 terms of those eligibility criteria.

3 So I would like to urge, we and all of those
4 who embrace the self-sufficiency standard reports,
5 would like to urge your office to consider using 250
6 percent of the poverty guidelines to determine
7 eligibility. So across the board what that would mean
8 is that for a single person, they would need to earn
9 about \$2400 a month, for a family of two, 3300, for a
10 family of three, 4,000, and for a family of four,
11 5,000. And so it's our position that working with
12 real numbers will help us to better meet the intent of
13 these hearings.

14 If we know that New York State families are
15 not earning enough money to make ends meet, then we
16 know they don't have the financial resources to hire
17 counsel. We will leave some of the thick copies of
18 our reports here for your perusal. And at a later
19 date, we will submit written testimony that goes into
20 more detail about the numbers, which usually causes
21 people's eyes to glaze over, which is why we decided
22 to do this exercise today.

23 So I want to thank you for the opportunity to
24 testify, and I'm happy to answer any questions that
25 you might have.

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2 MR. LEAHY: Thank you very much. This has
3 been very educational for us.

4 MS. REAGON: Good.

5 MR. LEAHY: I want to ask you maybe one or two
6 related questions. One is, we have been advised by
7 some speakers and writers to use the -- any multiplier
8 of the federal poverty guidelines only as an
9 inclusion -- only for inclusionary purposes and not
10 for exclusionary purposes, which we are also advised
11 they are frequently used for now.

12 MS. REAGON: Exactly. That is true.

13 MR. LEAHY: And I take it you would second
14 those opinions.

15 MS. REAGON: I would. Ideally, I would
16 recommend 300 percent of poverty, but that may not be
17 practical in the total scheme of things. 250 percent,
18 we've done the math in terms of the range of families,
19 and it does fall somewhere in the middle, it's not
20 enough for families who live, let's say in south
21 Manhattan or Suffolk County, but it might be enough
22 for families that live in the Bronx in terms of New
23 York City. And we will also leave copies of the
24 latest New York City report, which not only has
25 updated the number, but also had a very extensive

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2 demographic of who in New York State, which families,
3 working families, do not earn enough money to make
4 ends meet. And my guess is that at least in terms of
5 New York City, a lot of them would mirror the
6 population that is the clients of your agency.

7 MR. LEAHY: Thank you. The only other -- the
8 only comment I wanted to make is that your
9 demonstration via statistics of the different cost of
10 living, which is, you know, a factor of more than
11 double from the high end to the low end, I think will
12 help also inform our probably preliminary assessment
13 of not trying to get too definitive about what the
14 cost of counsel actually is because that too may vary
15 from location to location.

16 MS. REAGON: Exactly. Exactly.

17 MR. DAVIES: Thank you very much. I just
18 wanted to ask just one thing, which is: Why you
19 thought that we should use the federal poverty
20 guidelines, because you've already done the analysis
21 here, and why you also thought we shouldn't
22 distinguish between counties?

23 MS. REAGON: It would be fantastic if you
24 could. It just didn't seem to us that 62 different
25 sets of criteria would be efficiently practical. But

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2 if that is not the case, then absolutely we would make
3 that recommendation.

4 MR. DAVIES: And even if we do only one rather
5 than all 62, why not use these numbers rather than the
6 250-percent number?

7 MS. REAGON: That would be the best of all
8 possible worlds.

9 MS. MACRI: I'm thinking it would --

10 MR. DAVIES: Do I take it, by the way, that
11 this is only expected to be updated every ten years or
12 so?

13 MS. REAGON: I'm sorry.

14 MR. DAVIES: Do you expect this to be updated
15 every ten years or so? Because one of the advantages
16 of the federal poverty guidelines is it is annually
17 updated.

18 MS. REAGON: I will tell you that in some
19 states across the United States that rely to
20 self-sufficiency standard reports, they have built
21 into their statewide legislature, the funding to
22 update it on a regular basis. If we could make that
23 happen in New York State, that would be terrific. I
24 will tell you that the organization that -- around New
25 York State that last worked with us to update this,

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2 were not able to get the funding to update it at the
3 same time that we updated New York City. But we are
4 actually in conversation with them again to try to do
5 this every two or three years across the state because
6 that has the most value. With the New York City
7 numbers it's easy for people in the balance of state
8 to sort of dismiss those as unrealistic, but if we
9 look at all of the counties, it makes a lot of sense.

10 MS. MACRI: And so if you were to engage in,
11 you know, looking at the numbers more recent, how long
12 does this kind of process take for your agency, give
13 or take as what I'm --

14 MS. REAGON: I would say anywhere from four to
15 six months, and I think that amount of time because it
16 is a very participatory process. If we made it a more
17 efficient, not so participatory process, it would take
18 less time, because the numbers are there.

19 MR. LEAHY: When you say "participatory," do
20 you refer to local participation.

21 MS. REAGON: Well, statewide. So for example,
22 in the previous incarnations of the statewide report,
23 we had a committee of about ten different
24 organizations around the state and many, many, many,
25 many meetings.

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2 MS. MACRI: Well put.

3 MR. LEAHY: Well, we are very grateful to you
4 for being one of those many voices to speak to us.

5 MS. REAGON: Thank you for this opportunity.

6 MR. LEAHY: Thank you so much.

7 MS. MACRI: Thank you very much.

8 MR. LEAHY: Our next speaker is Beth Levy.

9 MS. LEVY: Good afternoon.

10 MS. MACRI: Good afternoon. You know to pull
11 the microphone up; right?12 MS. LEVY: I'm going to try to make it short,
13 because it's almost lunchtime. I'm here actually on
14 behalf of Karen Cheeks-Lomax. She wasn't able to be
15 here today. My name is Beth Levy. I've been working
16 at My Sister's Place. It's a not-for-profit agency
17 which has been in existence since 1976, and we are a
18 very holistic agency, and we collaborate with the two
19 other people who testified from Pace Women's Justice
20 Center and Legal Services of the Hudson Valley. We
21 provide a unique approach as well, in that we have a
22 huge shelter, and we have a whole training department
23 that goes into police departments and high schools and
24 middle schools and judge's workshops as well. So we
25 would like to be a part of any training, because we

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2 feel that 18B lawyers should be trained specifically
3 in the needs of domestic violence survivors, and
4 domestic violence survivors have very different needs.
5 Each case is very different.

6 My Sister's Place, as you know -- I don't know
7 if you know actually. We provide immigration. We go
8 into family courts. I'm in the trenches personally in
9 Mount Vernon, which is one of the poorest parts of New
10 York State, actually, and I work with 18B lawyers as
11 opponents and as attorneys for the children. Many of
12 the 18B lawyers are not really sensitive to domestic
13 violence issues, and many are, of course, sensitive.
14 So we would ask for across-the-board training for all
15 of the 18B lawyers.

16 We also do divorce cases. We do immigration.
17 We do (indiscernible) visas and we represent men and
18 women, of course, and we do divorce cases. Oh, we
19 provide counseling for adult and children. And one
20 unique program that we do have, which we help 18B
21 lawyers with, and that would be something that I hope
22 they would be trained on, is that we have volunteer
23 accompaniment people to go to court with the clients
24 because oftentimes they do not have family members or
25 friends to go to court with them. So I do work with

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2 18B lawyers with that.

3 So we are very fortunate in that we do bet
4 county money, and we do not discriminate against
5 people based on their income, unlike Legal Services of
6 the Hudson Valley or Pace. So I oftentimes represent
7 people who make a lot more than I do, but the criteria
8 is domestic violence. And even with women or men who
9 make more than I do, their assets are tied, as you
10 heard earlier in joint ownership of homes or debts or
11 needy children who might be disabled or adult children
12 who might be dependent on them.

13 So we're asking that, you know, you develop
14 criteria that would take into account the unique needs
15 of domestic violence victims to adhere to some basic
16 principles. We help a lot of people pre-filing in
17 court, as well as Pace Women's Justice Center and
18 Legal Services. 18B lawyers do not do that. They get
19 assigned after. I did hear the lawyer who does
20 criminal work and who is a judge. I did also criminal
21 defense earlier in my career, and 18B is crucial at
22 that initial stage. So I'm even thinking maybe 18B
23 lawyers can be assigned pre-petition, I don't know if
24 that would be possible. But, you know, when they
25 apply, because sometimes it is against the victim's

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2 interest to file for custody or an order of
3 protection, it might make their situation even worse.
4 So if they can get help at that earlier juncture, that
5 would be better for their safety.

6 Let's see. What else was I going to say?
7 I've witnessed discrepancies in appointing 18Bs by
8 judges. And I do a lot of support cases and I see the
9 abuser asking for a pre-18B when he has a private
10 attorney for a personal injury case and for a divorce
11 case and for other cases. And then he comes before
12 the judge and says, I'm poor, I have no money, and we
13 know that he works off the books and has these private
14 attorneys, and the judge will oftentimes hire --
15 appoint an 18B. So sometimes again, an 18B be
16 appointed because he should be able to hire his own
17 private lawyer.

18 I have another case where we have a conflict
19 of interest. It's a very unfortunate case; I really
20 wish we could take the case. All the other parties in
21 court have 18B and she does not and -- I'm sorry. The
22 father has a private attorney, the child has an 18B,
23 and she's the only one in court without any lawyer at
24 all. We cannot help her. And I've written a letter
25 to the judge on her behalf asking for an 18B because

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2 she has a very limited income on social security.
3 She's elderly, and the judge refused to appoint her an
4 18B. Now, maybe the judge thinks that she's
5 protecting her right, and maybe that's okay, but my
6 client won't -- I wish could be my client, feels very
7 uncomfortable being the only one without an 18B.
8 So --

9 MS. MACRI: Can I ask, were they denied
10 eligibility to an assignment of counsel; is that why
11 lower --

12 MS. LEVY: No. Just -- you know, it's not
13 mandatory.

14 MS. MACRI: Oh, right. I'm sorry. Yes. I
15 apologize. Yes. Thank you.

16 MS. LEVY: I don't know if you're addressing
17 that issue as well. But for the most part, we would
18 like to take part in the training for 18B and inform
19 the 18B lawyers the various resources they have at My
20 Sister's Place including pre-counseling and the
21 accompaniment to the court. Thank you.

22 MS. MACRI: Thank you.

23 MR. LEAHY: I just want to pick up the one
24 member of our panel who can't be here today who was at
25 the previous two hearings under our parent

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2 representation, Angela Burton. She would have
3 responded enthusiastically and would have followed up
4 with more questions about pre-petition representation.
5 Now, we're working on that; it's in our vision. I
6 just didn't want to let that go unspoken, because
7 Angela would beat me over the head if I did.

8 MS. LEVY: But I mean, My Sister's Place also
9 gets involved in those cases as well.

10 MS. MACRI: Great. Terrific. Thank you.

11 MR. LEAHY: Thanks very much for your
12 testimony.

13 MS. LEVY: Thank you.

14 MR. LEAHY: Saad Siddiqui.

15 MR. SIDDIQUI: Good afternoon. At this stage
16 in the hearing there's a lot of what I wanted to talk
17 about has actually been addressed by many of the
18 previous speakers, obviously. But just preliminarily,
19 my name is Saad Siddiqui. Up until very recently, I
20 was with the Legal Aid Society. I'm now in private
21 practice.

22 Additionally, I'm also a board member of the
23 lower Hudson Valley chapter of the Civil Liberties
24 Union; so I'm intimately familiar with a lot of what
25 has gone on with the Hurrell-Harring decision. But I

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2 think, one, to be brief, which I'm sure we can all
3 appreciate, but I did want to emphasize two key points
4 and reiterate what I've heard here today.

5 My practice encompasses mostly criminal
6 defense, and one of the things that certainly, I
7 think, is essential at this stage, and granted I can
8 only speak to what happens here in Westchester,
9 because that is where the majority of my legal career
10 thus far has been spent. Presently, the way this has
11 been done now is the appointment of counsel on a
12 misdemeanor level, at least in the courts that I've
13 appeared in front of, is the determination is made by
14 the court, and it's almost immediately made at an
15 arraignment.

16 I would certainly advocate for a system that
17 operates on the presumption that everyone is eligible.
18 Certainly, it is the best way to operate in order to
19 preserve the rights of the criminal defendant. The
20 second, we would be getting -- she was the first
21 speaker that had talked about the time sensitivity.
22 Now, granted with felony cases it works a little bit
23 differently because the Legal Aid Society is in a
24 position, of course, to make that determination, and
25 the institutional provider does that. But oftentimes

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2 an 18B the courts will make that determination. And
3 in a situation -- it's very easy to conceive of a
4 situation where the court can determine, at
5 arraignment, that someone may not be eligible, but if
6 you added other factors, the person remains
7 incarcerated. And then especially on a misdemeanor
8 case, almost immediately, you're talking about, you
9 know, the emotion time taking into effect all of these
10 other time-sensitive things that need to be addressed.
11 So, certainly, a system in place that would permit
12 these rights of the accused to be protected is
13 essential.

14 MS. GERSON: Could you explain with more
15 specificity, how does the court make the eligibility
16 determination in these misdemeanor cases; what
17 information does the court use?

18 MR. SIDDIQUI: Well, I'm glad you brought that
19 up. That was actually going to be my next point,
20 because it varies. To a certain extent, in my
21 experience, it has varied from court to court. Now,
22 certainly, they will ask for basic preliminary
23 information, name, address, employment, and it's all
24 self-reported, household income. But then once you
25 get to that point, the level of inquiry changes and

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2 varies from court to court. And there could be an
3 instance where you have one court that will literally
4 just rely on the black-letter-reported income and will
5 take into account the number of defendants -- excuse
6 me, dependents, whereas, another court may require a
7 greater inquiry, and they may look at that. They may
8 look at if you have child support obligations which,
9 certainly, can be very taxing on the individual's
10 income, or look at any governmental benefits that a
11 person may receive. But then you will run into an
12 interesting quagmire that some courts may look at
13 whether or not someone owns a home, but
14 (indiscernible) own a home versus another court that
15 may go into a greater degree of inquiry whether or not
16 there's financial insolvency. And those are very
17 important factors that, I think, uniformly all courts
18 should take into consideration. And while I can
19 appreciate that depending on where you reside looking
20 at New York State, the cost of living varies
21 significantly, whether you were looking at the
22 southernmost tip of New York State to the westernmost
23 corner of New York State. But what certainly can be
24 done is a uniformity with respect to the inquiry that
25 is conducted.

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2 And one other thing certainly is important, if
3 someone is denied, at least having some type of
4 uniform appellate process, certainly at the very
5 least, within a particular jurisdiction, a particular
6 county. So if someone is saying I am, in fact,
7 eligible, I still -- you know, even though the court
8 has made the determination of my ineligibility or the
9 determination of ineligibility has been made, I had
10 still made every attempt to obtain counsel, and I
11 cannot afford to do so.

12 So ultimately, those are the points that I
13 just wanted to re-emphasize to everyone here.

14 MS. MACRI: Can I ask -- and thanks for
15 offering these comments. Have you seen any situations
16 where you've been an 18B where you've seen a court
17 being asked to reconsider a denial of eligibility;
18 have you ever, you know --

19 MR. SIDDIQUI: I was in a situation where I
20 made that -- where I asked the court to reconsider at
21 the arraignment stage, because there was -- in that
22 particular instance, the court had looked at the
23 financial disclosure affidavit that they had required
24 the defendant to fill out. But it was -- let's just
25 say that there was not enough inquiry that was being

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2 done by that affidavit; so the court looked at it. I
3 asked the court to reconsider, and I mentioned a whole
4 slew of other factors for about five minutes. I think
5 my application to have the court reconsider the
6 defendant's financial eligibility actually wound up
7 being more comprehensive than the bail application
8 just because, to me, it's very essential that this
9 person, you know, have an attorney. And because it
10 was clear to me the person couldn't afford it and I
11 was trying to make the court aware of that.

12 MS. GERSON: Do you happen to know -- I asked
13 this question of Clare, and she was not aware. Is
14 there any ethical bar that would prevent you, as an
15 18B attorney, from representing a client who was
16 represented for arraignment purposes only, who is then
17 later found to be not eligible as a retained attorney?
18 Is there some place that talks about that.

19 MS. SIDDIQUI: There is no bar.

20 MS. GERSON: No bar. Okay.

21 MR. SIDDIQUE: There is no bar. But what
22 happens, and I had seen in instances where that had
23 happened is it's more that because the determination
24 is made so early on. And, of course, in most of those
25 instances, it's very rare that what the court will do

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2 if the person is out of custody, desk appearance
3 ticket. And for the purposes of the arraignment, if
4 there's an attorney assigned, just to make sure that
5 the rights are protected. But, ethically, there is no
6 prohibition with respect to this that I've observed in
7 my time of private practice.

8 MR. LEAHY: One of the concerns I have about
9 vesting defenders with the responsibility of
10 determining indigency, as opposed to courts, is the
11 potential for the self-interest of the lawyer or the
12 organization. Clare has (Indiscernible) with respect
13 to institutional defenders, and I'm not really asking
14 about that, although I know you've been with the
15 agency for a long time. Even though you're separate
16 now, I disagree with her about that. But in terms of
17 the majority of cases in Westchester County, which are
18 not the institutional defender cases, the so-called
19 18B cases, what is the solution if it's not the
20 courts? Is it an assigned counsel administrator
21 system, which functions in a similar institutional
22 capacity to the way the staff system functions in
23 terms of determining eligibility? Where do you stand
24 on that.

25 MS. SIDDIQUI: My own personal opinion is that

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2 if it is --- if you're looking at the assigned counsel
3 system and you have an assigned counsel administrator,
4 then certainly, you could run a parallel structure to
5 the way the institutional model runs. Certainly, at
6 least, there's a review, and, to me, it's just as
7 simple as saying that if you have a situation where
8 the 18B attorney or for whatever reason on that
9 misdemeanor case (indiscernible). If there was a
10 denial, then the simple remedy would be have the plan
11 administrator review that denial just to make sure
12 that it was a valid one. Because if you look at it,
13 at least a majority of the cases, you know, the court
14 does appoint the attorney. So it's not very common to
15 see someone being denied. And if it does happen, you
16 know, it happens -- no one's going to question if
17 someone's making \$150,000 a year and lives in
18 Chappaqua, as an example, and sit there and say
19 clearly that person is eligible. But it's those
20 close-call scenarios that every lawyer encounters. In
21 those types of situations, if the court feels that
22 he's not appropriate or if the defender feels that it
23 is not appropriate for this person to get
24 court-appointed representation, if you have a built-in
25 review process to monitor those denials, then I think

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2 that solves the problem.

3 MR. DAVIES: I just wanted to ask one thing
4 about your point that there should be a presumption of
5 eligibility. And I just wondered what difference that
6 made in your mind to the analysis of the person's
7 eligibility? Does it mean, for example, they would be
8 more likely to take their declaration of their income
9 as a facially accurate or -- I notice, for example.
10 That it sounded to me like most of the courts that you
11 were describing don't require pay stubs or further
12 documentation to verify the information.

13 MR. SIDDIQUI: My experience, I have not been
14 put in a position where I've had to provide that
15 degree of documentation. But my point is, that the
16 reason, in fact, that presumption should exist should
17 be implemented, if anything, the ultimate goal is to
18 ensure that anyone charged with a crime, their rights
19 are protected and that has to be to the principal
20 motivating force in everything that we're doing.
21 Because given the time sensitivity when we're talking
22 about not just, you know, procedural time limitations,
23 but just practical time limitations in dealing with a
24 criminal defense matter. If you're talking about
25 investigations being conducted, we are talking about

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2 (indiscernible) preservation of evidence, preservation
3 of videotapes, just going out and simply talking to
4 people. And more often than not, that needs to be
5 done almost immediately from the moment a criminal
6 investigation begins.

7 MR. DAVIES: Thank you.

8 MR. SIDDIQUI: Thank you.

9 MR. LEAHY: Thanks very much.

10 MS. MACRI: Thank you.

11 MR. LEAHY: Guiseda Marroquin from the Civil
12 Liberties Union. Please stand up. I butchered your
13 name. I apologize.

14 MS. MARROQUIN: It's okay. It's Guiseda
15 Marroquin. So, yes, just like my colleague here said,
16 a lot of the things that we had in our testimony has
17 been said, but we just wanted to comment and I'll just
18 say thank you for having this matter on a local level.
19 So the New York Civil Liberties Union respectfully
20 submits this testimony, and we are an affiliate -- a
21 New York State affiliate of the American Civil
22 Liberties Union, a nonprofit, nonpartisan organization
23 with eight offices across the state with nearly 50,000
24 members. I am the interim director of the NYCLU lower
25 Hudson Valley chapter. My office is here in White

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2 Plains, and I respond to civil liberty concerns on a
3 multi-county area in this region; so we go from
4 Westchester all the way to Dutchess, Ulster, in that
5 area.

6 Throughout the state and here in the lower
7 Hudson Valley, the NYCLU works to ensure fairness in
8 the criminal justice system, end mass incarceration,
9 and prevent punishment of people simply because of
10 their socioeconomic status. We are counsel to the
11 class of criminal defendants who are eligible for
12 public defense services in five counties, Ontario,
13 Schuyler, Suffolk, Washington, and Onondaga County.
14 The settlement of our litigation protecting those
15 defendants' right to counsel, Hurrell-Harring versus
16 State of New York, gave rise to mandate for the Office
17 of Indigent Legal Services to create statewide
18 eligibility standards and plans of ensuring quality
19 and plans of ensuring quality and aspects of the
20 indigent defense system.

21 Many of the problems that the NYCLU thought to
22 address in the Hurrell-Harring litigation --

23 MR. LEAHY: Could I ask you to just slow down
24 just a tad.

25 MS. MARROQUIN: Sorry.

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2 MR. LEAHY: Thank you.

3 MS. MARROQUIN: Access to justice and fairness
4 in the process should not depend on the county a
5 defendant is in. ILS must promulgate flexible
6 statewide standards for determination of eligibility
7 for counsel and ensure the provider has the necessary
8 funding to provide adequate representation.

9 In the vacuum created by the lack of state
10 standards, criminal defendants who cannot afford
11 counsel are denied access to publicly funded
12 attorneys. In the investigation, public defense
13 service across the state, we documented policies that
14 are on their face deny counsel to people who cannot
15 afford a lawyer. These include policies denying
16 merely because of ownership of an illiquid asset, such
17 as a home or car that is necessary to work or attend
18 school. Account only for income and not for debt
19 obligations, persons under 21 if they cannot provide
20 proof of their parents indigence and completely failed
21 to account for the actual cost of obtaining
22 representation on the charges filed.

23 In the lower Hudson Valley, youth may be
24 particularly affected by wrongful denial of counsel
25 when minors are charged with misdemeanor offenses,

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2 judges only review their parents' financial
3 information to determine eligibility for appointment
4 of counsel. In these situations of estrangement or
5 where parents refuse to help, the young person is left
6 without counsel. Judges have made these
7 determinations even when legal aid attorneys or others
8 advocate for appointment because of familiar
9 circumstances.

10 In addition to addressing these documented
11 wrongful denials of counsel, ILS should adopt
12 standards to ensure against other types of wrongful
13 denial commonly observed around the country.

14 A report by the Brennan Center of Justice documented
15 instances of clients denied eligibility because of a
16 family member was able to post bond or when the client
17 resided in a state mental health facility. Standards
18 to address these issues are needed whether or not
19 there is an established a faulty decision on those
20 basis in our state. There should be flexible
21 statewide standards that allow for consideration of
22 income disparities in areas like Westchester County.
23 If regional variance is allowed, it should be evidence
24 based. For example, economic evidence of the cost of
25 lawyers and the cost of living and the region should

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2 be clearly defined. The purpose of standards is to
3 ensure the integrity of each of the decisions, not
4 merely to address the problems of the past.

5 The absence of eligibility standards must be
6 seen in the context of New York State's decade long
7 failure to ensure meaningful and effective assistance
8 of counsel to poor people accused of crimes. In 1965
9 in response to Gideon versus Wainwright, the
10 legislature advocated responsibility to public county
11 government in the county law 18B.

12 The result is that the state has a patchwork
13 of local programs instead of a true public defense
14 system. Too often those local programs are
15 underfunded, and thus likely resources to provide
16 effective counseling creating the disparate system we
17 currently have. In Westchester County 18B cases do
18 not receive additional funding for necessary staff or
19 services needed, such as the investigator that should
20 be else mentioned. As a result, this caseload and
21 limited resources client may face only one choice, to
22 accept plea bargaining because their lawyers do not
23 have the capacity to adequately represent all eligible
24 clients.

25 The problem is further compounded for clients

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2 that have prior convictions or are undocumented
3 immigrants. ILS must promulgate standards that ensure
4 that eligibility determinations are fair, objective,
5 and insulated from these political and economic
6 pressures. ILS must also acknowledge that statewide
7 standards and procedures will also affect each
8 counties public defense systems' caseload. Absent an
9 increase in state funding, those counties will bear
10 the cost if state eligibility standards increase the
11 caseloads of county defender.

12 County government may well object to state
13 standards on that basis. But that complaint is valid
14 as it may be, we cannot justify standard and fail to
15 ensure the provision of counsel to those who cannot
16 afford attorneys. Standards governing public defense
17 should drive funding, not the other way around. The
18 NYCLU remains committed to ensuring that the state
19 provides the funding needed to meet those standards.
20 We thank the ILS for the opportunity to offer
21 testimony today on the importance of statewide
22 eligibility standards, and we look forward to
23 continuing to work with ILS to ensure that the
24 criminal justice system does not punish poverty and
25 respects the constitutional right of counsel.

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2 MR. LEAHY: Thank you very much. We
3 appreciate the voice of NYCLU.

4 Vojtech Bystricky, attorney.

5 MR. BYSTRICKY: Yeah. Thank you very much.

6 MS. MACRI: Hi. Good afternoon.

7 MR. BYSTRICKY: I'm actually Vojtech
8 Bystricky, V-O-J-T-E-C-H, B-Y-S-T-R-I-C-K-Y.

9 MR. LEAHY: Speak right up, sir, we'll be
10 happy to hear you.

11 Mr. BYSTRICKY: I'm actually -- I just saw the
12 sign outside. 18B caught my attention, came in and I
13 think the legal aid obviously was represented and made
14 their representation. I'm an 18B attorney,
15 misdemeanor panel only, actually hope and expect to
16 get onto the felony panel. But I trust Ms. Gerson
17 asked a question as to how do the judges decide, and I
18 really have no prepared remarks, but I was just
19 itching to answer that question because --

20 MS. GERSON: Please do.

21 MR. BYSTRICKY: In Westchester, the 18B
22 attorneys, misdemeanor, there are four areas in lower
23 Westchester you need to pick one of them. I am in the
24 one where the biggest court is White Plains, City of
25 White Plains criminal court, and there are others

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2 and --

3 MR. LEAHY: You practice only in one of the
4 four areas?5 MR. BYSTRICKY: You can only practice in one
6 of the areas and you get to be known in those courts.

7 MR. LEAHY: For better or worse?

8 MR. BYSTRICKY: Right. Exactly. And in my
9 area where White Plains is, the gamut runs from can
10 you afford an attorney, no, I can't. Joe, you're
11 assigned, done. Two, the judge asking the court
12 officers to ask people who are looking for an assigned
13 counsel, they distribute the affidavit, have them
14 prepare the affidavit. And again, it depends, but
15 most of the courts where they do it, and certainly
16 White Plains does it very consistently in keeping the
17 form, then the judge herself or himself reviews that
18 form and determines whether the person is eligible.
19 And they explain to the defendant that it's a sworn
20 statement and that perjury is a crime that could be
21 added to the list of their troubles if they falsify
22 any information.23 In other courts, the judge will actually ask
24 the potential 18B attorney to help the defendant
25 prepare that form, review it, and make a statement to

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2 the court that based on their review, they believe the
3 person is eligible. The only thought that I had that
4 one way to bring consistency to the assignment process
5 is to require the judge, at least perform or have the
6 defendant fill out that form, have that be a part of
7 the record. Because, I mean, I've had cases where I'm
8 assign a client and they tell me, you know, I had the
9 other case in Putnam and they just don't give me an
10 assigned attorney. I said, Do you own a house? Yes,
11 it's all paid for. Well, that's why they didn't.
12 This judge didn't care to ask you, and they requested
13 can you afford an attorney, that's a very wide-open
14 question. So I would, again, just like to point out
15 that is where it ranges. And as to the actual
16 mechanics, because the actual assignment, as far as
17 misdemeanor is concerned, is the absolute discretion
18 of the judge.

19 What that translates -- and by the way, I've
20 been doing this only for -- I'm new to it. I've only
21 been doing this for about five or six years, criminal
22 attorney, defense attorney about ten years, but 18B
23 misdemeanor, about five -- four or five years. In
24 most cases, particularly in the smaller courts where
25 the clerk is the 18B attorneys gateway to assignments.

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2 In other words, when I started this, I said, Don't
3 worry about the judge. Make sure you know the court
4 clerk, because that's where your bread and butter is.
5 So the discretion is sort of delegated to the court
6 clerk, and there is somewhat of a discontent
7 particular with the younger attorneys, like myself,
8 who come in later and there is a pecking order.

9 There's a pecking order and it is always the same
10 attorneys who get the top assignments and, of course,
11 there is always a value added to the top assignment.
12 Petty larceny is much better than a misconduct, just,
13 you know, a violation, sometimes even a violation gets
14 an assigned attorney because there is that 15-day
15 potential of incarceration.

16 MR. LEAHY: So you're saying that some judges
17 exercise favoritism to certain attorneys in their
18 assignments?

19 MR. BYSTRICKY: Absolutely. And I would say
20 it would be more the judge by default by letting that
21 assignment. So I would just recommend if there is any
22 way of one requiring that the judges actually have a
23 form that is prepared. And two -- and I don't know
24 that my minutiae of the actual 18B law, but to the
25 extent that the judges could somehow be reminded that

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2 there should be some sort of a turnover in the
3 assignment --

4 MS. GERSON: There should be a rotation
5 system.

6 MR. BYSTRICKY: Pardon?

7 MS. GERSON: There should be a rotation
8 system.

9 MR. BYSTRICKY: Exactly. And I would actually
10 like to leave on a positive note that White Plains
11 City Court is a very good example where the judges are
12 mindful, the clerks are mindful, and I think it's the
13 most open and transparent system of the 18B
14 misdemeanor panel assignments. And I thank the board
15 for letting me speak.

16 MR. DAVIES: Could I ask just one question?
17 In the event that you had a potential client who's
18 denied eligibility in some court, given the fact that
19 you do rely on the clerk as a gateway and potentially
20 the judge, would you hesitate to ask the judge to
21 reconsider that decision if you believe that the
22 client truly was eligible, because you have something
23 at stake in those relationships.

24 MR. BYSTRICKY: There is very little in real
25 life of denial of eligibility. My bigger concern

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2 would be the determination of eligibility and then
3 deciding in the pecking order to the judges. So I
4 have not seen really much saying, you know, I really
5 cannot afford an attorney. Most of the time, even to
6 that simple question, sometimes the defendant, much to
7 our chagrin will say, yes, can you afford an attorney,
8 and they will say yes, I could have gotten that one.
9 Okay. So -- but, yeah -- and by the way, that does
10 happen sometimes wherein the judge -- and this was
11 actually a particular case I'm thinking of in White
12 Plains where the judge would assign me in this case
13 for an arraignment and telling me, Mr. B, you realize
14 they're not eligible. By next time around, you have a
15 choice telling them, well, this is -- you are not
16 eligible. I was only standing in for the arraignment,
17 and then they have the option to hire you or hire
18 somebody else.

19 MR. DAVIES: Thank you.

20 MR. BYSTRICKY: Thank you very much for the
21 opportunity.

22 MR. LEAHY: Thank you, sir.

23 MS. MACRI: Thank you.

24 MR. BYSTRICKY: I apologize for the attire.

25 MS. MACRI: No. No. We're great. Thank you.

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2 MR. LEAHY: Is there anyone else who would
3 like to testify? Karen, come on up. Identify
4 yourself and speak your piece.

5 MS. NEEDLEMAN: Good afternoon. I'm Karen
6 Needleman, and I am the administrator of the assigned
7 counsel panel as of last week. So we work under the
8 leadership of the executive director of Legal Aid
9 Society. Someday in the future that may change, but
10 for now -- I want to respond to a lot of speakers'
11 comments. I didn't plan to speak, because Clare
12 Degan is the face of our office, but I have so much
13 to say. With response to the last speaker, we have
14 not four areas, we have five areas and it's the area
15 where you reside or where you have your place of
16 business, your office. And the rationale for that was
17 so that you could be close to the court if an
18 arraignment was called in. Makes sense. And probably
19 the client lives nearby, you can visit your client at
20 the local jail, whatever.

21 In White Plains City Court, you're now sitting
22 in White Plains. White Plains has, I believe, four
23 judges; they all proceed differently. On my first
24 page, the very first thing I wanted to talk about was
25 White Plains City Court. And I want to give you an

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2 example of the degree of difference, not just in White
3 Plains but in county court and in northern
4 Westchester. In White Plains City Court they have
5 what's called a duty day. So if you're assigned a
6 duty day, you're sitting in the jury box waiting for a
7 case to be assigned to you if someone cannot afford
8 counsel. Two attorneys were sitting in the box and
9 defendants were brought in for arraignment, and this
10 is from two attorneys on a panel, and the judge asked,
11 What do you do for a living, and one of the clients said
12 -- or the inmates said, I work at McDonald's. You can
13 afford counsel.

14 Two lawyers are sitting there. This is the
15 most important time in this person's life; this is
16 their arraignment. They're facing incarceration, and
17 they're told on an hourly wage salary to go retain
18 counsel. That is a disgrace. That cannot go on.
19 That's one example.

20 You have another --

21 MR. LEAHY: In that example -- if I can just
22 stop you there, Karen. Is there an effective appeal
23 right?

24 MS. NEEDLEMAN: In White Plains City Court.

25 MR. LEAHY: Yes.

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2 MS. NEEDLEMAN: I -- they call me. They call
3 me, and I can call the judge and that's my ruling. I
4 did this before I was legal aid before and that is
5 what it is, and let me see if they come back with --

6 MR. LEAHY: It's very ad hoc and very hard to
7 undo.

8 MS. NEEDLEMAN: That's the way it goes. They
9 call me. So you can make a call, you can alienate the
10 judges, or you can try to smooth it out and say go
11 back and try again, show up without counsel and
12 prolong the proceedings. As long as they're out. If
13 they're in, I would assume they would have to --

14 MR. LEAHY: Unlike the public defender
15 clients, I believe the clients that Clare testified to
16 earlier, these individuals, the McDonald's employee
17 has no representation during that interim period?

18 MS. NEEDLEMAN: Zero. Absolutely zero. I
19 want to jump a little bit back to the beginning.
20 There's been a whole range in Westchester of how
21 eligibility is determined. I gave you one example in
22 White Plains City Court, oh, you work for an hourly
23 wage, you get counsel, you have to hire an attorney.
24 We had a case where a judge -- a Supreme Court judge
25 could not determine eligibility, was perplexed by the

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2 issues and the client -- the client was a dentist and
3 asked us to step in. We have never done that before.
4 We have never done that, and it required going through
5 weeks and weeks of work and boxes and boxes of tax
6 returns and reports and all kinds of depositions and
7 prior proceedings, only to come back to duh, you're
8 not eligible. So the courts don't always make these
9 determinations. Even on -- and this was on a felony
10 case where the person was facing substantial jail
11 time.

12 And then we have one more example, and just to
13 give you the flavor of Westchester, where I asked an
14 18B attorney to bring -- to come in to discuss
15 (indiscernible), and why did the case take so long?
16 And the answer was, Well, the judge assigned me, and
17 this person was a flight attendant, and they were
18 always flying somewhere for Delta Airlines or whatever
19 airline it was. I said, What do you mean they were a
20 flight attendant? How are they eligible? And the
21 response from my assigned attorney was, Well, the
22 court made the determination and that was that. So
23 where do we go with that?

24 My personal feeling is that the court has a
25 vested interest in denying counsel for certain reasons

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2 and granting counsel for other reasons. County
3 funding is driving the bus there. The private
4 attorneys who are on the assigned counsel panel, of
5 course, have a vested interest in whether or not they
6 get assigned. My hope is that they are officers of
7 the court, they realize their responsibility to the
8 court and to their client, and they understand the
9 nature of being entrusted with public funds, and if a
10 client is not -- if a defendant is not eligible, they
11 report that. If a defendant is eligible, they say the
12 client is eligible. In most cases -- most cases --

13 MS. GERSON: Karen, I'm a little bit concerned
14 about the example you give about the flight attendant,
15 because the judge assigned the attorney and if the
16 attorney -- I think you're suggesting the attorney
17 should have stated I don't think this person is
18 eligible, but doesn't that put the attorney in an
19 adverse position to his client? I'm a little
20 concerned about that.

21 MS. NEEDLEMAN: Well, any time an attorney
22 says I don't believe the client is eligible, that's
23 not -- I don't know if that's an adverse position.
24 You're representing whether they're financially
25 eligible to retain private counsel or not. And if the

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2 attorney thinks that the client can retain private
3 counsel, that's what they should report back to the
4 court. I don't think that's adverse to the client. I
5 think that's in the best interest of the client,
6 because why would they want this person, to begin
7 with, I don't know. But if, you know, the attorney
8 represents the truth -- and I don't think it should be
9 in public either, I think that's another problem, then
10 the system works. I mean, I think that's how it
11 should be. I don't think you're getting my point.

12 MR. LEAHY: You -- go ahead. I'm sorry.

13 MS. GERSON: No. I don't have a follow-up.

14 MR. LEAHY: Okay. You were starting to talk
15 about the kind of vested interest of the private
16 attorneys as a group in terms of eligibility. Doesn't
17 it cut a couple of different ways? I mean --

18 MS. NEEDLEMAN: It's conflict either way.
19 It's a conflict for the judge to do it. It's a
20 conflict for the lawyer to do it. None of us want a
21 third party to do it because that's not convenient for
22 the client.

23 MR. LEAHY: What about the private counsel
24 administrator?

25 MS. NEEDLEMAN: We can do it, and this is

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2 --that's my last page. Let me come down to what my
3 suggestion is after listening to everything. A brief
4 form, it's a checklist. It's one page. It's not
5 two-sided. It's one-sided, and it lists the basic
6 criteria that the attorney should be discussing with
7 the client. That form can be forwarded with the
8 notice of assignment to the administrator, and the
9 attorney would hopefully get assigned for the purposes
10 of arraignment and for further consideration of
11 eligibility. That's what we did at Legal Aid. We
12 always said, Judge, at this time the client appears
13 eligible for legal aid. They never filled out a form.
14 We just said they appear eligible subject to further
15 discussion, and then we interview them. And that
16 would encourage and compel the 18B attorneys not to
17 conduct interviews in the hallway, but to spend some
18 time really gathering data from their prospective
19 client that needs to be reported back to
20 (indiscernible) or to whomever, whatever what agency
21 is collecting data, as to their legal status, their
22 immigration status, do they own a home, do they own a
23 co-op, how many children are in the family, how many
24 years have you lived here, do you work, how many years
25 have you worked, and all of that information can be

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2 kept somewhere in a database, which we are trying to
3 build online, but not reported in open court in front
4 of the prosecutor so that could be kept forever, not
5 sworn to under oath so it could be used in a perjury
6 case, God forbid the client wants to go on the grand
7 jury. That's confidential information, and I have a
8 real problem when judges delve into clients'
9 particular assets. I've never felt comfortable with
10 it. There are judges who will say, Can you afford an
11 attorney? The client will say, No. How do you
12 support yourself? I'm on public assistance, end of
13 the conversation. Or I work at an auto shop and,
14 obviously, the guy's in handcuffs; so he's not going
15 to be working there. We know he's making hourly wage.
16 Legal Aid, can you interview them or Mr. So-and-So,
17 Mr. 18B, can you interview them as to eligibility.
18 That's the way it should go. The judge may inquire
19 briefly. You've been charged with such and such, an
20 arraignment. You're entitled to counsel. If you
21 can't afford counsel, the court will assign counsel
22 for you. What do you do for a living, where do you
23 live, that's it. I mean, the rest of it is -- that is
24 so confidential. It shakes me up every time I hear
25 this.

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2 So that's my position. I think, ultimately,
3 the defender should be the one to report back to the
4 court as to whether someone is eligible or not.

5 MR. LEAHY: To what extent would it be helpful
6 if we followed Merbel's suggestion of a much
7 significantly broader multiple of the federal poverty
8 guidelines as of essentially a protective blanket
9 within the 250 percent or some local variation of it
10 or the 300 percent that you're covered. There's no
11 inquiry by anybody, you're entitled to it, or at least
12 presumed in the absence of contrary evidence.

13 MS. NEEDLEMAN: But you have to ask questions
14 in order to find that out, and I know in our office we
15 don't look at those guidelines. We know. We just
16 know. You interview someone, you assess them.

17 MR. LEAHY: Well, that would -- let me press
18 that a little bit. That would cover the McDonald's
19 employee and a heck of a lot more employees than that,
20 wouldn't it?

21 MS. NEEDLEMAN: I have no problem with that.
22 Absolutely no problem with that.

23 MS. MACRI: So then, you know, I know we had
24 talked about this earlier this idea of steadfast
25 possibilities are baselines. Would you agree then

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2 that having the counsel assigned at arraignment and
3 also for the purposes of determining eligibility at
4 that point, that would be recommended and then we'd go
5 from there in terms of what criteria the counsel
6 should consider for the eligibility, et cetera, et
7 cetera? Are you comfortable with that kind of
8 recommendation?

9 MS. NEEDLEMAN: Very. By the way, we do have
10 -- I want to just correct the last speaker. We do
11 have grant money available. We are hiring
12 investigators, hiring social workers. So not
13 everything is as it appears to be. We're growing.
14 We're changing, and we're going to get up to speed
15 very shortly.

16 MR. LEAHY: Let's close with our knowledge of
17 and appreciation of the efforts that you all are
18 making at LAS to really improve the entire justice
19 system and counsel system for Westchester County, 18B
20 as well as staff counsel. And we hope to be of some
21 assistance in your efforts.

22 MS. NEEDLEMAN: Thank you.

23 MR. LEAHY: If there are no other witnesses,
24 then we have completed our task. And thanks again to
25 Nancy Mangold and thanks to our court reporter for her

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2 terrific responsibility keeping up with speakers, slow
3 and fast and loud and soft-spoken. Thanks to all, and
4 join us in, what, Buffalo next week.

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9 (Time noted: 1:37 p.m.)
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C E R T I F I C A T E

I, MARCI LOREN DUSTIN, a Certified Court Reporter and Notary Public of the State of New York, do hereby certify that the transcript of the foregoing proceedings, taken at the time and place aforesaid, is a true and correct transcription of my shorthand notes.

Marci Loren Dustin

MARCI LOREN DUSTIN

Court Reporter

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