Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement

Final Report

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Submitted by the New York State Office of Indigent Legal Services to inform the Criteria and Procedures for Determining Assigned Counsel Eligibility

DETERMINING ELIGIBILITY FOR ASSIGNMENT OF COUNSEL IN NEW YORK: A STUDY OF CURRENT CRITERIA AND PROCEDURES AND RECOMMENDATIONS FOR IMPROVEMENT

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INTRODUCTION

In 2007, the New York Civil Liberties Union (NYCLU) sued New York State alleging that New York has systematically and structurally denied meaningful and effective representation to individuals entitled to publicly funded representation.[1] In this lawsuit, *Hurrell-Harring v. The State of New York,* NYCLU identified several flaws of New York's public defense system, including "incoherent or excessively restrictive eligibility standards" that result in the "wrongful denial of representation."[2]

In October 2014, the parties to *Hurrell-Harring* agreed to an Order of Stipulation and Settlement (Settlement), which was approved by the Albany County Supreme Court on March 11, 2015.[3] The Settlement requires New York State to enhance "constitutionally mandated publicly funded representation in criminal cases for people who are unable to afford counsel" [4] in four key areas: Counsel at Arraignment; Caseload Relief; Initiatives to Improve the Quality of Indigent Defense; and Eligibility Standards for Representation. The New York State Office of Indigent Legal Services (ILS), created in 2010 under Executive Law § 832, has accepted the responsibility of working with the parties to implement the Settlement.[5]

Focusing specifically on financial eligibility for assignment of counsel, Section VI of the Settlement requires that ILS "issue criteria and procedures to guide courts in counties outside of New York City in determining whether a person is eligible for Mandated Representation." To do so, it was important for ILS to research the current processes used across New York State for determining if a person is financially eligible for assignment of counsel.

We began by first conducting an online survey of city and county courts, presidents of county magistrates associations, and providers of public defense services in each of the fifty-seven counties outside New York City on the procedures and criteria used to determine eligibility for assignment of counsel. This survey was conducted with the assistance of the Office of Court Administration, the New York State Magistrates Association, and the New York State Association of Counties. Survey respondents were also asked for copies of written documents – such as application forms or financial guidelines – used in determining eligibility. Table I of the

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[1] Subsequently, five counties were included as defendants to this lawsuit: Onondaga, Ontario, Schuyler, Suffolk, and Washington.

[2] *Hurrell-Harring v. The State of New York*, Index No. 8866-07, Amended Class Action Complaint, available at: http://www.nyclu.org/files/Amended%20Class%20Action%20Complaint.pdf.

[3] The Settlement is available at: https://www.ils.ny.gov/files/Hurrell-Harring%20Final%20Settlement%20102114.pdf.

[4] This is the definition of "Mandated Representation" as set forth in the Settlement. See Settlement, § II.

[5] See Settlement, pp. 2-3.

attached Appendix on Research Methodology (Appendix A) details the number of responses and application forms ILS received, and from which counties.

In July and August 2015, ILS conducted a series of public hearings regarding the eligibility determination processes used in the fifty-seven counties outside of New York City (public hearings). The hearings were conducted in the eight Judicial Districts outside of New York City as follows: 3rd Judicial District (July 16, 2015, Albany); 4th Judicial District (August 26, 2015, Elizabethtown); 5th Judicial District (July 9, 2015, Syracuse); 6th Judicial District (August 20, 2015, Binghamton); 7th Judicial District (August 6, 2015, Rochester); 8th Judicial District (July 30, 2015, Buffalo); 9th Judicial District (July 23, 2015, White Plains); and the 10th Judicial District (August 12, 2015, Central Islip). The notice of hearings, which was widely distributed and posted on ILS' website, invited people and organizations to participate through oral testimony at one of the hearings or via a written submission, or both. The list of hearing participants is attached as Appendix B. These hearings elicited a wealth of information from a variety of stakeholders, including providers of mandated representation, judges, magistrates, county officials, providers of civil legal services, people who had faced criminal charges, and other people who offered their opinions about the eligibility determination process.

The surveys, application forms, and public hearings helped ILS better understand the current state of the eligibility determination process across New York State, and in so doing, highlighted the need for uniform, written criteria and procedures. The hearings also produced several recommendations about how the eligibility determination process could work more fairly and efficiently to distinguish between those who are able to pay the costs of a qualified attorney and a competent defense and those who lack the resources to do so. These recommendations have informed the eligibility determination criteria and procedures that ILS has developed.

This study outlines the results of ILS' research into the current assigned counsel eligibility processes in criminal courts outside of New York City. We detail not only the information learned about the current criteria and procedures for determining financial eligibility for assigned counsel, but also the recommendations that were made during ILS' public hearings.

This study has four sections, with appendices, as follows.

I. **New York's eligibility patchwork.** Our data show the extent to which eligibility determination processes vary both across and within counties. Even after conducting this research, some of the standards and processes for determining eligibility remain unclear in some places. We document the significant differences and substantial inequities that exist around New York State.

II. **Procedures.** This section provides an overview of what we learned about the current eligibility determination processes, such as who conducts the eligibility screening, what documents are required and who has access to them, whether applicants are told that they may face legal sanctions if they misrepresent their finances, and whether processes to appeal decisions exist.

III. **Criteria.** This section details the criteria used to make eligibility determinations. It addresses what qualifications lead to applicants being presumed eligible, what financial factors are considered (including income, assets, and financial obligations) and how that information is used, what income guidelines are used, and whether applicants' ability to afford bond, retain private counsel, or both are considered. It also includes information on whether assets held by individuals other than the applicant – particularly spouses and parents – are considered.

IV. **Outcomes.** This section details what we were able to learn about how frequently applicants who apply for assignment of counsel receive it.

As previously stated, the public hearings elicited oral testimony and written submissions. Appendix B identifies all of the hearing participants. We cite to the oral testimony by the name and title of the speaker, the specific hearing transcript ("3rd JD public hearing," "4th JD public hearing," etc.), and the page number of the transcript. We cite to each written submission by the name of the person or organization that submitted it and the submission's page number, (i.e., "Written submission of New York State Defenders Association, p. 2"). Hearing transcripts and written submissions are available on ILS' website at: https://www.ils.ny.gov/content/eligibility-public-hearings. Of note, ILS was not able to obtain a transcript for the hearing conducted in the 5th Judicial District.

I. New York's Eligibility Patchwork

> *Presently, eligibility criteria for the court appointment of assigned counsel seem to differ among counties, among courts within the same counties, and even among judges within the same courts. This inconsistency creates disparity across the state, to those most harmed, to those most vulnerable, members of the greater community who may face not only financial barriers to access to counsel, but also language, education, and disability barriers. Access to counsel is access to a more fair and just legal system for all its residents. And this state deserves a transparent and reliably streamlined process for appointment of assigned counsel. Such criteria will benefit not only the public, but also the members of the bar and the bench.*
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> - Tracey Alter, Director, Family Court Legal Program, Pace Women's Justice Center, Pace University School of Law, 9th JD public hearing, p. 28.

New York law vests with judges the responsibility for determining when a defendant is unable to afford counsel, but does not provide any guidance on how this determination should be made. The result, we learned through the surveys we conducted, the applications we collected, and the public hearings we held, is that eligibility determination procedures and criteria vary widely across New York State.

During the public hearings, participants relayed stories of the same defendant receiving different outcomes in different places; evidence of arbitrariness or consideration of inappropriate factors in decision-making, such as the desire to reduce program costs; and the opacity of determination processes themselves, making it difficult to understand how decisions were being made.

The application forms we received as part of our study represent clear evidence of the lack of uniformity across New York. We received 71 application forms from 51 counties. Of these, only two were identical – those from the county of Chenango and Caroga Town Court in Fulton County – leading to the conclusion that among the 57 counties outside of New York City, a minimum of no fewer than 70 distinct application forms are in use. Even without accounting for the kinds of informal, oral procedures speakers at our hearings described,[6] the diversity in application procedures across New York is remarkable. We even had the opportunity to witness the diversity that occurs within counties themselves: respondents in Fulton and Westchester each submitted eight application forms currently used in courts within those counties.[7]

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[6] See the quotes from hearing participants in n.10 below.

[7] See Appendix A, Research Methodology, for a full county-by-county breakdown of the application forms received.

A. Inconsistency and inequity

Several hearing participants testified as to the wide diversity of procedures and criteria used for determining eligibility for assignment of counsel in their jurisdictions. Decisions were reported to differ from judge to judge, court to court, and county to county.[8]

Regarding the criteria used for establishing whether an applicant is able to afford counsel, hearing participants reported considerable diversity. As a result, several participants noted that similarly situated applicants may be determined eligible in one county, but not in another.

> I have cases where the client may be on probation and, say, he has another crime in Onondaga or Broome or whatever. The guidelines are different. My client may be represented in Tompkins and go to the next county and is not represented. That is a problem. What happens in that case sometimes, and I've had it happen many times, is my attorney will appear pro bono and take care of that case so that he can come back to Tompkins County and take care of the case there. Or we have a client with a Family Court matter that is transferring in to Tompkins County out of another county. When they get to Tompkins County, they're not eligible, and that happens.[9]

Procedurally, the way in which the eligibility decision is made was also reported to differ considerably from place to place. Whereas some judges conduct the eligibility determination in open court, others use written application forms or rely on providers of mandated representation

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[8] In addition to Tracey Alter, quoted at the beginning of this section, see the testimony of Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, 10th JD public hearing, p. 83 ("The first rule of eligibility determinations in [Nassau County] district court is that there are no rules. There is no consistency or transparency at any point in the process"); written submission of New York State Defenders Association, p. 8 ("NYSDA's 1994 study described the random, poorly designed disparate eligibility determination procedures being used at the time around New York. NYSDA has every reason to believe that through its present inquiry, ILS will find that this state of affairs continues to this day."); written submission of Samuel Young, Director of Advocacy, and Dennis Kaufman, Executive Director, Legal Services of Central New York, p. 2 ("The different standards across the counties and the number of actors involved in eligibility determinations make for an often confusing patchwork for indigent representation in our region.").

[9] Julia Hughes, Coordinator, Tompkins County Assigned Counsel Program, 6th JD public hearing, pp. 36-7. For similar commentary, see Karri Beckwith, Administrator, Chenango County Assigned Counsel Program, 6th JD public hearing, p. 88 ("It should be statutory, you know, and it should be something that if somebody comes into Chenango County, they'll fill out an application, I can fax it to Ulster County, and they're using the same guidelines that I am so that that person doesn't have to say to me, as they did in another county, why did I get one in Chenango, but I don't get one in Ulster? I don't understand"); Gary Horton, Director, Veterans Defense Program, New York State Defenders Association and former Genesee County Public Defender, 8th JD public hearing, pp. 35-6 ("It has always concerned me that there's no conformity across the state on how eligibility is determined and that if you step across the county line you may qualify in one county and not the other. That's just not right").

or another entity to screen for eligibility and make a recommendation. The results again create an appearance of inequity, as some hearing participants commented.

> Some of the judges I don't believe even looked at it [the eligibility application form]. Some judges looked at it and ignored it. Some judges have their own standards as I described, so we have a very uneven result. We have one judge rejecting thirty-two percent of the clients who are asking for assigned counsel. With everyone, it's a total of seven percent. Something is wrong there.[10]

B. Arbitrariness

Hearing participants noted their experience with decisions which appeared arbitrary, unreasonable, or inappropriate.[11] Several reported instances which, as one participant put it, "highlights the disparate treatment clients get, depending on who is on the bench."[12]

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[10] Kent Moston, Attorney-in-Chief, Legal Aid Society of Nassau County, 10th JD public hearing, p. 120. For similar commentary, see James Milstein, Albany County Public Defender, 3rd JD public hearing, pp. 91 ("Within Albany, there are more than 35 judges that could potentially assign a client in family court or criminal court to our office. Some judges will request we represent a client subject to his later qualifying for our services, and others will rely on our office to make the determination as to whether a client is eligible. Other judges believe that it's the court's responsibility to determine if the client is eligible, and will assign us the cases"); Vojtech Bystricky, Attorney, 18-B misdemeanor panel, 9th JD public hearing, pp. 100-1 ("[I]n my area where White Plains is, the gamut runs from can you afford an attorney, no, I can't. Joe, you're assigned, done. To the judge asking the court officers to ask people who are looking for an assigned counsel, they distribute the affidavit, have them prepare the affidavit. … In other courts, the judge will actually ask the potential 18B attorney to help the defendant prepare that form, review it, and make a statement to the court that based on their review, they believe the person is eligible."); John Brennan, Chemung County Public Advocate's Office, 6th JD public hearing, p. 126 ("We're not really sure what guidelines, if any, these judges are using. I think it varies from court to court. It may even vary from judge to judge within each court. I know there are some justice courts who do use some sort of a financial affidavit, so to speak, although I don't necessarily know what questions are on it. Some judges conduct some sort of a back and forth on the record with the defendant at the arraignment just asking questions to determine if the judge thinks that they qualify for an assigned counsel.").

[11] See, for example, written submission of New York State Defenders Association, p. 1 ("As early as 1994, NYSDA documented in a statewide study the improper practices and abuses in determining eligibility for appointed counsel. Then, as now, individuals are wrongfully denied their constitutional right to counsel due to financial eligibility determinations that are based on improper standards or the consideration of inappropriate factors."); written submission of Samuel Young, Director of Advocacy, and Dennis Kaufman, Executive Director, Legal Services of Central New York, p. 1 (noting that their organization has often had to "represent eligible clients who are improperly denied assigned counsel"). As another speaker noted, even the appearance of arbitrariness is an issue of concern, since procedural fairness is a cornerstone of the criminal justice system. See KaeLyn Rich, Director of Genesee Valley Chapter of the NYCLU, 7th JD public hearing, p. 113 ("Consistent procedures are needed for both the perception and the reality of justice.").

[12] Kent Moston, Attorney-in-Chief, Legal Aid Society of Nassau County, 10th JD public hearing, p. 106.

> I've been in courts where judges respond to litigants requesting counsel and tell them "looks like these earrings were made out of diamonds, or that necklace, sell that jewelry and hire an attorney." I've been in courtrooms where if it becomes clear that the client wants to proceed to trial, [or] is not willing to take a negotiated disposition, the Legal Aid Society is relieved because of that. Now the person's forced to retain counsel. I've seen situations where when litigants make a request for counsel, the judge says "you look like you're able-bodied, go out and get a job, hire somebody." These things do occur.[13]

Another participant read the following from a transcript of an actual eligibility determination:

> This particular judge says: "He owns a home? He can't have Legal Aid represent him if he is a homeowner. Legal Aid is for indigent people."
> The attorney says, "He was assigned Legal Aid previously."
> There was an off the record conversation.
> THE COURT: "Sir, do you own a motor vehicle?"
> The defendant then says, "yes."
> THE COURT: "He owns a home and a car and, therefore, is not eligible for Legal Aid. The Legal Aid Society is removed."
> We were taken off the case there by that judge.[14]

Still others commented on what they saw as the likely causes of some of the inequities they observed. In particular, they speculated that political and economic pressures might be responsible for creating a climate in which eligibility determination procedures may be used to reduce the cost of providing indigent legal services.

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[13] Laurette Mulry, Assistant Chief Attorney-in-Charge, Legal Aid Society of Suffolk County, 10th JD public hearing, pp. 133-134. For similar testimony, see Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, 10th JD, p. 85 ("Sometimes [defendants are] asked completely random questions. My student with me was talking about an individual who was refused counsel because he had an iPad in the courtroom. Other times they've been asked what kind of phone they have."); Karen Needleman, Chief Administrator, Assigned Counsel Plan, Legal Aid Society of Westchester County, 9th JD public hearing, p. 106 ("Two attorneys were sitting in the box and defendants were brought in for arraignment, and this is from two attorneys on a panel, and the judge asked, What do you for a living, and one of the clients said -- or the inmates said, I work at McDonald's. You can afford counsel. Two lawyers are sitting there. This is the most important time in this person's life; this is their arraignment. They're facing incarceration, and they're told on an hourly wage salary to go retain counsel. That is a disgrace. That cannot go on. That's one example.").

[14] Kent Moston, Attorney-in-Chief, Legal Aid Society of Nassau County, 10th JD public hearing, pp. 105-6.

> My personal feeling is that the court has a vested interest in denying counsel for certain reasons and granting counsel for other reasons. County funding is driving the bus there.[15]

> [T]here's no question because if I go to a meeting, the assigned counsel coordinator who is not a criminal lawyer, not a defense lawyer or prosecutor, is interested in one thing, protecting the county tax level, period.[16]

One hearing participant opined that the problem is particularly acute in less financially secure rural counties.

> The right to a free or affordable attorney in a criminal matter seems straightforward. Unfortunately, this right is undermined in rural New York largely because cash strapped rural counties have the burden of paying for this legal representation, so there is a built in tension between a county's serious budget concerns and an individual's Constitutional right.[17]

This same hearing participant emphasized that the issue of assigned counsel eligibility implicates not only individual rights, but the well-being of families and the community as a whole.

> Unfortunately, under our current system, cutting costs can also mean stripping a person of his or her Constitutional right to counsel, and the long term consequences of facing a criminal charge without an attorney can be substantial to the individual and to the community…. For example, I am reminded of an 18 year old young man from a tiny town, who came to see me, after he had served 4 months in jail. His crime was walking through the woods with a friend when they came upon an old snowmobile. They sat on it and played with it, and someone called the police. As I remember, they were charged with possession of stolen property, and failure to report a crime. The younger boy's case was diverted to family court where he was assigned an attorney, and the matter was

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[15] Karen Needleman, Chief Administrator, Assigned Counsel Plan, Legal Aid Society of Westchester County, 9th JD public hearing, pp. 108-9. For similar testimony, see Karri Beckwith, Administrator, Chenango County Assigned Counsel Program, 6th JD public hearing, pp. 85-86 (testimony is set forth in Section II, A, *infra*); Joy A. LaFountain, Administrator/Coordinator, Warren County Assigned Counsel Plan, 4th JD public hearing, pp. 154-5 ("There's a lot of pushback from board of supervisors, as you all know, about money being spent. Regardless if you tell them it's a mandated office, they need to be explained that every year, usually every six months, that it's a mandated office regardless. I'm constantly battling with them over money. You can't touch this. You have to pay these vendors, you have to provide the service. It's just the way they operate. They're always looking to cut somebody's toes off to give somebody a leg up.").

[16] Norman Effman, Wyoming County Public Defender and Executive Director of Wyoming-Attica Legal Aid Bureau, 8th JD public hearing, p. 122.

[17] Written submission of Susan L. Patnode, Executive Director, Rural Law Center of New York, Inc., p. 1.

> resolved with an ACD. The older boy was not given an attorney, nor was he told that he had a constitutional right to an attorney. His parents did not have a telephone and, since they lived outside of town, they did not learn that the boy was sent to jail. He was a senior in his last semester of high school when he was sent to jail, and was to be the first in his family to graduate from high school. Unfortunately, this incarceration affected his schooling and he quit school in the last semester.[18]

C. Lack of transparency

The *Hurrell-Harring* Settlement provides that "eligibility determinations shall be made pursuant to written criteria,"[19] a requirement that promotes the goal of a transparent assigned counsel eligibility determination process. Several hearing participants articulated frustration at the lack of transparency in the eligibility determination process. Not only did different courts and counties employ different criteria, they noted, but those criteria were often not publicized, leading to confusion over who was likely to be found eligible, and potentially decreasing public confidence in the public defense system. Their strong recommendation, therefore, was to make the criteria and processes for eligibility determinations more transparent.

> Eligibility guidelines and criteria for 18B representation should be more specific and transparent than they currently appear to be. No formula seems to exist for calculating potential financial eligibility. Thus our office is unable to explain with any particular degree of certainty whether a litigant may or may not qualify for counsel assigned by the court.[20]

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[18] *Id.*, p. 1-2.

[19] See Settlement, § VI (B)(1).

[20] Tracey Alter, Director, Family Court Legal Program, Women's Justice Center, Pace University School of Law, 9th JD public hearing, p. 30. For similar commentary, see the testimony of Joanne Sirotkin, Attorney-in-Charge, Legal Services of the Hudson Valley, 9th JD public hearing, p. 47 ("We hope that these guidelines could become very transparent. I mean, post them on the website, in court, so that everyone who comes to court will know the likelihood of whether or not they're going to get an attorney. Predictability, I think, is really the key here."); Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, 10th JD public hearing, p. 91 ("[S]tandards and criteria must be transparent. To my knowledge, if any guidelines or standards exist or are used by judges in district court, they have not been made public. To the extent they are issued or followed by any courts, they should be published and prominently posted in the courthouse to insure that the standards are being upheld and promote fairness and confidence in the system."); David C. Schopp, Chief Executive Officer and Executive Director, Legal Aid Bureau of Buffalo, 8th JD public hearing, pp. 94-95 ("[N]o one really knows what the Appellate Division standards are; they're not publicized, they're not -- don't know; no one talks about percentages of federal poverty guidelines, nothing.").

D. The need for uniform criteria and procedures

Nearly all of the hearing participants emphasized the importance of improving standardization around New York State.

> This diversity has led to a system in which eligibility determinations are neither uniform nor transparent. We urge the ILS to develop county-wide criteria and procedures that are as objective as possible and which truly reflect an individual's ability to afford counsel.[21]

Many hearing participants specifically requested that, in addition to criteria and procedures, ILS draft a model application form.[22] One participant noted that an obstacle to consistency is that there is no central authority empowered to change the practice in the courts.

> We have 58 jurisdictions we cover here and we'll have differences in five county courts. There's no real control, top down influence to say you will do this.[23]

Nevertheless, speakers expressed their belief that the criteria and procedures ILS promulgates will be a critical step in creating a system of assigned counsel eligibility determinations that honors principles of fairness, due process, and political independence, as the following testimony illustrates:

> I realize the difficulty of these situations to make it uniform and I realize different economies in each county, but I think that there has to be some sort of baseline so we can all bring this together and make sure each one of our clients has due process.[24]

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[21] Written submission of Laurette Mulry, Assistant Chief Attorney-in-Charge, Legal Aid Society of Suffolk County, p. 2. See also the written submission of the New York State Defenders Association, p. 1 ("Applying uniform and legal eligibility standards will stop the deprivation of counsel to individuals who are unable to afford lawyers that currently occurs, resulting in more individuals being found eligible.").

[22] See for example, Daniel P. McCoy, County Executive, Albany County, 3rd JD public hearing, p. 8 ("All courts should utilize the same form."); Hon. Dr. Carrie A. O'Hare, Town Court Justice, Town of Stuyvesant, Columbia County, current Director of the New York State Magistrates Association and former President of the Columbia County Magistrates Association, 3rd JD public hearing, p. 70 ("Perhaps it would be instructive for the New York State Office of Indigent Legal Services to develop a statewide application form.").

[23] Robert Convissar, Chief Defender and Administrator, Erie County Assigned Counsel Program, 8th JD public hearing, pp. 78-9.

[24] Julia Hughes, Coordinator, Tompkins County Assigned Counsel Program, 6th JD public hearing, p. 37. For similar testimony, see Gary Horton, Director, Veterans Defense Program, New York State Defenders Association and former Genesee County Public Defender, 8th JD public hearing, p. 37 ("I think it's absolutely necessary that there be clear-cut standards of eligibility which is necessary to provide uniformity of expectations across the state, an application across the state as well as to provide insulation from political pressure to local offices."); Saad Siddiqui, Attorney and Board Member of the Lower Hudson Valley Chapter of the New York Civil Liberties Union, 9th JD public hearing, p. 87 ("And while I can appreciate that depending on where you reside looking at New York State, the cost of living varies

E. "Indigency" means the inability to pay for the costs of representation

During the public hearing process, many participants emphasized the importance of utilizing the correct standard for determining if an applicant is eligible for assignment of counsel. Participants discussed how the term "indigent" has misled the public into believing that an accused person is not eligible for assignment of counsel unless the person is destitute.

> The public perception is that individuals receiving the benefit of a court-appointed attorney must be Indigent. Even the name of your [ILS'] office includes Indigent within the title. The word Indigent conjures images of a homeless, vagrant, down and out, a pauper, barely surviving within society. The reality is nothing could be further from the truth. As your office is aware, the constitutional right to appointed counsel is based upon financial inability to retain counsel. An individual could own property, have automobiles, [have] a good job but their liabilities for all of that could exceed their ability to retain private counsel, therefore [the person] would still qualify for an assigned attorney. When the public sees someone, who appears to be doing quite well, assigned an attorney then they assume the system has failed, when in fact it probably has not. The State needs to do a better job of explaining the nuances of the assignment of counsel to the general public.[25]

> The use of the word "indigent" has done much damage in this State, where counties have mandates continuously imposed and resources continually withdrawn. As a result, local officials often confuse the constitutional right to counsel with "entitlement programs" and also improperly equate eligibility for federal civil legal service programs with the constitutional right to appointed representation.[26]

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significantly, whether you were looking at the southernmost tip of New York State to the westernmost corner of New York State. But what certainly can be done is a uniformity with respect to the inquiry that is conducted.").

[25] Written submission of Daniel L. Palmer, County Manager, Essex County (on behalf of the Essex County Board of Supervisors), pp. 1-2. See also testimony of Edward Nowak, President of the New York State Defenders Association and former Monroe County Public Defender, 7th JD public hearing, pp. 21, 23 ("[I]ndigency has created a lot of problems because people think you just need to be beyond unable to afford counsel… I would ask, you know, that this group when it's developing guidelines to try to get away from the term 'indigency' and look at ability to afford counsel."); testimony of Norman Effman, Wyoming County Public Defender and Executive Director, Wyoming-Attica Legal Aid Bureau, 8th JD public hearing, pp. 106-107 ("I think we do ourselves a disservice by using the term indigency with respect to eligibility… [T]hat's a real issue because if you're dealing with the people that supply us local money, the counties, they're looking at indigency as a standard and that is a totally different concept than what we have been talking about this morning as far as the ability to afford competent counsel…. That's a lot different from indigency, and the two are not only confusing but create a barrier for us to try to justify what we do for our funding sources….").

[26] Written submission of New York State Defenders Association, p. 2.

Hearing participants repeatedly emphasized that under the law, applicants are entitled to assignment of counsel when they are *unable to afford counsel* and that it is critical this standard be honored in determining who is eligible for assignment of counsel.

> The constitutional and statutory standard for determining eligibility is financial inability to afford counsel, not indigency. County Law § 722 uses the phrase "financially unable to obtain counsel" as the standard for court appointment of a lawyer. The statute mirrors the federal standard contained in 18 U.S.C. § 3006a, which requires appointment for those who are "financially unable to obtain adequate representation." The New York Court of Appeals in *People v. Witenski*, 15 N.Y.2d 392 (1965), the watershed case which gave rise to the establishment of County Law Article 18-B, referred to those who had "no money to pay attorneys." The standard under the New York State Constitution, Article I, section 6, and the United States Constitution, Amendments VI and XIV is "inability to pay."[27]

> In 1963, the United States Supreme Court in *Gideon v. Wainwright* found that it is an "obvious truth" that, "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."… Accurately identifying "defendants unable to employ counsel" is imperative, observed the Court in *Gideon,* if we are to uphold the Sixth Amendment. Too often, eligibility standards have fallen prey to political whim or financial concerns, depriving our citizens of the right to counsel.[28]

Some hearing participants pointed out that national standards require that counsel be appointed whenever an applicant is "unable to afford" private representation.

> Eligibility should not require destitution. Rather, "[c]ounsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship"…. Further, a jurisdiction should not deny a defendant the right to counsel because … she has the "ability to pay part of the cost of representation."[29]

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[27] Written submission of New York State Defenders Association, p. 2. See also written submission of Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, p. 4 ("As hard as it may be, the Office of Indigent Legal Services must establish a definition of "unable to afford counsel" and criteria for making that determination that are sufficiently uniform to produce fairness."); testimony of Robert Convissar, Chief Defender and Administrator, Erie County Assigned Counsel Program, 8th JD public hearing, p. 62 ("The statutory criteria for determining eligibility for the services of assigned counsel is those who are financially unable to attain counsel under the county law. It's not just those who are poor. While a defendant who is destitute is clearly eligible for such services, it's not necessary in every case for a person to be destitute.").

[28] Written submission of Paulette Brown, President of the American Bar Association, p. 1.

[29] Written submission of Paulette Brown, President of the American Bar Association, p. 2 (quoting *ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5-7.1). See also written

Finally, one hearing participant attached to his written submission a February 1977 Memorandum written by Richard J. Comiskey, then Director of the Third Judicial Department, entitled "Assignment of Attorneys to Represent Individuals who are Financially Unable to Obtain Counsel." This Memorandum was prepared at the direction of Harold E. Koreman, then Presiding Justice of the Appellate Division, Third Judicial Department, and its guidelines were intended to apply throughout the Third Judicial Department. It emphasizes that "unable to retain counsel," and not destitution, is the correct standard to be used in determining eligibility for the assignment of counsel.

> These standards are to be used as guidelines in determining who is "financially unable to obtain counsel" under section 722 of the County Law.... Financial inability to afford counsel is not synonymous with destitution or a total absence of means. Nor are the standards used to determine indigency for other purposes controlling.... A person ... is eligible for assigned counsel when the value of his present net assets and his current net income are insufficient to enable him promptly to retain a qualified attorney, obtain release on bond and pay other expenses necessary to an adequate defense, while furnishing himself and his dependents with the necessities of life.[30]

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submission of Michelle Bonner, Chief Counsel, Defender Legal Services, National Legal Aid and Defender Association, p. 1 ("NLADA's guidelines regarding determination of eligibility for representation complement the work of the American Bar Association (ABA) in this area. Both organizations use as the fundamental basis for determining eligibility for counsel a consideration of financial inability and substantial hardship.").

[30] Memorandum attached to written submission of James T. Murphy, Legal Services of Central New York, p. 2-3. See also testimony of Senora Bolarinwa, currently incarcerated at the Taconic Correctional Facility, 4th JD public hearing, p. 13 ("When an attorney asked my father if he had $150,000 I would not go to prison, I know my father died of a broken heart. My father was the working class, chaplain for DOCCS, pastor, but he did not have liquidity of funds. He did not have fast funds.... So the criteria has to be solely lack of funds to pay. No other criterion.").

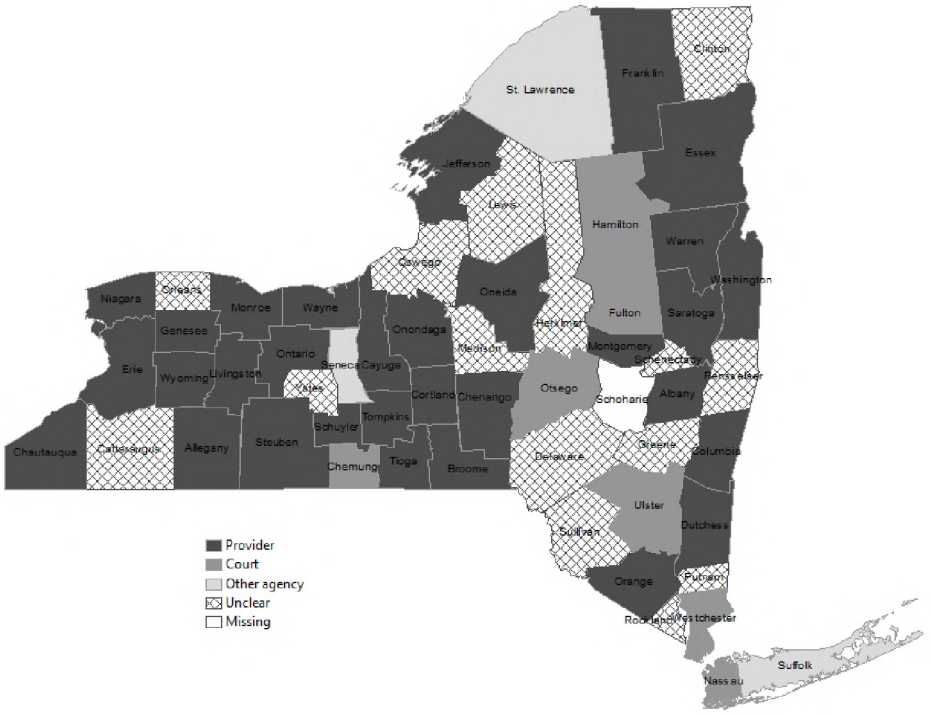
II. Procedures

Eligibility determination procedures should distinguish between those who are able to afford the cost of counsel and those who cannot. When functioning properly, procedures can ensure that this is done fairly and efficiently. Below is the information ILS collected about current procedures for determining who is eligible for assigned counsel, and who is not.

A. The responsibility for screening and making an eligibility recommendation

Although the judge is the final arbiter on financial eligibility, it is common for some other entity to be responsible for screening and making a recommendation to the court. Our analysis suggests that in 31 of the 57 counties outside New York City, the entity responsible for screening is the provider of mandated representation; in 7, it is the courts; and in 3, some other entity is responsible. In 15 counties it is unclear who is primarily responsible.[31] These data are presented in Map A, below.

Map A: Responsibility for initial screening by county [32]



[31] In Seneca County the Department of Human Services performs the screening, while in Suffolk County the function is performed by the County's Department of Probation. In St. Lawrence County, this task is performed by the Office of Indigent Defense, a county government office, separate from the providers of mandated representation.

[32] The application forms and survey responses we obtained occasionally contradicted each other regarding which entity is responsible for assigned counsel eligibility screening in each county. Only when we had two or more sources corroborating each other did we record that a county fell into one of three categories,

During the ILS public hearings, participants were asked to address the following question posed by the *Hurrell-Harring* Settlement: should screening for eligibility be performed by the primary provider of mandated representation in each county?[33] The testimony reflected divergent views on this question. Some hearing participants attested to the pressure placed on providers to save money for their county budgets by utilizing rigid standards that effectively "screen out" applicants.

> Right now we're having an issue in our county, and this is kind of based on the assignments, but we went to committee yesterday because our 18-b line, we're depleted for the entire year this year, and our committee bases our performance as an office on how low we can keep the 18-b line, which is just a horrible thing. It doesn't take into account our representation of these clients who just desperately need our help. All that they care about is how much the county part is going to be at the end of the year, and we work very hard to try to keep that line low. . . . [U]nfortunately, the county considers it to be a bad thing if the assigned counsel line, which we have absolutely no control over, exceeds our budget for the year.[34]

Other hearing participants identified the potential for conflict that arises when the mandated provider is responsible for financial eligibility screening:

> I do think that it creates a conflict and I want to tell you a couple reasons why. I used to work in New Hampshire when I first started and New Hampshire is not a perfect world either, but New Hampshire Public Defender is a private entity that contracted with the state to represent indigent defendants all over the whole state, multiple offices, essentially a Legal Aid type of model, but in New Hampshire the courts had the absolute obligation to do the eligibility screening, and I've been in both places now and I can tell you that I liked that model much better…. I can tell you that I felt the difference when I first came to New York that we had to screen people out financially and put them on the spot a lot. I mean, you open with an adversarial relationship to an extent.[35]

(the provider, the courts, or some other entity). In counties where no such corroboration existed, or where we had only one source of information regarding screening, we recorded the responsibility for screening as 'unclear.' In the case of Schoharie County, where no information was made available, the information is recorded as 'missing.'

[33] See Settlement § VI (B)(7).

[34] Karri Beckwith, Administrator, Chenango County Assigned Counsel Program, 6th JD public hearing, at 85-86. Similar testimony is set forth in note 15, *supra.*

[35] Andrew Correia, First Assistant, Wayne County Public Defender Office, 7th JD public hearing, pp. 79-80.

While acknowledging these issues, other hearing participants nonetheless identified the advantages of delegating to the provider of mandated representation the responsibility for screening and making an eligibility recommendation.

> It would be a burden on any agency to do the eligibility determination, to gather all the information and try to verify it… [but] I would just ask, which entity in the entire State of New York in the United States of America cares about the rights of defendant[s] more than the defender? I submit to you, there are none. Everyone else has some type of a conflicting position and there is no one that looks out for the rights of a defendant who is charged with a crime more than the defense attorney. That is why they are the ones. Yes, it's going to be a financial burden, but somebody in the government, whether it's done by the court system, by the probation department, you name it, they've got to provide the resources. Why not give the resources to the entity whose duty it is to represent that client and who in this state does so zealously for their client?[36]

This position appeared to be the general consensus amongst those who made written submissions on this issue, with participants identifying additional reasons for tasking providers with the responsibility for screening and making a recommendation regarding eligibility.

> The courts have the ultimate authority to determine eligibility; the standards cannot limit a court's inherent power and fundamental duty to provide counsel.
>
> However, initial eligibility determination is best delegated to a public defense provider, in a way that: furthers establishment of a trusting attorney-client relationship; minimizes conflicts of interest as to determination of eligibility for multiple clients; prohibits consideration of public defense workloads and/or program budgets in the eligibility determination, and adheres to the statewide criteria and procedures established by the Indigent Legal Services Office. Further, [c]ounty attorneys, prosecuting attorneys, probation employees and any other adversaries of public defense clients should have no role in determining the eligibility of prospective clients.[37]

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[36] Edward Nowak, President of the New York State Defenders Association and former Monroe County Public Defender, 7th JD public hearing, pp. 28-30. For similar testimony, see Jonathan E. Gradess, Executive Director, New York State Defenders Association, 10th JD public hearing, pp. 24-25 ("[W]hat you want to build – hopefully building for a state system, the place where clients can walk in off the street and find competent counsel, be treated with respect and dignity and have access to legal services in the same way that the rich have. That's what we're trying to build. When that happens, it would be fundamentally absurd to think of a third party making that decision. It ought to be part of – the engagement of counsel – part of the first step in the relationship and confidentiality should attach, so it saves time because it allows for the same questions that occur on a bail inquiry, starts the case earlier, you can have early investigation and do many things that a rich person's lawyer would do.").

[37] Written submission of Velma Hullum, New York State Defenders Association, Client Advisory Board, p. 4.

> We recommend that the judicial responsibility for determining eligibility be delegated to the primary provider of public defense representation in the first instance. That way, as with clients retaining private counsel, discussions of financial eligibility could take place in a confidential setting rather than in open court and would be protected by the attorney-client privilege.[38]

B. Extent of concerns about applicants committing fraud to obtain free counsel

During the ILS public hearings, there was divergent testimony regarding the extent to which applicants intentionally misrepresent their finances – or engage in fraud – to obtain free counsel. Though no hearing participant could identify specific instances of applicants engaging in fraudulent conduct to obtain free counsel, some participants expressed their belief that fraud is a problem. These participants identified two reasons to be concerned about the possibility of fraud: first, the need to maintain the integrity of assigned counsel programs; and second, the need to preserve limited resources for individuals who really need assigned counsel.

> [B]ut the idea with respect to screening individuals, I don't have an example [of fraud occurring], except to the extent that when individuals get a benefit they're not entitled to, it calls into question the integrity of the system.[39]

> I think that it does have a double-edged sword effect, because if people are using the system that really don't need it and the people that need the system that we could put more time into and really evaluate the case.[40]

The majority of hearing participants who addressed the issue, however, stated that in their experience, fraud is not a common problem.

> MR. DUNNE: In what percent of clients would you say this [fraud] is a potential issue?
> MR. LUBOW: One to two percent…. I think that the people gaming the system are not – it's not that significant an issue. It's more an issue to counties that do not want to provide services, in my opinion.[41]

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[38] Written submission of New York State Defenders Association, p. 3.

[39] Robert M. Nigro, Administrator, Nassau County Assigned Counsel Defender Plan, 10th JD public hearing, p. 160.

[40] Daniel P. McCoy, County Executive, Albany County, 3rd JD public hearing, p. 11. See also written submission of County Executive McCoy, p. 2 (suggesting procedures for ILS to "stem the abuse").

[41] Greg Lubow, Attorney and former Chief Public Defender, Greene County, 3rd JD public hearing, pp. 54-55.

> And again, something I think is just generally true, I'm sure there are very small number of people who try and get a free attorney even though they could afford one, but generally our experience is, and I think the experience of most other offices, is that people who can afford an attorney seek out private counsel.[42]

> Anecdotally, it has not been our experience that individuals seeking our services are camouflaging assets that need to be flushed out by declaring them ineligible for our services. In other words, individuals don't need "motivation" to hire private counsel. In the great majority of cases, an individual seeks the services of the Public Defender because of legitimate financial need; it is counterproductive for the system of justice to presume otherwise.[43]

C. Documentation requirements

Although it is not uncommon for eligibility determinations to be accomplished, at least in part, through oral interviews, the survey results revealed that most jurisdictions use application forms to obtain financial information from individuals seeking assignment of counsel. Of the 47 survey responses we received from providers, 38 indicated that application forms are used, while 30 of the 51 OCA judge responses indicated they are used in at least some of the courts in the county.[44]

Presumably to identify misinformation in the application process, some counties also require that applicants provide documentation to verify the financial information they disclose. Specifically, 20 (or 28%) of the application forms we received indicate that such documentation must be provided. Of these, 17 require applicants to provide pay stubs or other evidence of income from employment; 13 require proof of entitlement to public benefits; and 5 require tax documents. Two require that applicants who state they have 'no income' must produce a notarized statement to that effect. The full results are shown below, in Figure 1.

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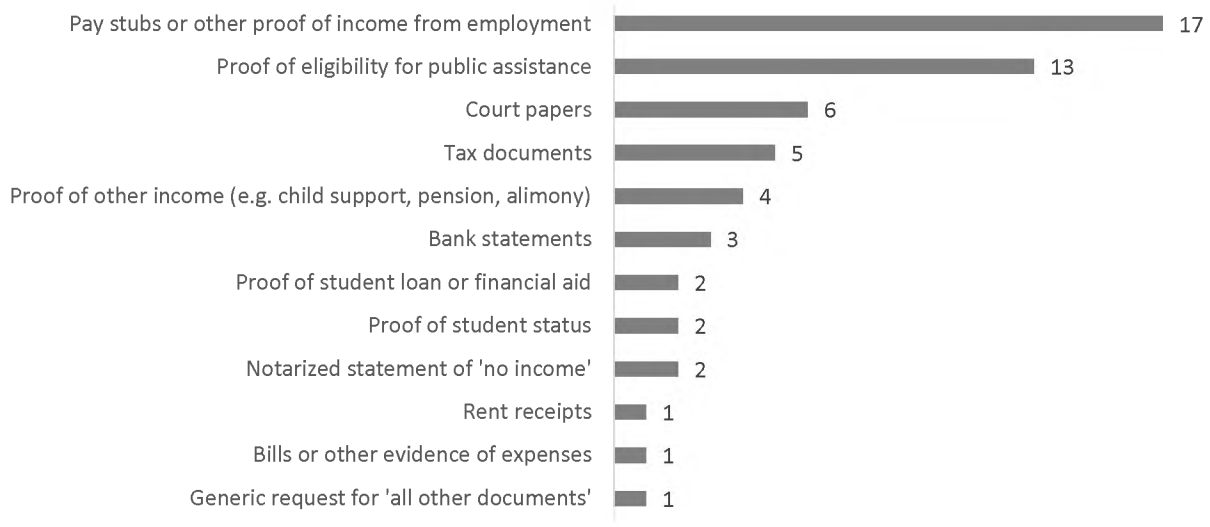
[42] David C. Schopp, Chief Executive Officer and Executive Director, Legal Aid Bureau of Buffalo, 8th JD public hearing, p. 99. For similar testimony, see Peter Racette, Deputy Director, Legal Aid Society of Northeastern New York, 4th JD public hearing, p. 74 ("No, I – I don't see people gaming the system to get a free criminal defense lawyer."); Andrew Correia, First Assistant, Wayne County Public Defender Office, 7th JD public hearing, p. 74 ("I would say [that fraud is] a small problem at best. I mean, my county is, generally speaking, pretty poor and, you know, there's not a lot of people willing to commit fraud to obtain public defenders in my county.").

[43] Written submission of James D. Licata, Rockland County Public Defender, and Keith I. Braunfotel, Chair Administrator, Rockland County Assigned Counsel Plan, p. 3.

[44] It is worth noting that of the 51 OCA judge responses, 4 responses were blank and 5 indicated 'don't know', leaving just 12 responses indicating no courts used application forms. Also, of the 47 provider responses, 4 indicated 'don't know'.

Figure 1: Requests for documents on application forms by type



Notably, our survey results suggest that requests for supporting documentation are slightly more common than the application forms themselves suggest. Specifically, 27 (57%) of the 47 providers who responded to the survey indicated that supporting documentation is required either in the form of pay stubs, household bills, or tax documents, and 17 (33%) of the 51 OCA criminal court judges who responded indicated that such supporting documentation is required in at least some of the courts in their county.

In the course of our review, we noted that many application forms contain language indicating that failure to provide the documentation requested, or even failure to fill out an application form completely, can result in the application being delayed, denied, or not considered. Of the 71 application forms we collected, 27 (38%) include language indicating that the applicant will face a problem with the eligibility determination process if the applicant does not provide the documentation requested, with most indicating the application will be denied automatically. Figure 2 includes examples of such language on applications.

Figure 2: Sample language from forms requiring complete information

> It is important that you realize that our office cannot undertake legal representation if you do not cooperate with this procedure. *(Form letter to applicants, Albany County.)*
>
> YOU MUST RETURN ALL COURT PAPERS WITH THIS FINANCIAL AFFIDAVIT IN ORDER TO BE INTERVIEWED *(Application form, Chautauqua County, capitalization in original)*
>
> YOU MUST SUBMIT ALL OF THE FOLLOWING REQUIRED INFORMATION BEFORE YOUR APPLICATION WILL BE PROCESSED *(Application form, Cortland County, capitalization in original)*
>
> If left blank, your application will be denied! *(Application form, Rensselaer City Court, referring to income information)*
>
> Answer ALL questions as directed. Failure to do so may delay the decision on this application. *(Application form, Tompkins County Assigned Counsel Program)*

Balanced against the concern about incorrect financial information is the concern about procedures which create barriers to applying for assigned counsel. During the public hearings, almost everyone who addressed this issue expressed concerns about documentation requirements that are needlessly burdensome and demeaning, and which prevent applicants from applying in the first place, or if they do decide to apply, from completing the application process.

> And I have seen in other counties that there's a tremendous and detailed inquiry that the public defenders go through to determine eligibility. There is lines of paper. They – some counties ask for tax returns and ask for employment stubs and material that's not easily available – not readily available, anyways, at the time an attorney is needed and the decision for representation is needed.... I think that's demeaning and unnecessary....[45]

One hearing participant noted that documentation requirements are of particular concern for assigned counsel applicants who work "off the books," as is often the case for immigrants.

> Though most immigrants work hard, many do not have conventional proofs of income. For immigrants who have not adjusted status and are awaiting work authorization, they

[45] Robert Linville, Columbia County Public Defender, 3rd JD public hearing, p. 30. For similar testimony, see Karri Beckwith, Administrator, Chenango County Assigned Counsel Program, 6th JD public hearing, p. 92 (in response to the question, "[are there] people who are denied eligibility for failure to provide… supporting documentation?" testifying "Daily, yes."); Keith Dayton, Cortland County Public Defender, 6th JD public hearing, p. 115 (responding "Yeah,… [we] consider it incomplete" in response to the question, "Have you ever had to deny somebody because the documents are not available?"); Hon. Peter J. Herne, Chief Judge, St. Regis Mohawk Tribal Court, 4th JD public hearing, pp. 59-60 (noting that enrolled members of Native nations often do not file taxes or apply for public benefits, and therefore cannot provide the documentation that is required on assigned counsel application forms).

> often work "off the books" and are paid in cash by their employers. As a result, they do not have the ability to produce pay stubs or W2 forms. Their employers are not usually willing to produce written confirmation of their employment due to federal laws prohibiting the hiring of undocumented workers. Recognizing this reality, New York City's courts and uninsured care programs allow immigrants to provide income and asset affidavits in lieu of proof of income. Given the growing immigrant populations throughout the state, it is imperative that their needs and realities be included in the assigned counsel application eligibility criteria in each jurisdiction.[46]

Some hearing participants acknowledged that requiring documentation is a means by which to diminish the number of applicants, thereby saving the county money in assigned counsel costs.

> MS. MACRI: Is it fair to say that in your county failure to provide the requested documentation will result in a likely denial unless there's some other type of documentation that can supplement the application?
> MR. SOUCIA: Yes. And it's one way of eliminating cases, is because people do not provide proper documentation. When I look at – because we have a monthly assessment or a monthly report that comes out, routinely it's because people fail to provide income documentation is why they're denied.[47]

To prevent this practice, and ensure that assigned counsel applicants are not denied assignment of counsel because of failure to produce documents that may be unavailable or difficult to provide in a timely fashion, one hearing participant recommended as follows:

> Failure to supply specific financial documentation should not be the sole ground for denying, or a ground for delaying representation.[48]

Finally, some hearing participants recommended that verifying documentation should be required only when there is incomplete information or a concrete reason to believe that the applicant has not provided accurate information.

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[46] Written submission of Immigrant Defense Project, p. 2. See also Hon. Peter J. Herne, Chief Judge, St. Regis Mohawk Tribal Court, 4th JD public hearing, pp. 59-60 (noting that enrolled members of Native nations often do not file income taxes or apply for public benefits and therefore cannot provide the documentation that is often required on assigned counsel application forms).

[47] Thomas G. Soucia, Franklin County Public Defender, 4th JD public hearing, pp. 140-141. For similar commentary, see the testimony of Marcea Clark Tetamore, Livingston County Public Defender, 7th JD public hearing, p. 127 (noting that in the past year, her office has denied assigned counsel eligibility in about 50% of the applications, and speculating that at least one reason for this may be "failure to complete the application process." The full quote regarding this topic is found in the last section of this report, "Outcomes.").

[48] Written submission of Velma Hullum, New York State Defenders Association, Client Advisory Board, p. 3.

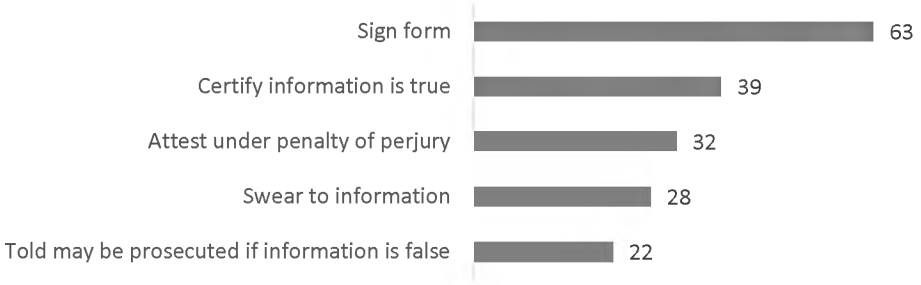
> [W]e don't look for verification of the information unless we have reason to doubt the veracity of it. Now that will happen from some – time to time… But if we don't have reason to doubt then we assume that it's correct….[49]

> [A] national study on eligibility conducted by the U.S. Department of Justice in 1986 concluded that verification of all financial information in each application for appointed counsel wastes scarce resources and causes unnecessary delay in the proceedings. The study recommended that eligibility information be verified only when financial data is missing or when there are legitimate grounds to suspect it is inaccurate.[50]

D. Requiring applicants to swear, attest, or certify to the accuracy of the information they provide

As is the case with documentation requirements, some counties seek to reduce the occurrence of misinformation by requiring that applicants swear or attest to the information they provide on the application form. Of the 71 forms we analyzed, 63 (89%) require applicants to sign their name. Thirty-nine (55%) include language suggesting that by signing, the applicant is certifying to the truth of the information provided, while 32 (45%) of the application forms indicate that the applicant is submitting information under penalty of perjury. Many of the applications include multiple forms of such language. A summary of the language used on the forms is shown in Figure 3.

Figure 3: Requirements upon defendants to attest to truth of information



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[49] Peter Racette, Deputy Director, Legal Aid Society of Northeastern New York, 4th JD public hearing, p.71. See also written submission of Mr. Racette, pp. 3-4 ("[F]inancial verification requirements should be reserved for those cases in which there is reason to doubt the accuracy of financial information given by the applicant. . . . Our experience is that such verification requirements are not necessary to ensure accurate eligibility determinations and often delay the start of legal services."). For similar testimony, see Jay Wilbur, Broome County Public Defender, 6th JD public hearing, p. 28 ("There have been circumstances where I've suspected that the client may have many more resources than they're telling us. There are cases where I want to see some documentation, bank statements, tax returns for those that file tax returns, just to make sure that they qualify.").

[50] Written submission of New York State Defenders Association, p. 10.

During the public hearings, several participants expressed concerns with requiring applicants to swear, attest or certify as to the accuracy of the information provided. For one, applicants often can only provide estimates of their financial status, yet they are being required to certify that this information is accurate.

> What you will find is that when you ask somebody how much they earn, they give you an estimate. Particularly, low income people do not receive the same amount of money every two weeks deposited into their bank account. You know, if you're an hourly worker, you don't always work the same number of hours every week. And so people give you an estimate.[51]

If applicants know that they are able to provide only estimated information, but that they could be prosecuted for providing inaccurate information, they may forego the application process altogether and choose instead to proceed without counsel. Some hearing participants articulated concerns about this "chilling effect."

> Beyond vague guidelines, some rural counties overtly discourage individuals from applying for an assigned attorney. Sometimes there are veiled threats of criminal prosecution if statements are found not to be true. For example one county's application form, just above the signature line, reads: "I further understand that any false statements herein may be a crime under the state of New York, punishable as a Class A Misdemeanor. (P.L. 210.45)." That statement arguably has a chilling effect of filling out the form, since the guidelines are not clear. When one is facing a criminal charge, the last thing he or she wants is to be told they might be committing a crime by applying for an attorney.[52]

> Finally, minor reporting errors should not result in harsh penalties for defendants seeking to provide information during screening interviews. If defendants fear prosecution based on unintentional or minor errors, they may opt to forego the screening and fail to avail themselves of their right to counsel.[53]

Hearing participants also articulated the concern that requiring applicants to swear or attest to the information they disclose on the application enhances the likelihood that law enforcement will attempt to obtain the applications and use the sworn documents against the applicant.

> I encountered a situation where a prosecutor was thinking of charging a client with perjury for signing an affidavit when they weren't eligible, so now we're going to have

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[51] Peter Racette, Deputy Director, Legal Aid Society of Northeastern New York, 4th JD public hearing, pp. 72-3.

[52] Written submission of Susan L. Patnode, Executive Director, Rural Law Center of New York, Inc., p. 4.

[53] Written submission of Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, p. 8.

> felony perjury charges brought, and it was my position that they could not have that information under any circumstances.[54]

Several providers testified that, in order to protect applicants from possible prosecution and to ensure the confidentiality of information disclosed (an issue discussed further below), they no longer require applicants to swear or attest to the accuracy of the information they provide on the application.

> I think client confidentiality has to be assured so much so that through NYSDA's work, New York State Defenders Association, there was a case brought to our attention where a particular client in another county, their financial information was subpoenaed. Due to that I no longer have a sworn statement. I just take a financial statement.[55]

E. Maintaining the confidentiality of applicants' financial information

As the foregoing suggests, maintaining the confidentiality of applicants' financial information is a critical issue, particularly since evaluating a person's eligibility for assignment of counsel necessarily involves handling private financial information. Not surprisingly, the *Hurrell-Harring* Settlement states that the ILS criteria and procedures must provide that "confidentiality shall be maintained for all information submitted for purposes of assessing eligibility."[56]

Our survey results suggest, however, that the confidentiality of the information disclosed is not always maintained. While in most courts only the defense attorney, judge, and court staff have access to the materials submitted, procedures in a small number of jurisdictions permit state actors (defined here as district attorneys or probation officers) to access the financial information applicants submit. This is set forth in Figure 4 below.

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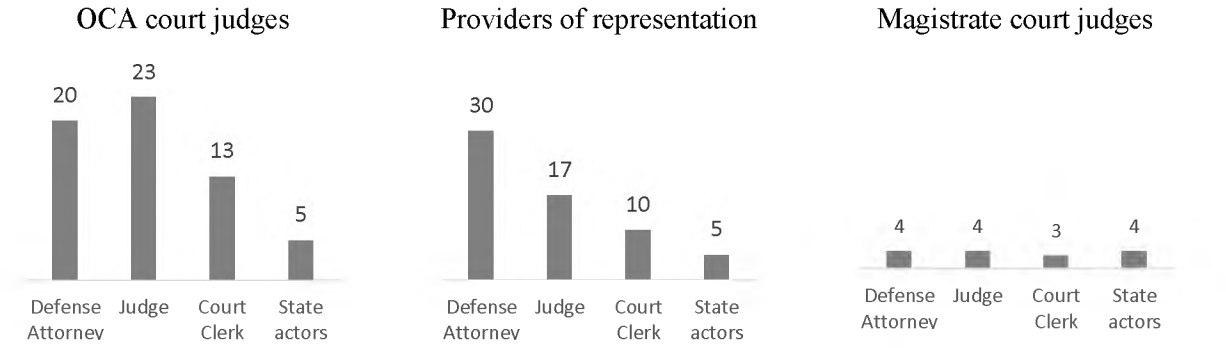
[54] Edward Nowak, President of the New York State Defenders Association and former Monroe County Public Defender, 7th JD public hearing, p. 19.

[55] Jay Wilbur, Broome County Public Defender, 6th JD public hearing, pp. 13-14. For similar testimony, see Andrew Correia, First Assistant, Wayne County Public Defender Office, 7th JD public hearing, p. 71 ("Our staff asks them to fill out a financial affidavit which used to be sworn to, but is no longer for a variety of reasons."); Mark Williams, Cattaraugus County Public Defender, 8th JD public hearing, p. 21 ("[M]y office no longer uses an affidavit, we no longer have any swearing or attesting to the truthfulness of that information.").

[56] See Settlement, § VI (B)(2).

Figure 4: Responses to survey question, "If written materials are submitted, who has access to them?"



'State actors' includes any survey response indicating either that the district attorney's office or office of probation has access to eligibility documentation. Not shown: OCA criminal court judges – 11 'Other', 4 N/A, 7 DK; Magistrates – 2 'Other', 1 N/A, 3 DK; Criminal court providers – 14 'Other', 1 N/A, 1 DK. A single survey respondent could select multiple responses to this question: the total number of responses therefore exceeds the total number of surveys.

The issue of confidentiality was a frequent topic of testimony during ILS' public hearings. Nearly every hearing participant who addressed this issue identified the importance of maintaining the confidentiality of the financial information gathered during the assigned counsel eligibility determination process. In both oral testimony and written submissions, hearing participants highlighted the lack of confidentiality that occurs when judges screen for eligibility in open court.

> The assessment should be confidential. There is simply no reason that a person's personal financial information must be shared in front of a courtroom full of people. Such a public airing can lead people to exaggerate their earnings, for fear of embarrassment (but in derogation of the right to counsel and the accuracy of the information), and certainly means public disclosure of very personal information. In some matters, disclosure of information may even have Fifth Amendment implications, as in the case of domestic violence matters (where familial relationship is an element of the crime), tax offenses (where income may be a question of fact), or even drug possession cases (where ownership of a vehicle is at issue).[57]

[57] Written submission of Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, pp. 6-7. See also oral testimony of Elizabeth Nevins, 10th JD public hearing, p. 92. For similar testimony, see Greg Lubow, Attorney and former Chief Public Defender, Greene County, 3rd JD public hearing, p. 46 ("The defendant is now accused by – accused of [a] crime, a misdemeanor, perhaps a felony. And the judge is starting to ask questions. You have a police officer there. You asked about confidentiality. There is no confidentiality.").

> Confidentiality of information provided when seeking provision of counsel should be maintained to protect privacy, constitutional and statutory rights, and the client-attorney relationship. Again, this is vital in small, rural counties where confidentiality has a very different meaning.[58]

Other hearing participants noted that the confidentiality of the financial information disclosed should be honored by limiting re-disclosure to only the court, and even then, doing so with an *ex parte* submission, under seal, and refusing to provide the documents to any other entity.

> … I would not turn over any documentation unless ordered by the Court and I would do that *ex parte*.[59]

F. Processes for seeking review of or appealing an eligibility determination

The *Hurrell-Harring* Settlement states that in developing criteria and procedures for determining assigned counsel eligibility, ILS is to consider "whether there should be a process for appealing any denial of eligibility and notice of that process should be provided to any person denied counsel."[60]

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[58] Written submission of Velma Hullum, New York State Defenders Association, Client Advisory Board, p. 2.

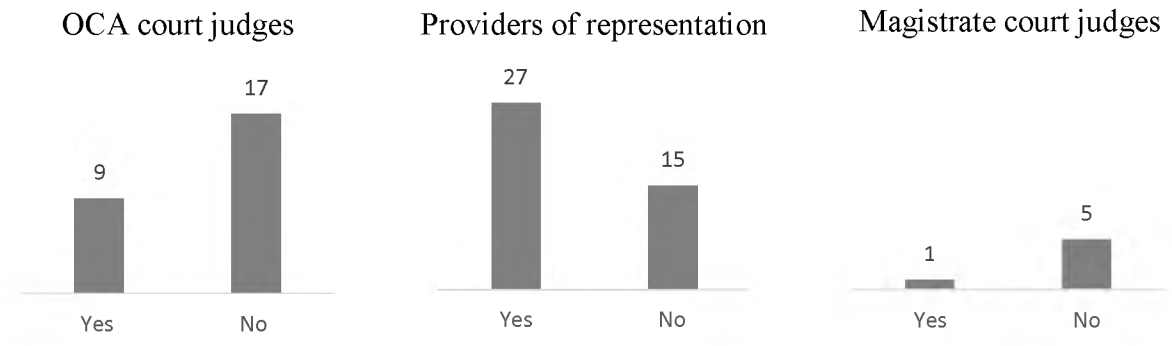
[59] Jay Wilbur, Broome County Public Defender, 6th JD public hearing, p. 29. For similar testimony, see Julia Hughes, Coordinator, Tompkins County Assigned Counsel Program, 6th JD public hearing, pp. 35-36 ("The judge [may] call our office and ask for a copy of the client's application and supporting documentation…. We do provide it to them *ex parte*."); Marcy I. Flores, Warren County Public Defender, 4th JD public hearing, p. 117 ("Someone asked a question about district attorney's office and do they ever ask for applications. I know that they have in our county. And Mrs. LaFountain is very strong in defending the clients' rights and tells the DA's office they can't see these applications. So that's a very important thing. The applications are confidential, and they need to be confidential."); Robert Convissar, Chief Defender and Administrator, Erie County Assigned Counsel Program, 8th JD public hearing, pp. 83-84 ("We may hold it [the information disclosed during the eligibility screening] but it goes – because we need it to support our audits and things of that nature, but we consider that absolutely confidential as an attorney work product and nobody is going to see it until they take the handcuffs off."); written submission of Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, p. 7 ("At a minimum, prosecutors should be precluded from subsequently using disclosures during this screening against the defendant, so as not to require defendants to choose between exercising their Fifth and Sixth Amendment rights. Further, the proceedings should be conducted in writing and/or at the bench to maximize the defendant's privacy. If the court must maintain a written record of the proceedings, it can keep the screening document or other discussion of personal financial information in the file under seal.").

[60] See Settlement, § VI (B)(12).

Through the surveys, ILS sought to learn of processes for seeking review of or appealing a denial of eligibility for assigned counsel. As Figure 5 reveals, most of the providers who responded to the survey indicated that there is such a process.

In contrast, most of the magistrates and judges who responded indicated that there is no such process. The discrepancy in responses makes sense: if a provider makes an initial recommendation that an applicant is not eligible for assigned counsel, the applicant can always ask the provider or judge to review this recommendation. But currently there is no process by which an applicant can immediately appeal or seek review of a judicial denial of assigned counsel eligibility.[61]

Figure 5: Responses to survey question, "Is there a standard review or appeal process for challenging an eligibility determination?"



Not shown: OCA criminal court judges – 20 DK, 5 blank; Magistrates – 4 DK, 7 blank; Criminal court providers – 4 DK, 1 blank.

During the public hearings, providers described existing processes by which applicants may seek review of a provider's recommendation that the applicant be deemed ineligible for assignment of counsel. Typically, this review occurs by way of a direct appeal to the judge or, in the case of some providers, by asking the provider to reconsider the ineligibility recommendation. These review processes tend to be informal, thereby promoting accessibility. Often applicants who take advantage of the review opportunity are deemed eligible for assignment of counsel. Some providers inform applicants of the opportunity for review at the point they inform applicants of the ineligibility recommendation. However, other providers do not, and only tell applicants of the review opportunity if the applicant calls to complain about the ineligibility recommendation. In

[61] See, for example, written submission of Daniel L. Palmer, County Manager, Essex County (on behalf of the Essex County Board of Supervisors), p. 4 ("Under the current system there is really very little recourse for a defendant that has been turned down for assignment of counsel.").

some instances, hearing participants indicated that providers lack a standardized review process of their eligibility recommendations.[62]

Below are examples of provider testimony describing their review or appeal process:

> [W]hen we deny someone, we send the applicant a letter and we let them know that they've been denied and we advise them that they can appeal to the court, the judge, where their charges are pending, and the judge can then assign us.… And most of the time when people appeal to the judge… they often assign us.[63]

> We will send them a letter telling them that we determined that they're ineligible and why, and then we tell them that they have the right to go to the judge.[64]

> [T]here is an appeal process through which our supervising attorney is notified.… He then reviews it [the application.] If he decides that the person is then not eligible, it then goes on to the judge.[65]

> In any case where an attorney has determined that the potential client does not qualify for Public Defender services, the potential client can appeal to the main office for consideration through the use of our "long form" qualification form prepared by an investigator and given to a supervisor for approval or rejection of the application for services.[66]

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[62] See, for example, the story provided by James T. Murphy, Legal Services of Central New York, referenced in Section III, H, below, about Dorothy who was denied counsel. On pp. 4-5 of his written submission, Mr. Murphy indicated that after her denial, "I assumed that a phone call to the public defender's office would resolve the matter. I was sorely mistaken. The receptionist advised that the public defender's office would not review the matter and that Dorothy's only option was to appeal to the Court.… [The public defender then] did agree that he would take a look at the case after he completed work on a memorandum of law due within two hours. I then appeared at 4:00 that afternoon in justice court with Dorothy where we explained some of these issues. The town justice explained that he 'relies' on the public defender's office to make eligibility determinations."

[63] Molly Hann, Assistant Public Defender, Essex County Public Defender Office, 4th JD public hearing, pp. 100-102.

[64] Mark Williams, Cattaraugus County Public Defender, 8th JD public hearing, p.29.

[65] Julia Hughes, Coordinator, Tompkins County Assigned Counsel Program, 6th JD public hearing, pp. 34-35.

[66] Written submission of Tina Hartwell, Assistant Public Defender, Criminal Division, Oneida County Public Defender Office, p. 2.

> LASNNY's major funders require that we have a grievance process for denials of assistance. The process is fairly simple – a person with supervisory responsibility must review all pertinent information and speak with the applicant either in person or by telephone and determine if the denial of eligibility was correct. Such a simplified process helps assure uniform and fair decisions and avoids simple, unintended mistakes.[67]

> We tell people who call and complain about not being approved that they can go to the judge and talk to the judge. We don't put it in our letters.[68]

There was some discussion during the public hearings about the lack of an administrative process for expeditious review of a judge's denial of assigned counsel. One hearing participant testified that because there is no such process, and because of a reluctance to question a judge's decision to deny assignment of counsel, the only solution is to advise rejected applicants to appear in court without a retained lawyer and hope that the judge eventually appoints counsel. But this method unnecessarily delays the assignment of counsel.

> MR. LEAHY: Is there an effective appeal right?...
> MS. NEEDLEMAN: … They call me, and I can call the judge [who says] that's my ruling.… That's the way it goes.… So you can make a call, you can alienate the judges, or you can try to smooth it out and say [to the applicant], go back and try again, show up without counsel and prolong the proceedings.[69]

In this vein, other hearing participants identified the value of having a review or appeal process, both with regard to a provider's recommendation and a judge's decision to deny counsel.

> [I]t's not very common to see someone being denied… But it's those close-call scenarios that every lawyer encounters. In those types of situations, if the court feels that he's not appropriate or if the defender feels that it is not appropriate for this person to get court-appointed representation, if you have a built-in review process to monitor those denials, then I think that solves the problem.[70]

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[67] Written submission of Peter Racette, Deputy Director, Legal Aid Society of Northeastern New York, p. 4.

[68] Marcea Clark Tetamore, Livingston County Public Defender, 7th JD public hearing, p. 122.

[69] Karen Needleman, Chief Administrator, Assigned Counsel Plan, Legal Aid Society of Westchester County, 9th JD public hearing, pp. 106-107.

[70] Saad Siddiqui, Attorney and former Member of the Lower Hudson Valley Chapter of the New York Civil Liberties Union, 9th JD public hearing, pp. 91-92. For similar testimony, see Hon. Peter J. Herne, Chief Judge, St. Regis Mohawk Tribal Court, 4th JD public hearing, p. 61 ("I think the only thing I would like to add is obviously that that first line of questioning is so important, but also the appeals. It's

Ultimately, nearly every hearing participant who addressed this issue recommended that there be some type of formalized review process for decisions to deny assignment of counsel.

> There should be a process for appealing any denial of financial eligibility. A denial of eligibility must be made in writing and must include the basis for the denial. Any person denied counsel must receive notice of the right to appeal and the appeal process. The appeal process should ensure prompt resolution; when denial of eligibility is upheld, explanation of the denial must be confidential and made part of a sealed record relating to the matter for which counsel was sought.[71]

G. Provisional appointment of counsel

Eligibility determination procedures that delay access to counsel can negatively impact defendants. During the public hearings, several hearing participants identified the need to have defense counsel involved in a case immediately.[72] One provider described what commonly happens in misdemeanor cases in his jurisdiction as a result of a process that delays the assignment of counsel:

> [The court asks] "Where is your attorney?"
> [Defendant responds:] "I don't have an attorney. I can't afford an attorney."

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difficult to understand how you're going to handle an appeal with somebody who doesn't have an attorney who can't afford an attorney. So we'd really like to kind of see where your proposals are in the appeal process.").

[71] Written submission of New York State Defenders Association, p. 7. For similar testimony, see written submission of Barrie Gewanter, Director of the Central New York Chapter of the New York Civil Liberties Union, p. 3 ("An eligibility determination is a determination of a criminal defendant's constitutional rights. Like any other such determination, it must be subject to judicial review. Denials of eligibility should be made in writing, provided in court or by proof of service to the defendant, and accompanied by information about how to appeal that decision."); written submission of Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, p. 8 ("[T]he denial of counsel should be a formally appealable decision, as it is in many jurisdictions (citing to Fla. Stat. Ann. § 27.52(2) (providing for judicial review of the court clerk's indigency determination at defendant's request). A defendant who is denied appointment of counsel should be able to bring documentation or other evidence that he would be otherwise unable to afford counsel to a judge other than the one who made the initial determination for *de novo* review.").

[72] See, for example, Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, 10th JD public hearing, p. 91 ("[T]he determination must be made as early as possible. It is beyond dispute that the right to counsel attaches at arraignment, if not before, and lasts throughout subsequent proceedings."); Jerry Ader, Genesee County Public Defender, 8th JD public hearing, p. 54 ("I think the eligibility determination has to be made as quickly as possible.").

> [The court says:] "Step up." Then a conversation will be taken wherein the defendant indicates that he is charged with this misdemeanor, and the prosecutor is now offering the reduced charge to such and such…. The client is left in the situation where take that plea, go home today or get this case adjourned in hopes of getting counsel assigned, come back in six weeks….[73]

Another hearing participant told of people being incarcerated for lengthy periods of time without access to counsel while the decision regarding eligibility for assigned counsel is pending:

> Local Town and Village Courts generally meet once a week or sometimes twice a month. So if a person is charged with a crime, without funds for a private attorney, he is often remanded to the county jail, until he can make bail or come for the next court appearance. Since the court may not be in session for a week or two, the defendant is likely to spend significant time incarcerated before the matter comes before the justice again. A friend of mine who practices criminal defense has been frustrated because often a defendant will spend more time in jail, waiting for a hearing, than he would if he served a full sentence. Of course the consequences of that incarceration are significant to the individual and to the county tax payer. Even if the charges are diminished or dropped, the defendant may lose his employment, fall behind in child support, or miss classes if he or she is enrolled in school. Additionally, the county must pick up the cost of the defendant's time in jail, which is likely to exceed the county's cost of paying for an assigned attorney.[74]

ILS' survey sought to learn whether counsel is currently provisionally appointed to honor applicants' statutory and constitutional right to counsel when delay is inevitable. The survey results suggest that many jurisdictions do provisionally appoint counsel pending the eligibility determination, though a sizeable minority do not. Among the OCA judges ILS surveyed, 18 (35%) indicated all courts in their county provisionally appointed counsel prior to eligibility determinations, while 20 (39%) indicated only some did so, or that none did. Among providers of representation, 12 (26%) indicated that provisional appointment was not practiced in their jurisdiction. Amongst the magistrates, 5 respondents indicated early appointment was practiced in their counties, while 6 indicated it was done only some of the time, and a further 5 left the question blank (see Figure 6).

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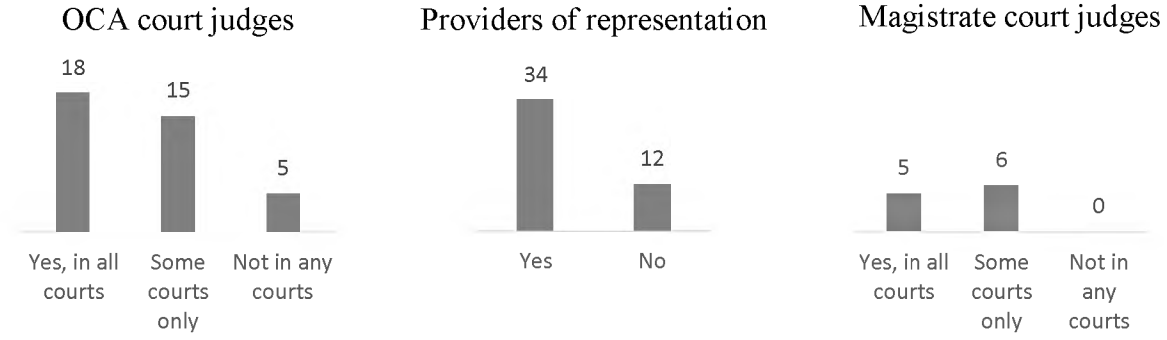
[73] Kent Moston, Attorney in Chief, Legal Aid Society of Nassau County, 10th JD public hearing, p. 108.

[74] Written submission of Susan L. Patnode, Executive Director, Rural Law Center of New York, Inc., pp. 3-4. For similar testimony, see Amol Sinha, Director of the Suffolk County Chapter of the New York Civil Liberties Union, 10th JD public hearing, p. 142 ("Too often the NYCLU have identified defendants who spend days or weeks in jail without meaningful contact with their attorney pending a decision on their financial eligibility.").

Figure 6: Responses to survey question, "Is counsel provisionally appointed pending the determination of eligibility?"



Not shown: OCA criminal court judges – 8 DK, 5 blank; Magistrates – 1 DK, 5 blank; Criminal court providers – 0 DK, 1 blank.

During the public hearings, several speakers emphasized the value of provisional appointment, particularly at arraignment.

> But in the majority of cases, with [ILS'] support, we have boots on the ground in all courts around the clock. And that's important in the context of our subject today, because it's my policy to send attorneys to every arraignment in the county… whether or not we keep those defendants as our own clients…. But we do believe, with [ILS'] support, that an attorney at arraignment is absolutely critical because the decisions that occur at that point are tremendously important to everyone who's arrested. Jobs go away. Lives blow up. The woman at home says, "That's it. I'm out of here," and children get kicked into the system. And – and there's no going back when those things occur.[75]

[75] Robert Linville, Columbia County Public Defender, 3rd JD public hearing, pp. 22-23. For similar commentary, see the testimony of Julia Hughes, Coordinator, Tompkins County Assigned Counsel Program, 6th JD public hearing, pp. 41-42 ("And we also have countywide counsel at first appearance in our county… And wherever you go into court, there is going to be an attorney there with you, and you are presumed to be eligible at that point."); Norman Effman, Wyoming County Public Defender and Executive Director, Wyoming-Attica Legal Aid Bureau, 8th JD public hearing, p. 116 ("Counsel at first appearance is kind of a magic bullet with respect to early entry and eligibility determinations. We have a counsel-at-first appearance grant, which has been in effect for about a year and a half now, there's no eligibility requirement, we cover 24/7."). Another provider agreed with the recommendation that there be a presumption of eligibility for assigned counsel for arraignments. See testimony of Marcy I. Flores, Warren County Public Defender, 4th JD public hearing, pp. 127-128 ("I think it should occur. The reason being, arraignment is a critical stage and it is very important for a client to have an attorney at that time to advocate on their behalf, explain some of what's going on, because not all – not every client has been in the criminal justice system before and it's a new experience and it's overwhelming, and I think it's very

Finally, some providers testified to steps their offices take to ensure that, even prior to arraignment and during the criminal investigation stage, people have access to assigned counsel if the provider is informed of the investigation:

> I believe, as Mr. Nowak said, that entry of counsel at the earliest possible moment is incredibly important, especially if someone's under investigation, and we do take investigations in our offices as well and it's imperative to have an attorney during an investigation.[76]

H. Use of County Law § 722-d orders

Under County Law § 722-d, if a mandated provider who has been assigned to a case learns that the defendant is "financially able to obtain counsel or make partial payments for representation," the mandated provider may report this fact to the court,[77] and the court may then terminate the assignment of counsel or authorize partial payment to the mandated provider. The court can do so only after conducting a detailed inquiry into the person's financial situation to determine if he or she can pay the costs of representation.[78]

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important for a client to have an attorney at arraignment."). Finally, one hearing participant stated that while counsel at arraignment programs have fostered the provisional assignment of counsel, not every jurisdiction has such a program, and much remains to be done in this area. See testimony of Amol Sinha, Director of the Suffolk County Chapter of the New York Civil Liberties Union, 10th JD public hearing, p. 145 ("While it is also plausible that many institutional [providers] default to representing unrepresented defendants in arraignment sessions, sadly there remains across the state a significant number of arraignments not covered by institutional defenders.").

[76] Leanne Lapp, Ontario County Public Defender, 7th JD public hearing, p. 104. For similar commentary, see the testimony of Timothy P. Donaher, Monroe County Public Defender, 7th JD public hearing, p. 54 (describing the process his office has established to assert a person's right to counsel prior to arraignment when notified that a person is being interrogated); written submission of Velma Hullum, New York State Defenders Association, Client Advisory Board, p. 1 ("Counsel should be assigned upon the initial request and should not be delayed while questions about eligibility are being resolved or while efforts are required to convert assets to funds available to hire counsel.").

[77] The use of the word "may" in County Law § 722-d instead of the mandatory "shall" is intentional and is compatible with defense counsel's ethical responsibility to maintain the confidences of their clients. Specifically, the New York State Rules of Professional Conduct prohibit attorneys from revealing their clients' confidential information, which includes a client's financial information, unless the client consents or some other exception exists under the Rules. See 22 NYCRR 1200.0; Rule 1.6(a)(1), (2) & (b).

[78] See *People v. Lincoln*, 158 A.D.2d 545 (2nd Dept. 1990) (reversing the defendant's conviction where the trial court had relieved the assigned counsel without conducting a detailed inquiry into the defendant's income, financial obligations, and "other relevant economic information").

During the public hearings, there was a significant amount of discussion about the use of County Law § 722-d and the efficacy of issuing orders for partial repayment of publicly funded defense. This discussion prompted ILS to seek out data on repayments under County Law § 722-d, which we obtained from the annual Indigent Legal Services Fund financial reports submitted by each county to the Office of the State Comptroller. According to 2013 data from those forms, only 17 counties reported receiving payments as a result of orders for partial payment of indigent legal services. The amount of money received ranged from $300 (Cortland County) to $21,253.50 (Monroe County). The total amount collected among the 17 counties was $98,360.13, which is an average of $5,785.89 among the 17 counties that received any money from County Law § 722-d payments (and $1,586 if averaged for all 62 counties). The total amount collected from partial payment orders was less than 1/20 of 1% of the total spending on indigent legal services for that year.[79] This does not take into account the administrative costs associated with collecting partial payment orders issued pursuant to County Law § 722-d.

The discussion about County Law § 722-d orders helped to illuminate the circumstances in which such orders tend to be issued, and the tension between benefits of such orders and possible disadvantages.

When describing how County Law § 722-d orders are issued in their particular counties, several hearing participants stated that County Law § 722-d orders are most commonly issued up front, at the time that counsel is assigned, rather than after assignment of counsel and upon defense counsel notification, as required by County Law § 722-d. This point is best illustrated in the following testimony:

> Normally if something will happen in the scope of the representation they'll [public defenders] say, "wait a minute" – a light bulb will go off – "there's something seriously wrong here where this person has assets." That's relatively rare… So the 722-d orders that are generated in midstream, so to speak, in the middle of representation is relatively rare.
>
> 722-d orders, however, we do receive at the beginning of representation and one area that is just now getting those in greater numbers is through our Counsel at First Appearance Program. When we show up and the person is grossly over the recommended guidelines we will, in fact, say to the person,…"We will do the arraignment for you, but we will charge you $50 if you would like us to do it," and that's going to be a 722-d order. We are going to ask for it and that's largely for a couple of reasons. The reality is, is if we're there and the person's ineligible, the judge is going to be like, "You're doing it anyway. You're not going anywhere." So you're there, do the arraignment, and in an effort to try to avoid that, "Why are you doing an arraignment, Donaher, for people who are clearly ineligible?" we say, "Well, at least we're trying to get some revenue out of this."

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[79] In 2013, counties reported that they spent a combined total of $423,178,526 on indigent legal services; the total of $98,360 collected from County Law § 722-d orders is less than 1/20 of 1% of this spending.

> The second instance where we're assigned 722-d orders are those persons that are over the limit and they say they can't obtain [counsel] and they've provided proof, and oftentimes judges will do one of two things, the straight 717 assignment or they'll say, ok, 722-d. Those second types of 722-d's are largely uncollectible. They sit in a drawer for the most part.[80]

Several hearing participants were critical of the practice of issuing County Law § 722-d orders for partial payment simultaneous with the decision to assign counsel, pointing out that the statute only authorizes issuing such orders after a decision about assigned counsel eligibility has been made and after the provider learns of and brings new information to the court about the defendant's financial circumstances.

> [B]ut when you look at 722-d of the County Law, in my opinion it is worded such that the public defender is to provide the representation and then if during the pendency of that representation it is learned that that person has some ability to pay, that can be brought to the attention of the court. Not in the very first instance where everybody knows what's happening today.... Again, to my thinking it's a fairly sloppy procedure and one that has been sort of allowed to survive because of the financial crush on counties.[81]

Some hearing participants stated that County Law § 722-d orders can be an effective counter-balance to judges erring in favor of assigning counsel in "close calls."

> The court should err on the side of assigning counsel since the public defender has a remedy if they disagree with the court's assessment, in that they can bring a proceeding

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[80] Timothy P. Donaher, Monroe County Public Defender, 7th JD public hearing, pp. 64-66. Other hearing participants testified to County Law § 722-d orders being issued at the point of assignment. See, for example, the testimony of Jay Wilbur, Broome County Public Defender, 6th JD public hearing, pp. 15-17 ("We use 722-d a lot if they have some partial payments depending on their case and their charge.... We inform the Court that we're going to apply at the end of the case, we're going to present to the Court a 722-d order.").

[81] Edward Nowak, President of the New York State Defenders Association and former Monroe County Public Defender, 7th JD public hearing, pp. 26-27. For similar commentary, see written submission of the New York State Defenders Association, p. 9 ("Courts read County Law § 722-d too expansively, fashioning co-payment and sliding fee schemes which are not authorized by law. The standards should make clear that a strict reading of the law is mandatory. Nothing in § 722-d authorizes a court to prospectively order partial payment of assigned counsel fees during the initial eligibility determination process. At most, the statute provides that if, at some point during the course of representation, appointed counsel determines that the assigned representation should be terminated based on the represented individual's newly discovered ability to hire counsel, then under County Law § 722-d, counsel *may* seek to withdraw or ask the court to order reimbursement for services rendered. Section 722-d does not authorize courts to act *sua sponte* with regard to payment for legal services of assigned counsel. *See Matter of Legal Aid Society v. Samenga*, 39 A.D.2d 912 (2d Dept. 1967).").

> pursuant to County Law 722-d to force the defendant to pay all or part of the cost of representation.[82]

> If the courts are going to liberally assign public defenders in cases where the accused may not necessarily be eligible, this committee should consider examining whether partial payment to the county could be justified pursuant to section [722-d] of the County Law.[83]

Several other hearing participants, however, identified possible abuses that pertain to the use of County Law § 722-d:

> Ironically we actually have instances where judges will try to punish clients through 722-d's, which causes us a great amount of concern. We'll submit an order, for instance, for maybe 150 bucks on a case because what we normally do when we're assigned is we ask for reasonable counsel rates and then a judge will say a thousand dollars and it's just like, oh my Lord, that's not fair…. [B]ut for the most part it's relatively rare where we have a 722-d assignment where it's even collectible outside of those $50 one-time orders.[84]

> We've had 722-d orders taken with regard to folks receiving SSI benefits. Those benefits, of course, are exempt from execution under both federal law and state law, but these orders were routinely being taken simply by an application by the defender's office.[85]

> [I]t was always an issue with how we determine 722(d)s; every court wants somebody who is not eligible to be eligible under some basis, partial payment, so we had, in the past before I took over, if they were … turned down and told to contact the court, the court would say, take them under 722, figure out how much. We would have the person

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[82] Hon. Dr. Carrie A. O'Hare, Stuyvesant Town Justice, Columbia County; current Director of the New York State Magistrates Association and former President of the Columbia County Magistrates Association, 3rd JD public hearing, p. 72; see also Hon. Dr. O'Hare's written submission, p. 5.

[83] James Milstein, Albany County Public Defender, 3rd JD public hearing, p. 96.

[84] Timothy P. Donaher, Monroe County Public Defender, 7th JD public hearing, p. 66. For similar commentary, see the testimony of Jay Wilbur, Broome County Public Defender, 6th JD public hearing, p. 17 ("Now, it's not my place to tell the Court what that [the amount of the order] is, and in other cases they've given us the assigned counsel rates and in other cases they've given us greater than that, but we inform the client at the beginning that an order will be put forth to the judge…. Just so you all are aware, that money does not go into the public defender's budget. That goes into the general budget.").

[85] James T. Murphy, Legal Services of Central New York, 6th JD public hearing, pp. 67-68.

> come back, we would make a determination, very subjective determination as to the amount that they should pay. The court would then be informed, they would have to have the defendant there saying do you want to make this payment arrangement, and if you don't, can you hire any counsel. If you do, I'm gonna sign this order. And in the past those orders were done on a routine basis for all courts and turned out that the county did nothing to collect them, so in effect we were taking people that we determined were not eligible, the county never got any money so we just increased our case load.[86]

> What was happening was that a judge would be presiding in arraignment court, and he would ask the client the information about initial eligibility and this client comes in, let's say, charged with a first time driving while intoxicated offense. No prior involvement with the law whatsoever; nothing to complicate the case. It's going to be an easy plea.… The judges in Nassau County who would say "okay, I believe that you can make partial payment. I am going to direct that you pay fifteen hundred dollars of the —I'll assign counsel, but direct that you pay fifteen hundred dollars to that Eighteen B attorney out of your pocket directly to him or her as the initial payment of counsel." What happens is the client is placed in a situation where he goes out in the hall and has to start peeling off bills, handing the money directly to the lawyer in the courthouse. This was perceived as an abuse. As a result, the administrative judge at the time, the supervising judge in the criminal courts, ended partial payment.[87]

> It is also important, once counsel has been assigned, that the eligibility determination not be re-opened without good cause based on new information arising during the course of the litigation. Multiple redeterminations can make an otherwise efficient system inefficient and provide a possible avenue for abuse, as the court or the parties may seek to use the redetermination to pressure a defendant into accepting a plea.[88]

Finally, consistent with the data we received regarding the relatively minimal amount of money collected from County Law § 722-d orders, a fair number of hearing participants

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[86] Jerry Ader, Genesee County Public Defender, 8th JD public hearing, pp. 50-51. For similar commentary, see the testimony of Keith Dayton, Cortland County Public Defender, 6th JD public hearing, pp. 104-105 (describing how one judge in his county routinely assigns counsel, regardless of a defendant's income, while simultaneously issuing a County Law § 722-d order requiring the defendant to pay a fixed rate, but that the Public Defender Office is not able to collect on these orders).

[87] Kent Moston, Attorney-in-Chief, Legal Aid Society of Nassau County, 10th JD public hearing, pp. 109-110.

[88] Written submission of Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, p. 8.

explained that they have had difficulty actually collecting money from the County Law § 722-d orders.

> It used to be in Wayne County that they [County Law 722-d orders] would be occasionally entered and my understanding is that it fell to the county attorney to collect those fees and eventually the county attorney asked them to stop ordering them because they were unsuccessful and it was unproductive and it was not worth the time and energy to collect. Again, you're talking about a county where there's a lot of poverty and it's very hard to squeeze blood from that stone when there's so many other people in line for that money with surcharges and fees and things being the way they are.[89]

> We will get 722-d orders. Right now we probably have approximately 6 to $7,000 of outstanding orders. My county attorney will not attempt to collect them, so we try, not very successfully. I think we've received $38 from our collection agency so far this year and about $250 as a result of paralegal's work. So I think that those are abused at least in my county.[90]

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[89] Andrew Correia, First Assistant, Wayne County Public Defender Office, 7th JD public hearing, pp. 88-89.

[90] Marcea Clark Tetamore, Livingston County Public Defender, 7th JD public hearing, p. 121. See also the testimony of Keith Dayton, Cortland County Public Defender, 6th JD public hearing, pp. 105-107 ("[W]e're seeing a dramatic increase in the 722 orders that are issued, not necessarily collected…" and noting that the yearly collection is less than $1,000 and that "those that end up paying, you know, come in, and they give us a check for $20.").

III. Criteria

As stated in Section I above, several hearing participants expressed their belief that the vast differences in criteria for assigned counsel eligibility contribute to inequities in decisions regarding eligibility for assignment of counsel.

When Hon. Peter J. Herne, Chief Judge of the Saint Regis Mohawk Tribal Court spoke at the 4th Judicial District public hearing, he emphasized the need to pay attention to how the question of a person's ability to pay was asked.

> Recently at the -- the tribal court we were able to start, through the federal programs, a child support unit. And during that process … we asked how many people would actually, in our community, from our ZIP code, receive TANF. We were surprised to learn the most they could find in one month was four. So there's a lot of self-survival going on there. And so how you ask the question – what resources you have to obtain a lawyer – is going to be crucial, and that's why we're concerned with any kind of statewide form that might be developed.[91]

Our research revealed that jurisdictions across the State ask the "ability to pay" question in very different ways. Perhaps most fundamentally, we learned of jurisdictions where applicants' gross income is considered in isolation, and little or no attempt is made to account for their liabilities – such as taxes withheld from paychecks, day-to-day living expenses, or other financial obligations.

> When the NYCLU filed the Hurrell-Harring lawsuit, we found that Suffolk County eligibility determinations were made on the basis of a defendant's income and the value of any assets that the applicant owned, without accounting for any of the applicant's debt, the amount of equity in any assets, other financial obligations or the actual cost of retaining a private attorney to defend against a charge.[92]

Of the 71 forms we collected, 11 requested no information whatsoever about applicants' living expenses or other financial liabilities, focusing only on the income and assets they owned. Nine of those 11 forms specifically requested gross income rather than net, or after-tax, income. It appears therefore that these jurisdictions are performing eligibility determinations using only applicants' gross income in their calculations, and without any investigation of how much of that income is actually available after taxes, living expenses or other financial liabilities.

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[91] Hon. Peter J. Herne, Chief Judge, St. Regis Mohawk Tribal Court, 4th JD public hearing, pp. 60-61.

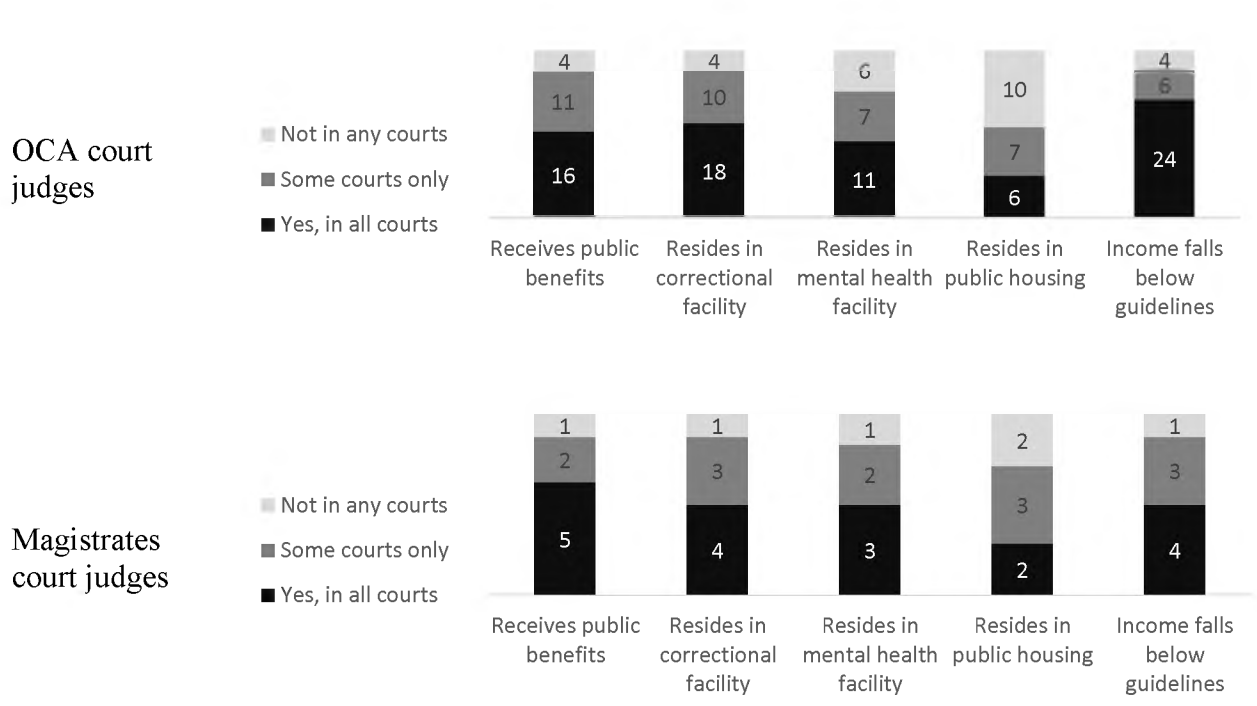
[92] Laurette Mulry, Assistant Chief Attorney-in-Charge, Legal Aid Society of Suffolk County, 10th JD public hearing, p. 140. See also testimony of Robert Linville, Columbia County Public Defender, 3rd JD public hearing, pp. 25-6 ("I submit to you that…when you get a careful evaluation of their income and their liabilities and their debt load, that you should look at only the disposable income.").

With Chief Judge Herne's admonition in mind, we present below the results of our investigation into the criteria currently used for determining eligibility for assignment of counsel.

A. Presumptions of eligibility for assignment of counsel

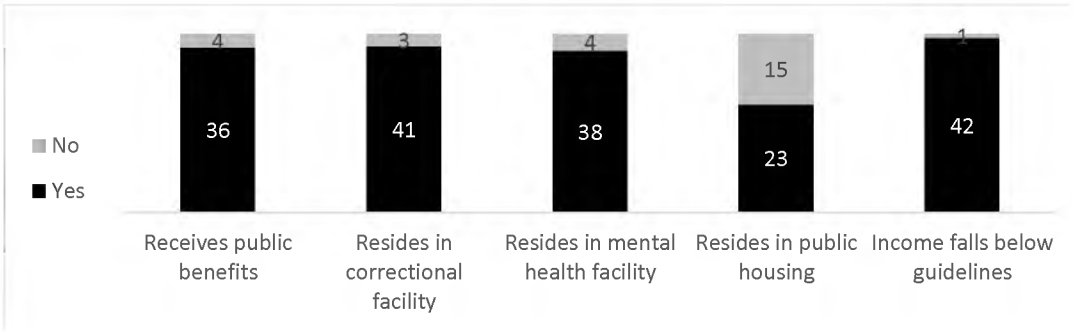
The *Hurrell-Harring* Settlement provides that in developing assigned counsel eligibility criteria and procedures, ILS is to consider "whether persons who receive public benefits, cannot post bond, reside in correctional or mental health facilities, or have incomes below a fixed multiple of [the] federal poverty guidelines should be deemed presumed eligible…."[93] Our research revealed that certain criteria are commonly used to automatically or presumptively determine that an applicant is eligible for assignment of counsel. Many counties employ income guidelines, and individuals falling below certain income levels are presumed eligible for counsel. (The use of income guidelines is discussed more in Section B, below). Other criteria – notably that the applicant receives public benefits or has already lost his or her liberty as a result of incarceration or confinement to a mental health facility – also commonly lead to presumptive eligibility for assignment of counsel. Figure 7 illustrates these results.

Figure 7: Responses to survey question, "Are individuals in the following categories presumed to be eligible for counsel?"



[93] See Settlement, § VI (B)(8).

Providers of representation



Not shown: These graphs show responses to five separate questions about presumptions. The numbers of 'don't know' and blank responses were different for each of the questions. Among OCA court judges, the number responding 'don't know' ranged from 12 to 18 depending on the question; the number leaving the question blank ranged from 5 to10. Provider 'don't know' responses ranged from 2 to 8, and blanks from 1 to 2. Magistrate 'don't know' responses ranged from 4 to 5, and blank responses from 5 to 6.

Consistent with the survey results, most of the public hearing participants stated that applicants who are incarcerated or in receipt of public assistance should be deemed eligible for assignment of counsel or currently are deemed eligible in their particular jurisdiction.

> Certainly, if a person is receiving public assistance benefits, that would be proof of an inability to hire an attorney.[94]

> Incarcerated individuals are automatically assigned [counsel].[95]

> Our first level of determination was first, anybody who was incarcerated unable to make bail qualified, anybody on public assistance qualified.[96]

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[94] James Milstein, Albany County Public Defender, 3rd JD public hearing, p. 92. For similar testimony, see Karri Beckwith, Administrator, Chenango County Assigned Counsel Program, 6th JD public hearing, p. 93 ("[I]f someone comes in and they're able to provide us with a public assistance number, Medicaid, a food stamp number, they are someone that as long as they have that card number on the application, that is an automatic."); Robert Convissar, Chief Defender and Administrator, Erie County Assigned Counsel Program, 8th JD public hearing, p. 63 ("The Assigned Counsel Program here in Erie County considers eligible in all cases persons who can document current receipt of public assistance…"); David Farrugia, Niagara County Public Defender, 8th JD public hearing, pp. 133-134 ("Most of the folks we represent are getting some type of public assistance and the inquiry stops there…. [I]t's only a small percentage of folks that we really have to go beyond the initial inquiry; are you on public assistance, are you working. That would only probably be maybe 10 or 15% of the applicants.").

[95] Joy A. LaFountain, Administrator/Coordinator, Warren County Assigned Counsel Plan, 4th JD public hearing, p. 157. For similar testimony, see Andrew Correia, First Assistant, Wayne County Public Defender Office, 7th JD public hearing, p. 69 ("[I]f they're in jail, they presumptively qualify.").

[96] Gary Horton, Director, Veterans Defense Program, New York State Defenders Association and former Genesee County Public Defender, 8th JD public hearing, p. 32.

Some hearing participants identified specific types of need-based public assistance which they felt should lead to presumptive qualification.

> [I]ndividuals who are eligible for public need-based benefits should be automatically eligible for assigned counsel. This should include recipients of Temporary Assistance (TANF and Safety Net), Supplemental Security Income (SSI), State Supplement Program (SSP) benefits, SNAP (Food Stamps) and Medicaid. Folks determined to have too little income to afford food, shelter and medical care certainly cannot afford an attorney.[97]

Some hearing participants suggested prior findings of eligibility should create the presumption of eligibility in future cases, mitigating the problem of jurisdictions using different standards and coming to divergent determinations for the same person:

> MS. MACRI: [H]ow would you respond to creating sort of a presumption that in that region if someone has been deemed eligible in one county that there should be a presumption that they be deemed eligible in another [county]…? Do you think that would be--
> MS. HUGHES: Yes. Yes, I do.[98]

Hearing participants also listed several other suggestions for presumptions of eligibility, including applicants who are unemployed,[99] applicants under the age of twenty-one years old,[100]

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[97] Written submission of James T. Murphy, Legal Services of Central New York, pp. 5-6. For similar testimony, see written submission of Peter Racette, Deputy Director, Legal Aid Society of Northeastern New York, p. 2 ("LASNNY also believes that those receiving needs-based benefits such as Public Assistance, Supplemental Security Income (SSI), Supplemental Nutrition Assistance (Food Stamps); and Medicaid should be presumptively eligible."); written submission of New York State Defenders Association, p. 4 ("'Substantial hardship' and resulting eligibility should be presumed for prospective clients who receive public assistance, including but not limited to assistance provided through Temporary Assistance programs, the Supplemental Nutrition Assistance Program, Supplemental Security Income, Medicaid, and similar programs; reside in public housing; are currently detained in or serving a sentence in a correctional facility; are housed in a mental health facility; or earn income in an amount less than 250 percent of the Federal Poverty Guidelines (FPG), or a higher percentage/amount where local economic factors so require.").

[98] Julia Hughes, Coordinator, Tompkins County Assigned Counsel Program, 6th JD public hearing, p. 40.

[99] Written submission of Greg Lubow, Attorney and former Chief Public Defender, Greene County, p. 1 ("Persons who were chronically unemployed were in a similar situation [presumed eligible].").

[100] See, for example, written submission of David C. Schopp, Chief Executive Officer and Executive Director, Legal Aid Bureau of Buffalo, p. 1 ("The LAB … believe[s] eligible individuals under 21 years of age should be automatically assigned counsel regardless of parental resource"); written submission of Velma Hullum, New York State Defenders Association, Client Advisory Board, p. 2 ("There should be a

and applicants deemed eligible for assignment of counsel at trial who now require counsel for an appeal.[101]

In supporting use of presumptions of eligibility, individuals noted that presumptions add to both the fairness of the eligibility determination process and to its efficiency, helping to guarantee both expeditious assignment of counsel and, in the case of persons confined to mental health institutions, ready access to other needed services.

> It often takes days or weeks to assemble the necessary information, during which time no legal services can be provided. Our experience is that such verification requirements are not necessary to ensure accurate eligibility determinations and often delay the start of legal services.[102]

> Diversion of mentally ill individuals charged with crimes, not only in our local jails, but its mental institutions, is recognized as a valid goal of both the corrections and court systems. This goal would be greatly enhanced if assigned counsel programs could provide legal representation of such individuals facing criminal charges upon request.... [T]he Office of Mental Health does report that detainees with mental illness and substance abuse disorders will remain incarcerated 4-5 times ... longer than similarly charged individuals without such disorders.... Timely access to assigned counsel may improve the circumstances of these individuals.[103]

Finally, some individuals emphasized that if presumptions of eligibility are to be adopted, it must be clear that they are to be used as a "floor" and not a "ceiling": that is, applicants must not be denied assigned counsel just because they do not meet one of the presumptions.[104]

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presumption of eligibility due to 'substantial hardship' for all those who... are an unemancipated minor under the age of 21.").

[101] See written submission of New York State Defenders Association, p. 4, n. 11 ("[I]t is essential that ILS include within its standards an additional eligibility presumption. Appellate courts should presumptively continue a defendant's status as a poor person when that status has been recognized in the trial court and assign counsel for the appeal after notice of appeal has been filed, similar to the practice used for Family Court appeals.").

[102] Written submission of Peter Racette, Deputy Director, Legal Aid Society of Northeastern New York, pp. 3-4. Mr. Racette noted earlier, on p. 3 of his written submission that "Those persons who receive needs-based public benefits ... have had their financial resources evaluated by the agency administering the benefit and are subject to rigorous verification and disclosure requirements, as well as robust anti-fraud checks such as computer interfaces reflecting payroll withholding... It is a waste of time and money to enquire and document financial resources in qualifying such individuals for service...."

[103] Written submission of Emmett J. Creahan, Director, Mental Hygiene Legal Service, Appellate Division, Fourth Department, pp. 2-3.

[104] For more examples of automatic denial of counsel, see 'How assets are treated' section, below.

> I would certainly hope that as you look at your statewide standards … you will establish a threshold that no program can go below, but then allow them the flexibility to go above….[105]

> That there can't be a default that says they're not eligible, the default must be that they're eligible….[106]

To further emphasize this point, one organization highlighted the situation of non-citizen applicants as an illustration of how using presumptions as justification for a denial can result in unfairness.

> For immigrants living on subsistence wages, many are not eligible for safety net assistance due to their immigration status and do not have evidence of means-tested benefits…. With respect to citizens and non-citizens alike, lack of means-tested benefits should not automatically result in a conclusion that the applicant is not eligible for assigned counsel.[107]

B. The use of income guidelines

The *Hurrell-Harring* Settlement requires ILS to consider whether applicants who "have incomes below a fixed multiple of [the] federal poverty guidelines should be deemed presumed eligible" for assignment of counsel.[108] Accordingly, our survey asked respondents to identify any income guidelines used in determining eligibility for assignment of counsel. The survey results suggest that a standard of 125% of the Federal Poverty Guidelines (FPG) is most commonly used. A small number of counties use a lower standard, while a greater number of counties use a higher standard. Some respondents indicated the standard varies, most often depending on the type of case in question, with lower and more stringent income guidelines applying to less serious cases. These survey results are illustrated in Figure 8.

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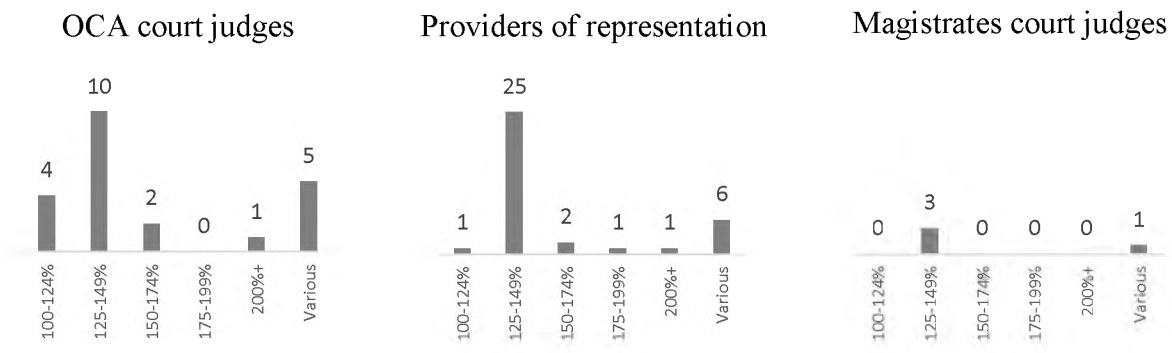
[105] Robert M. Elardo, Managing Attorney, Erie County Bar Association Volunteer Lawyers Project, 8th JD public hearing, p. 140.

[106] Clare J. Degnan, Executive Director, Legal Aid Society of Westchester County, 9th JD public hearing, p. 7.

[107] Written submission of Immigrant Defense Project, p. 2.

[108] See Settlement, § VI (B)(8).

Figure 8: If using the Federal Poverty Guidelines, what percentage is applied to determine eligibility for assigned counsel?



Not shown: OCA criminal court judges – 10 DK/Other, 19 blank; Criminal court providers – 4 DK, 7 blank; Magistrates: 4 DK, 9 blank.

While the surveys informed us of the income standards that are most commonly used, the public hearings illuminated *how* these income standards are used. In some counties, the income standard is used as a strict cap, meaning that applicants whose income is over the set standard are deemed ineligible for assignment of counsel.

> MR. SOUCIA: [Our standard] it's 133…
> MS. WARTH: Is that a ceiling or a floor?
> MR. SOUCIA: It's kind of more like a somewhat of a ceiling. There is some fudge room in there. Not as much fudge room as my colleagues [from other counties] have mentioned. Franklin County is a really poor county.[109]

> I do follow 125 percent of the guidelines which I get from NYSDA every year. I do not give a variation based on crimes.[110]

Most other hearing participants, however, stated that in their county, the income standards is used either as a presumption of eligibility or as a "starting point" for assessing whether or not an applicant has the resources needed to retain private counsel.

> Presumption is 200% [FPG] lower, you're in. Other than that, we do what everybody else has been doing, and has talked about this, and that is we plan the case, we

[109] Thomas G. Soucia, Franklin County Public Defender, 4th JD public hearing, pp. 136-137.

[110] Marcea Clark Tetamore, Livingston County Public Defender, 7th JD public hearing, p. 117.

> determine what reasonable attorney's fees would be if they went private and we look at all of the other factors including the seriousness of the case and what it would cost to mount a competent defense.[111]

> MS. HANN: … I mean, someone who might be able to defend against a violation with, you know, a minimal amount of liquid assets and being closer to the 125 percent figure certainly wouldn't be able to defend against a felony charge. Yes.
> MS. WARTH: Oh, so we take it then that you're using the 125 as a floor, but not as a ceiling?
> MS. HANN: It's not a ceiling … by any means. It's just a starting point….[112]

> We've always used the 125% but again, that's always been just a starting point. If they fall below, easy. And again, the other thing is that most of the determinations are very easy. It's only a small percentage that you really have to ask the deeper questions regarding their liabilities and assets and that type of thing.[113]

Notably, the vast majority of hearing participants who addressed this issue stated that an income guideline of 125% of the FPG is too low, even as a presumption of eligibility. Indeed, one provider explained that this is why he had recently increased the income guideline in his jurisdiction from 125% to 200% of the FPG.

> The thing that changed my mind about the 125, and I know it's mentioned in some of the materials, but this document, the Self-Sufficiency Standard of New York State, this one is 2010, it's available on-line, and it is an eye-opener. And around 2010, I think it was the chiefs at NYSDA – New York State Defenders – had had a presentation by the people involved in creating the standard. And … if you take a look at this, not only does it contain the rationale for dealing with assignment of counsel in a different way

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[111] Norman Effman, Wyoming County Public Defender and Executive Director, Wyoming-Attica Legal Aid Bureau, 8th JD public hearing, p. 110.

[112] Molly Hann, Assistant Public Defender, Essex County Public Defender Office, 4th JD public hearing, 113.

[113] David J. Farrugia, Niagara County Public Defender, 8th JD public hearing, p. 133. For similar testimony, see James Milstein, Albany County Public Defender, 3rd JD public hearing, p. 92 ("Income measures, such as percentage of poverty guidelines are used to make an initial eligibility determination, but they are not the sole criteria utilized."); Leanne Lapp, Ontario County Public Defender, 7th JD public hearing, p. 93 ("I know Mr. Garvey referenced the 125 percent of the poverty guidelines. That is the base level for misdemeanors and violations, but we do have a graduated system based on seriousness of the offense."); Mark Williams, Cattaraugus County Public Defender, 8th JD public hearing, pp. 12-13 ("The first year we started at 125% of the poverty guidelines and that clearly was not an appropriate place to start. So our program has been using 150% of the LSC guidelines as our starting point. If someone falls below the 150%, they are given an attorney without any further questions. If, however, someone is above that, then we start asking other questions.").

> than indigency, but it lists all of the counties, every one of them, and talks about the different standards of living and what is required in each of those counties… And that's why when I looked at this …. I looked at that and I think Wyoming County was at about 232% of the poverty lines – guidelines, and so I was conservative, I went to 200%.[114]

Several other participants recommended using a higher income guideline, with the recommendations generally ranging from 200% to 300% of the Federal Poverty Guidelines.

> LASNNY also believes that the floor for eligibility should be no lower than 200% of the federal poverty level for household size with discretion to increase the income eligibility level to account for factors such as actual availability of income, cost of retaining counsel, necessary family or household expenses, and the cost of living in particular localities…. LASNNY's experience is that the cost of housing and unreimbursed medical expenses alone render those at or under 200% of poverty eligible for [civil legal] services. It is inefficient to document those expenses for persons at or below 200% of poverty – such people are inevitably eligible.[115]

> Consideration should be given to establishing a presumptive financial eligibility standard which would serve as a baseline for eligibility determinations but not as a ceiling for these determinations. Some have suggested utilizing 250 percent of the federal poverty guidelines.[116]

> For the purpose of assisting the NYS Office of Indigent Legal Services in establishing criteria and procedures to guide courts in determining eligibility for mandated legal representation in criminal and family court proceedings, we recommend using 300% of

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[114] Norman Effman, Wyoming County Public Defender and Executive Director, Wyoming-Attica Legal Aid Bureau, 8th JD public hearing, pp. 108-109. For similar testimony, see Jay Wilbur, Broome County Public Defender, 6th JD public hearing, p. 14 ("I intend to raise my standards, federal poverty standards. Currently we use 150 percent. I don't know if I can go full to the 240, but I am probably going to raise it to at least 200.").

[115] Written submission of Peter Racette, Deputy Director, Legal Aid Society of Northeastern New York, pp. 2-3. See also written submission of Patricia Moriarty, Advocate, Jail Ministry of Syracuse, p. 1 ("I would like the qualifier to be raised to 200% FPG with the stipulation that it would not be the sole qualifier to determine eligibility.").

[116] Written submission of David Miranda, President, New York State Bar Association, p. 2. For similar testimony, see written submission of the New York State Defenders Association, p. 4 ("'Substantial hardship' and resulting eligibility should be presumed for prospective clients who … earn income in an amount less than 250 percent of the Federal Poverty Guidelines (FPG), or a higher percentage/amount where local economic factors so require."); written submission of Velma Hullum, New York State Defenders Association, Client Advisory Board, p. 2 ("There should be a presumption of eligibility due to 'substantial hardship' for all those who … [h]ave income that is 250% of the Federal Poverty Guidelines or less.").

> the Federal Poverty Guidelines to determine financial eligibility for assignment of counsel. This recommendation is based on our experience in determining and reporting on "… the income needed to meet reasonable living expenses of the applicant and any dependents…"[117]

Several providers who addressed this issue voiced the concern that raising the income guideline would have a significant impact on their office caseloads unless they receive the resources needed to hire additional attorneys.

> Franklin County is a very poor county. If we go to 250, like I said, we would have 60 percent more cases.[118]

> [W]e use initially, as a threshold…. 125% of the federal poverty guidelines. This is something that we have internally talked about changing in our office. Our civil division, which applies federal poverty guidelines for eligibility, has a threshold, a percentage of 200%. Virtually every civil provider in the state utilizes 200% as the threshold for consideration for financial eligibility. The reason we have not, as a matter of internal policy, raised our threshold is simply because we have extremely heavy caseloads in Buffalo City Court… So we have not instituted a higher level but we certainly think a higher level should be instituted….[119]

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[117] Written submission of Merble Reagon, Executive Director, Women's Center for Education and Career Advancement, pp. 1-3. During her oral testimony, Ms. Reagon recommended an income guideline of 250% of the Federal Poverty Guideline. See, Merble Reagon, 9th JD public hearing, pp. 74-75. Of note, some individuals and organizations suggested that ILS reject a single state-wide income guideline and instead use county-specific income guidelines. See for example, written submission of the Chief Defenders Association of New York, p. 2 ("CDANY believes that any eligibility criteria promulgated by ILS which establish levels of 'presumptive eligibility' must consider … New York State specific indexes of poverty for each jurisdiction, such as 'the New York State Poverty Report' issued by the New York State Community Action Association, and 'The Self Sufficiency Standard for New York State 2010' prepared for the New York State Self Sufficiency Standard Steering Committee. A single presumptive eligibility standard employed in all non-NYC counties [e.g. 250% of the federal poverty guidelines] no matter the jurisdiction or type of case would likely be either over-inclusive or under-inclusive in many jurisdictions throughout the State.") (emphasis in original). See also written submission of Patrick J. Brophy, Chief Attorney, Putnam County Legal Aid Society Inc., p. 2.

[118] Thomas G. Soucia, Franklin County Public Defender, 4th JD public hearing, p. 137.

[119] David C. Schopp, Chief Executive Officer and Executive Director, Legal Aid Bureau of Buffalo, 8th JD public hearing, p. 97. See also Mr. Schopp's written submission, at 1 ("The LAB fully supports the recommendations of other not-for-profit and defense organizations, in that we believe … that the threshold eligibility percentage should be increased to 250% of the federal poverty rate."). For similar concerns, see the written submission of the New York State Defenders Association, p. 1 ("The State should provide additional funding to cover the increased costs to counties that will result from having defender systems function with legally appropriate eligibility standards."); written submission of Chief Defenders Association of New York, p. 2 (same).

One hearing participant suggested that, based on his experience providing civil legal services, increasing the income standard might not dramatically increase caseloads, at least not for counties that are using income guidelines as a presumption of eligibility rather than a cap.

> [O]n the civil side, we are moving more and more towards 200% of the poverty level as our – as our threshold and in particular with funding that Chief Judge Lippman has secured through the judiciary legal services funding, that's been the standard. And, you know, in the past and still with some funding sources, 125% was the threshold, but we could go up to 187% it was and then up to 200% with certain factors… [W]e found that – that going just to the straight 200% level with some of our funding sources, it didn't make that much of a difference. There were some people who became eligible who weren't before, but a lot of them we were spending a lot more time doing all of this extra work trying to figure out if they were eligible, and, you know, they were becoming eligible anyways.[120]

Finally, like other presumptions of eligibility discussed previously in Section III, A, several hearing participants emphasized that whatever income guideline is used, the guideline must not be used as a reason to deem an applicant ineligible for assignment of counsel.

> Income measures, such as a percentage of the FPG, as discussed above, can be used to find someone presumptively eligible for counsel, but exceeding an income guideline alone cannot be a basis to deny the appointment of counsel. Meeting or exceeding income guidelines is not determinative of eligibility, but must be considered with other factors.[121]

C. The types of income that are considered

If an applicant is not presumed eligible for assignment of counsel, some assessment of his or her ability to retain private counsel generally follows. Central to this inquiry is the attempt to quantify an applicant's income. We learned in our research that the types of income captured and the ways that information is interpreted vary considerably from court to court and from county to county.

The application forms that we received differ in the depth of the inquiry about income. Every application we reviewed requires applicants to identify how much income they make from employment; many go beyond this. Of the 71 applications we received, 37 ask applicants to

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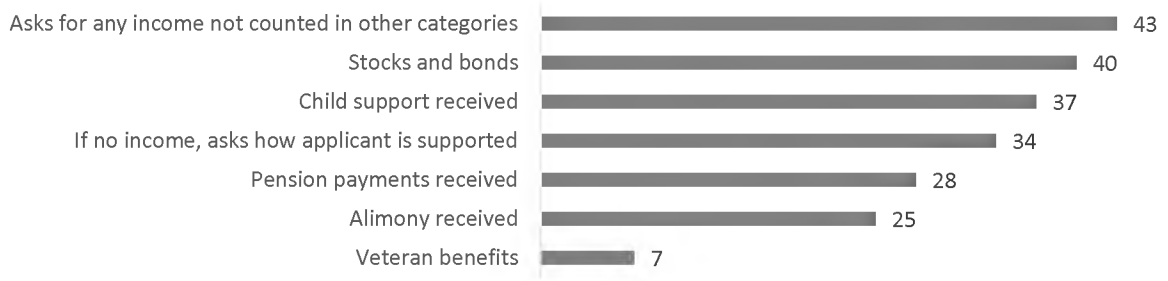
[120] Robert M. Elardo, Managing Attorney, Erie County Bar Association Volunteer Lawyers Project, 8th JD public hearing, pp. 138-139.

[121] Written submission of the New York State Defenders Association, at 9. See also written submission of David P. Miranda, President, New York State Bar Association, at 2 (noting that income guidelines can "serve as a baseline for eligibility determinations but not as a ceiling for these determinations."); written submission of Patricia Moriarty, Advocate, Jail Ministry of Syracuse, p. 1 (emphasizing that her recommended income guideline of 200% should not be used as a sole reason to disqualify an applicant).

report income from child support; 28 ask applicants to report income received from pensions; and 25 ask applicants to report income from alimony. Forty-three applications include an open-ended question about any income not accounted for elsewhere on the application, while 34 ask applicants who report no income to explain how they support themselves. These survey results are illustrated in Figure 9.

Figure 9: Types of Income Collected on Application Forms



While the application forms indicate the type of income information that is collected, the survey results illuminate *how* this income information is used and whether it makes an applicant more or less likely to be eligible for assignment of counsel.[122] In a majority of jurisdictions, income from employment, pension payments, alimony and child support makes an applicant less likely to be found eligible for assignment of counsel.[123] Income from need-based public assistance, however, almost always results in an applicant being *more* likely to be found eligible for assignment of counsel. For the four categories of need-based assistance we asked about (welfare payments such as TANF or food stamps, disability benefits, unemployment benefits and other public benefits), between 53% and 79% of respondents indicated an applicant in receipt of such income is more likely to be found eligible.[124]

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[122] Our analysis of the forms suggests the wide variation in the depth and breadth of income information collected among counties. However, the application forms themselves can tell us very little about how, or even whether, the information collected is actually considered in determining eligibility.

[123] Twenty-two responses from providers of representation indicated that alimony is considered in the eligibility determination process, of which 19 (86%) said that it renders an applicant less likely to be deemed eligible for assignment of counsel. The results for income from employment (32 out of 34 responses, or 94%), pension payments (27 out of 32 responses, or 84%), and child support (17 out of 20 responses, or 85%) all indicated that these types of income generally serve to render applicants less likely to be eligible. The remainder of the 47 responses we received either indicated that these types of income are not considered, that they do not know whether they are considered, or the question was left blank.

[124] The majority of the rest of the responses – between 19% and 36% – were either 'don't know' or left blank. Among respondents who actually answered the question, therefore, the percentage indicating recipients of need-based assistance were more likely to be found eligible for counsel exceeded 80% in each case.

Some hearing participants indicated they had witnessed income from need-based public assistance being used to deny applicants assigned counsel. They decried the practice as unethical and contrary to the law.

> The federal statute, 7 U.S.C. § 2017 (b) provides: "The value of benefits that may be provided under this Act shall not be considered income or resources for any purpose under any Federal, state, or local laws, including, but not limited to, laws relating to taxation, welfare, and public assistance programs, and no participating State or political subdivision thereof shall decrease any assistance otherwise provided an individual or individuals because of the receipt of benefits under this Act." While the New York State statute, Social Services Law §95(5) provides: "Any inconsistent provision of law notwithstanding, the value of any SNAP benefits provided an eligible person shall not be considered income or resources for any purpose, including taxation."[125]

> Some assigned counsel programs and courts will consider an applicant's food stamps as income for purposes of making an eligibility determination. Our office has encountered applicants who have been denied assigned counsel because they receive food stamps. Food stamp benefits under the Supplemental Nutrition Assistance Program (SNAP) are not income, but are benefits accorded to a household that does not otherwise have sufficient income to feed itself. They should not be considered in determining ability to retain counsel.[126]

Other hearing participants raised concerns about other categories of income being counted toward an applicant's ability to afford counsel. These included tax refunds, the earned income tax credit, child support, and, more generally, the practice of counting gross income without accounting for tax liabilities. When occurring in combination, one hearing participant observed, some income may be double-counted.

> Income tax refunds and earned income credits are expressly disregarded as either income or resource under New York's Temporary Assistance, SNAP and Medicaid programs.... These monies are also excluded as income under the federal Legal

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[125] Written submission of James T. Murphy, Legal Services of Central New York, p. 9, n. 4. Similarly, Peter Racette, Deputy Director, Legal Aid Society of Northeastern New York, submitted IOLA guidelines as an appendix to his written submission, noting they explicitly preclude consideration of welfare benefits as income. The rules determine 125% of the Federal Poverty Guidelines is to be used as a cut-off point for eligibility *except* where the "person would be eligible but for the receipt of benefits provided by a governmental income maintenance program." (21 NYCRR § 7000.14, (a)(2)).

[126] Written submission of Samuel Young, Director of Advocacy, and Dennis Kaufman, Executive Director, Legal Services of Central New York, pp. 3-4. See also testimony of James T. Murphy, Legal Services of Central New York, 6th JD public hearing, p. 64 ("[O]ne of the Hurrell-Harring counties ... was counting food stamp or SNAP benefits as income, that despite the fact that consideration of SNAP benefits as income for any program operated by a state is illegal both under federal statute and under New York statute. That county is not alone. Five years ago we addressed that same issue in an adjoining county.").

> Services program as well. And, of course, in counties looking at "gross" income, counting tax refunds results in double counting income.[127]

One speaker also raised a specific objection to counting child support as income.

> If you receive child support, it is not deemed to be income to you because that's for the children.[128]

Notwithstanding, of the 20 respondents to our survey who indicated child support is considered, 17 (85%) said that it renders an applicant less likely to be found eligible for assignment of counsel.[129]

D. The types of assets that are considered

The *Hurrell-Harring* Settlement requires that ILS' eligibility criteria and procedures for assignment of counsel provide that "ownership of an automobile should not be considered sufficient, standing alone, to deny eligibility where the automobile is necessary for the applicant to maintain his or her employment."[130] Additionally, the Settlement asks ILS to consider whether non-liquid assets, particularly a home or a car not used for employment purposes, should be considered during the assigned counsel eligibility determination process.[131] For that reason, ILS explored how counties consider assets during the assigned counsel eligibility determination process.

Several hearing participants reported examples of applicants being deemed ineligible for assignment of counsel because they own non-liquid assets, such as homes or cars.

> One of the most frequent problems we have encountered are county policies that provide for categorical ineligibility for people who own homes. Although homes may be assets, they are not liquid assets. Nevertheless, some county programs will automatically disqualify a person if the family owns any home, regardless of the value or the circumstances.[132]

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[127] Written submission of James T. Murphy, Legal Services of Central New York, p. 9, n. 5.

[128] Marcea Clark Tetamore, Livingston County Public Defender, 7th JD public hearing, p. 118.

[129] Eight respondents indicated that child support is not considered, 14 indicated that they do not know if it is, and 5 left the question blank.

[130] See Settlement, § VI (B)(6).

[131] See Settlement, § VI (B)(9)(a), (11).

[132] Written submission of Samuel Young, Director of Advocacy, and Dennis Kaufman, Executive Director, Legal Services of Central New York, p. 2. For similar testimony, see written submission of James T. Murphy, Legal Services of Central New York, p. 10 ("[A] number of counties treat ownership of a home as precluding the assignment of counsel, irrespective of equity, value, or ability to access that equity.").

> The judges need to be educated. Judges need to know owning a car does not disqualify you, owning a house does not disqualify you.[133]

Many hearing participants were critical of the practice of considering applicants' non-liquid assets when determining eligibility, especially applicants' primary residence or any vehicle used for basic life necessities.

> Defendants are asked if they own a home but not the financial solvency of the home or its condition. We've had clients where they're living in really condemnable properties, but they own a home. Therefore, they're not eligible.[134]

> We've tried to convince the judges that, Judge, it doesn't matter if they have a car or not because in Cattaraugus County there is no real public transportation. So a car is an essential for them to have in order to get to their work, in order to get to their medical appointments, in order to get to the grocery store to buy food, in order to get to the drugstore, [any place] that they want to go, they have to have that vehicle.[135]

Nevertheless, the vast majority of the 71 application forms we received require applicants to identify non-liquid assets they own: 68 (96%) ask the applicant to report any real estate owned, 65 (92%) request the balances of checking or savings accounts, and the same number request information on any vehicles owned. (This data is illustrated in Figure 10). With regard to vehicles, only one application asks applicants to identify if the car is used for employment. With regard to real estate, none of the applications ask the applicant to identify if the home is the applicant's primary residence. Our surveys confirmed that when considered in eligibility determination procedures, ownership of any of these assets almost always renders an applicant less likely to be found eligible for assignment of counsel.[136]

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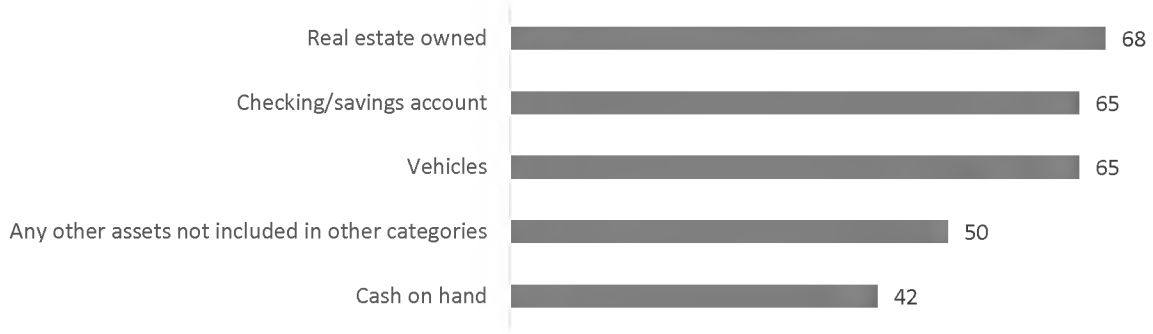
[133] Kent Moston, Attorney-in-Chief, Legal Aid Society of Nassau County, 10th JD public hearing, p. 112.

[134] Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, 10th JD public hearing, pp. 84-85.

[135] Mark Williams, Cattaraugus County Public Defender, 8th JD public hearing, p. 13. See also the testimony of Robert Convissar, Chief Defender and Administrator, Erie County Assigned Counsel Program, 8th JD public hearing, p. 64 ("Car ownership is not considered.").

[136] In the survey of criminal defense providers, we asked if certain assets were considered and whether they made an applicant more or less likely to be eligible for counsel. Of the 30 responses we received, the 28 (93%) indicating home ownership was considered also stated it made applicants less likely to be found eligible (other responses: 9 DK, 6 blank, 2 indicating home ownership not considered). Eight of 10 responses (80%) indicating ownership of a car essential to employment was considered also said consideration of the car made applicants less likely to be found eligible (other responses: 15 DK, 6 blank, 16 indicating ownership of such a car not considered).

Figure 10: Types of Asset Information Collected on Application Forms



Hearing participants raised three distinct concerns about considering non-liquid assets toward an applicant's ability to pay for counsel. First, assets such as homes and vehicles are frequently purchased using long-term loans, and the applicant may not have sufficient equity in the asset to render it useful in retaining counsel.

> If somebody has a doublewide house and it's maybe worth around a hundred and eighty thousand dollars and it's mortgaged to the top or the guy's underwater, it doesn't matter a bit in my calculation that they have this house. There's no place they can go to get money.
>
> [I would not suggest] that a person with a BMW needs to go out and borrow against the car. That may not be his car. Maybe he newly bought it and 99 percent except for the bumper is owned by the car company….[137]

Second, even when there is equity in an asset, it is not always possible to readily convert the asset into cash. Consequently, such an asset does not enhance an applicant's ability to actually retain private counsel.

> [W]hat might be considered a liquid asset in some parts of New York, are not liquid in rural New York. I have heard numerous anecdotes where a person who qualifies for eligibility based on income guidelines, but perhaps owns an ATV or a share in a hunting camp, is denied counsel. This denial presumes that the defendant should be able to sell the asset and then afford an attorney. However, the liquidity of a remote hunting camp or selling an ATV, in a little town, is questionable at best, and while the property is for sale, the defendant must go forward, often in jail, without an attorney.[138]

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[137] Robert Linville, Columbia County Public Defender, 3rd JD public hearing, pp. 26-27, 35. See also the testimony of Robert Convissar, Chief Defender and Administrator, Erie County Assigned Counsel Program, 8th JD public hearing, p. 64 ("Non liquid assets such as the equity in a residential family home up to $40,000 are allowed before requiring application for a home equity loan.").

[138] Written submission of Susan L. Patnode, Executive Director, Rural Law Center of New York, Inc., p. 5. For similar testimony, see Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, 10th JD public

> [I]f people have equity in their home, it may take them months to access that equity in that home, if a lender will provide an equity loan. It's not something that someone can be arraigned and then go the next day and get a home equity loan. Same thing happens with vehicles. Some people may have some equity in their vehicle. The chance -- the ability of them accessing that equity, even if it's a vehicle like a four-wheeler or a snow machine, are not necessarily available on demand.[139]

> Matter of DeMarco [v. Raftery, 242 A.D.2d 625 (2nd Dept. 1997)] held that it was "error to presume, in the absence of any proof, that the appellant's half-interest in certain real property rendered him able to retain counsel. There is no basis in this record to conclude that this asset is susceptible to immediate disposition, and there is no competent proof in the record establishing the value of this asset."[140]

Two hearing participants also noted that Native American applicants face a particularly confounding situation when asked to liquidate their assets because their assets may not be theirs to sell.

> [I]f you ask a person upon arrest "do you own a house" and they say yes, but if that house is a reservation house, then there is no bail available.... There is no mortgaging of our tribal properties.[141]

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hearing, pp. 89-90 ("If a question is whether a person can actually pay a lawyer in a matter as time sensitive as a pending criminal case, the fact that she owns a home or car she needs to get to work everyday is patently irrelevant."). See also written submission of the New York State Defenders Association, p. 5 ("Only non-liquid assets that have demonstrable monetary value and marketability or are otherwise convertible to cash may be considered, and only if converting such assets to cash would not create substantial hardship for the prospective client or persons dependent upon the prospective client. Such assets include: real estate other than a residence occupied by the prospective client or persons who are dependents of the prospective client; automobiles other than those necessary to maintain employment or school enrollment or for transportation to medical care for the prospective client or persons dependent on the prospective client; and luxury items."). For a slightly different but related problem – the inaccessibility of assets due to domestic conflict – see Joanne Sirotkin, Attorney-in-Charge, Legal Services of the Hudson Valley, 9th JD public hearing, p. 51 ("[S]omebody may not be able to gain access to their assets. Their assets may be a home that is shared with another party and that oftentimes, even if it's not a domestic violence situation, you're in family court because you disagree with the other person that you're sharing parenting with or, you know, neglect cases too, you may be on different side of the fence. So it's those assets may not be available for seeking an attorney.").

[139] Peter Racette, Deputy Director, Legal Aid Society of Northeastern New York, 4th JD public hearing, p. 70.

[140] Written submission of James T. Murphy, Legal Services of Central New York, p. 10, n. 6.

[141] Marguerite Smith, Attorney, New York Federal and State Tribal Justice Forum, 10th JD public hearing, pp. 39-40.

> [A] lot of our lands are inalienable. It has to be held by a tribal member. So how do you consider that it has no real effective market value other than on the reservation itself?[142]

Third, requiring applicants to liquidate assets in order to pay for private counsel may in itself impose undue hardship. For that reason, many need-based assistance programs allow applicants to possess certain levels of assets and still be deemed eligible to receive benefits.

> It should be noted that Temporary Assistance, SSI, and SNAP each permit ownership of a home, an automobile, and generally liquid resources, including cash of $2,000 to $3,000.[143]

> No one should be required to choose between having a home and having representation in a critical court proceeding.[144]

> Remember, "affording counsel" does not require hocking everything or damaging a family.[145]

E. Consideration of financial obligations and living expenses

The *Hurrell-Harring* Settlement requires that ILS' eligibility criteria and procedures for assignment of counsel provide that "income needed to meet the reasonable living expenses of the applicant and any dependent minors within his or her immediate family, or dependent parent or spouse, should not be considered available for purposes of determining eligibility."[146] Accordingly, ILS reviewed assigned counsel application forms to discern how financial obligations and living expenses are currently being considered. As previously noted, 11 of the 71 applications we collected do not ask applicants for any information about their financial

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[142] Hon. Peter J. Herne, Chief Judge, St. Regis Mohawk Tribal Court, 4th JD public hearing, p. 49.

[143] Written submission of James T. Murphy, Legal Services of Central New York, p. 6, n. 2 (citing 18 NYCRR §352.23, 20 C.F.R. §§416.1205, 416.1210, 416.1212, 18 NYCRR §387.9, etc.).

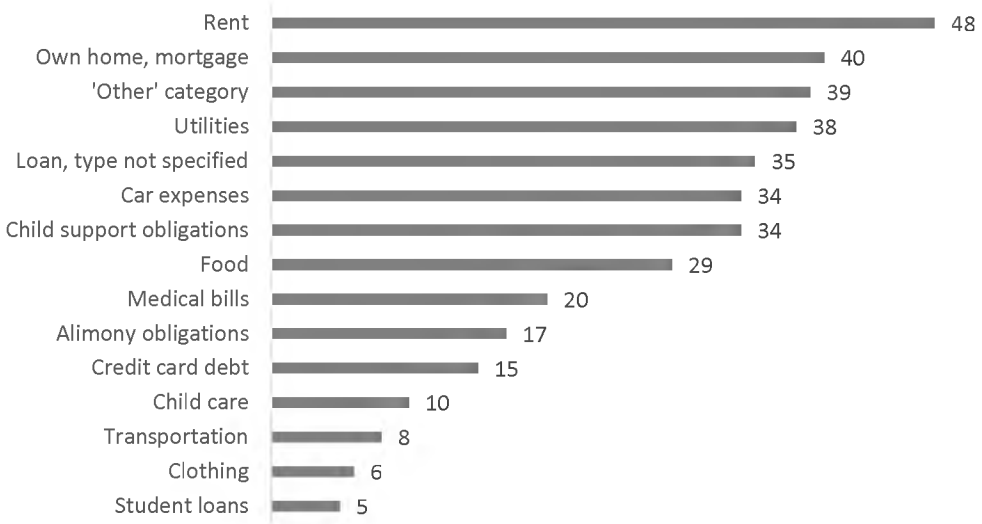
[144] Written submission of Samuel Young, Director of Advocacy and Dennis Kaufman, Executive Director, Legal Services of Central New York, p. 2. For similar testimony, see written submission of Daniel L. Palmer, County Manager, Essex County (on behalf of the Essex County Board of Supervisors), p. 3 ("Although the general public does not understand, an individual is not required to liquidate their assets so that they can afford to pay an attorney.").

[145] Written submission of Robert Linville, Columbia County Public Defender, p. 1.

[146] See Settlement, § VI (B)(5).

obligations or living expenses.[147] Where they do collect that information, however, they most frequently ask about costs associated with an applicant's residence: 48 applications (68%) ask about rent costs, while 40 (56%) ask about mortgage payments and other fixed expenses such as utility bills (38, 54%) or loans (35, 49%). Day-to-day living expenses such as food (29, 41%) and child care (10, 14%) are captured less frequently. For the full results of our analysis, see Figure 11.

Figure 11: Types of Financial Obligations and Living Expenses Collected on Application Forms



In response to our inquiry about the consideration of financial obligations and living expenses, several hearing participants stated their concern that living expenses and financial obligations are often neglected in the assigned counsel eligibility determination process, thereby resulting in an incomplete financial assessment of the applicant.

> Expenses should be considered relevant. This may seem obvious, but it is a factor that gets routinely dismissed or not considered in determinations.[148]
>
> The standards imposed by the Assigned Counsel Program in Onondaga County are extremely rigid and unrealistic. Their process does not consider the individual's overall

[147] See above, Section III, introduction. Our surveys corroborated this finding. Among OCA judge respondents, for example, a substantial minority of between a third and a half of respondents indicated that they do not consider a variety of financial obligations in eligibility determinations. Where courts do consider living expenses, they almost always serve to make applicants more likely to be eligible presumably because they are understood to render an applicant less able to afford an attorney.

[148] Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, 10th JD public hearing, p. 90.

> financial situation; hence, debt payments, regular monthly bills, credit worthiness or job loss as a result of arrest or incarceration are not considered.[149]

Similarly, individuals pointed out that neglecting financial obligations could blind the assessment procedure to the unique financial hardships of many applicants.

> There needs to be room in the process for situational hardship considerations (i.e., extensive medical bills, child support responsibilities, catastrophic situations, etc). People with 200% of the FPG [Federal Poverty Guidelines] exist "hand to mouth" and do not have a ready supply of cash to retain counsel.[150]

Individuals also pointed out that the failure to take into account applicants' living expenses and financial obligations when calculating their ability to pay for private counsel is at odds with other legal services programs, which explicitly require that such expenses and liabilities be considered because they may render eligible an applicant who does not meet a presumptive eligibility criteria.

> LSC requires that a person's income be at or below 125% of the federal poverty level to be eligible for services or that a person be at or below 200% of the federal poverty level with household expenses such as unreimbursed medical costs; fixed debt and obligations; job-related expenses such as dependent care, transportation, clothing or

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[149] Written submission of Barrie Gewanter, Director of the Central New York Chapter of the New York Civil Liberties Union, pp. 1-2. Ms. Gewanter continued, "Eligibility for public assistance is not accepted as presumed evidence of eligibility for assigned counsel; neither is inability to make bail. Moreover, under the Assigned Counsel process, individuals who make monthly mortgage payments on their home, or already own their residence, are automatically disqualified. When individuals try to challenge this automatic denial by stating that they do not qualify for a home loan, they are often required to show several loan rejections. This is an overly burdensome requirement because it requires three separate applications, each carrying associated non-refundable application fees that may be well beyond the individual's available resources. As a result of these restrictive policies many individuals, who cannot afford a lawyer, are denied representation." Another hearing participant noted the irony of counting child support as income while failing to account for an applicant's child support obligations as an expense. See James T. Murphy, Legal Services of Central New York, 6th JD public hearing, p. 66 ("We have counties that count child support income received by households as available income, but there's no corresponding deduction for child support benefits that they are required and, in fact, are paying out to other households.").

[150] Written submission of Patricia Moriarty, Advocate, Jail Ministry Program of Syracuse, p. 1. For similar testimony see written submission of Velma Hullum, New York State Defenders Association, Client Advisory Board, pp. 1, 3 ("No single criteria, including income, should be used to presumptively establish ineligibility. For those not presumed eligible, all factors affecting whether paying for counsel will create a substantial hardship must be considered…. Debts and other reasonable financial obligations of the prospective client and dependents shall be weighed against income and assets in determining whether counsel could be obtained without financial hardship including future financial instability.").

equipment; non-medical expenses associated with age or disability; and current taxes or other significant factors that affect the ability to afford legal representation.[151]

F. The ability to post bond

The *Hurrell-Harring* Settlement requires ILS' criteria and procedures to specify that the "ability to post bond shall not be consider[ed] sufficient, standing alone, to deny eligibility."[152] Accordingly, hearing participants were encouraged to discuss whether the ability to post bond should be considered, and whether this was the practice in their jurisdictions.

Of those who addressed the issue, only one opined that ability to post bond should be considered, and even then, only if the bond posted exceeds $20,000.

> My suggestion is that if bail of over $20,000 is posted ILS should promulgate instructions (with OCA approval) that judges must inquire, under oath, as to the source of the funds and [whether] those or other funds were not utilized to retain counsel. The common practice of saving money for bail and getting free legal service should be closely examined.[153]

All other hearing participants who addressed this issue, however, disagreed that assigned counsel applicants should be denied counsel because of the ability to post bond. Many disagreed with the assertion that applicants who have enough resources to pay for bond should use this money to

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[151] Written submission of Peter Racette, Deputy Director, Legal Aid Society of Northeastern New York, p. 2. Mr. Racette also appended 45 CFR Part 1611 (LSC financial eligibility guidelines) to his submission. The relevant text states that an applicant may be eligible provided the "applicant's income does not exceed 200% of the applicable Federal Poverty Guidelines amount and the recipient has determined that the applicant should be considered financially eligible based on consideration of one or more of the following factors as applicable to the applicant or members of the applicant's household: (i) Current income prospects, taking into account seasonal variations in income; (ii) Unreimbursed medical expenses and medical insurance premiums; (iii) Fixed debts and obligations; (iv) Expenses such as dependent care, transportation, clothing and equipment expenses necessary for employment, job training, or educational activities in preparation for employment; (v) Non-medical expenses associated with age or disability; (vi) Current taxes; or (vii) Other significant factors that the recipient has determined affect the applicant's ability to afford legal assistance." Another hearing participant provided a concrete example of the differences in eligibility determinations that occur between assigned counsel and Legal Services Corporation eligibility determination procedures: "[The applicant] was informed that her application for assigned counsel had been denied by the public defender's office. The letter advised that the public defender's office had determined that she was part of a 3 person household, and that the gross income of that household was $679.00 per week, which exceeded the $483.00 per week gross income standard used by that office.… By comparison, the eligibility standards under the Office of Court Administration's Civil Legal Services Program for a three person household is $773.00 per week, and for a two person household is $613.00 per week." Written submission of James T. Murphy, Legal Services of Central New York, pp. 3-4.

[152] See Settlement, § VI (B)(3).

[153] Written submission of Daniel P. McCoy, County Executive, Albany County, p. 2.

retain a private lawyer – even if it means that they must remain in jail pending disposition of the charges against them. Simply put, they asserted, defendants should not be confronted with a choice between obtaining their liberty and obtaining counsel.

> [I]t creates a Hobson's choice for a defendant of -- who needs to decide do I need to pay bail money, do I need to pay a lawyer?[154]

> If somebody has to choose between representation or bail, that's a conundrum, and that's a choice they should never have to make. Freedom is the ultimate issue, and if bail is being posted at $20,000, that may be every cent that a family can pull together either by bond or by cash. That should have no bearing on eligibility standards.[155]

Hearing participants also noted that the ability to post bond often is not an indicator of the ability to afford counsel. Defendants may be bailed out by friends and family, meaning the availability of cash for that purpose may be unrelated to their ability to afford counsel.

> I remember situations where friends of a client would come in and say, "We're going to post the bail to help this person out." Well, if they couldn't afford $500 bail, where is the money for the lawyer coming from? … [W]e had situations where that happened and then the judge says, "I want a 722-d order for the county for the bail money," and the friends are screaming, "I didn't want to pay for a lawyer. I was expecting to get my money back."[156]

Finally, some hearing participants pointed out that national professional standards specify that the ability to post bond should not be a consideration in determining eligibility for assignment of counsel.

> [A] jurisdiction should not deny a defendant the right to counsel because … "bond has been or can be posted."[157]

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[154] Lee Kindlon, Attorney, Kindlon Law Firm, 3rd JD public hearing, pp. 79-80.

[155] Claire J. Degnan, Executive Director, Legal Aid Society of Westchester County, 9th JD public hearing, pp. 22-23. For similar testimony, see written submission of Patricia Moriarty, Advocate, Jail Ministry of Syracuse, p. 1 (recommending that the ability to post bond should not be considered because it "puts them in the position of choosing between their liberty and obtaining counsel.").

[156] Edward Nowak, President of the New York State Defenders Association and former Monroe County Public Defender, 7th JD public hearing, pp. 40-41. For similar testimony, see Mark Williams, Cattaraugus County Public Defender, 8th JD public hearing, p. 13 ("We've tried to convince the courts that whether or not a person can post bail – and in most cases the bail is being posted by friends or family members – that that, again, is not a real indicator of whether or not the person has the ability to retain their own attorney.").

[157] Written submission of Paulette Brown, President of the American Bar Association (ABA), p. 2 (quoting ABA, *Standards for Criminal Justice: Providing Defense Services,* (3rd ed.), Standard 5-7.2. Similarly, the February 1977 Memorandum written by Richard J. Comiskey, then Director of the Third

Despite the strong sentiment against considering the ability to post bond when determining eligibility for assignment of counsel, our survey data showed that many courts do in fact consider an applicant's ability to post bond when determining ability to pay for an attorney. This is illustrated in Figure 12.

Figure 12: Responses to survey question, "Is the ability to post bond considered?"

Not shown: OCA criminal court judges – 19 DK, 8 blank; Magistrates – 4 DK, 5 blank; Criminal court providers – 15 DK, 4 blank

Predictably, the results of our survey of providers of representation show that the ability to post bond makes applicants for assigned counsel less likely to be found eligible than they would otherwise have been. The salience of bail as a litmus test for eligibility was reflected in another speaker's testimony, referring to the surprised reaction of fellow attorneys when clients successfully posted high bail.

> We've had cases where people have posted bail in the amount of $60,000, hundred thousand dollar bonds, and we're the attorney of record. And you walk in the court and everybody in the private [bar] is saying to you, "Why are you representing this person?" [We respond,] "We've been appointed."[158]

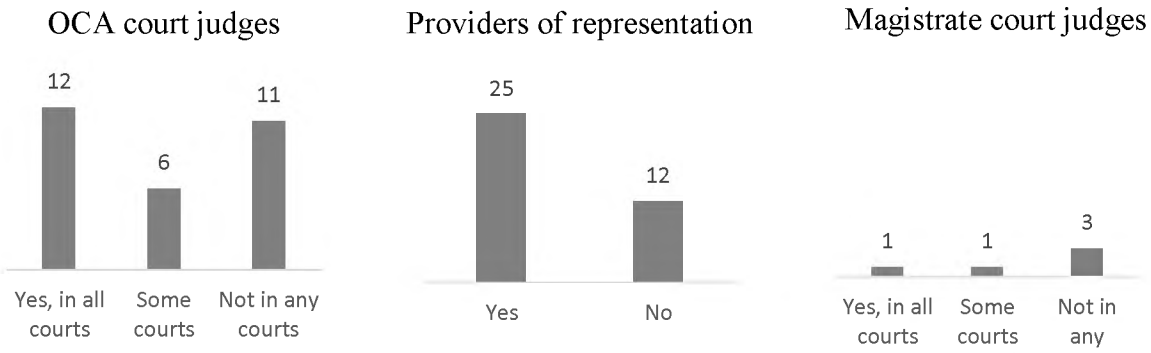
Judicial Department, referenced previously in Section I, makes it clear that the resources needed to "obtain release on bond" are not to be considered as resources available to the defendant for private representation. See written submission of James T. Murphy, Legal Services of Central New York, Attachment A, at 3.

[158] James Milstein, Albany County Public Defender, 3rd JD public hearing, p. 100.

G. Consideration of the cost of private counsel

The *Hurrell-Harring* Settlement requires that ILS' criteria and procedures "take into account the actual cost of retaining a private attorney in the relevant jurisdiction for the category of crime charged."[159] Yet our survey showed that in many jurisdictions the financial ability to retain a private lawyer is not considered during the eligibility determination.

Figure 13: Are the costs of retaining a private attorney for the case considered when determining eligibility?



Not shown: OCA criminal court judges – 17 DK, 5 blank; Providers – 9 DK, 1 blank; Magistrates – 7 DK, 5 blank.

A number of hearing participants stated that the eligibility determination process should take into account the actual costs of retaining private counsel.

> [G]eographical nuances – including differences in the cost of living and the cost of retaining counsel … the complexity of the matter, and the severity of the charge must be taken into account in making a determination as to the right to appointment of assigned counsel.[160]

[159] See Settlement, § VI (B)(4).

[160] Written submission of David P. Miranda, President, New York State Bar Association, p. 2. See also written submission of the Chief Defenders Association of New York, p. 2 (noting that ILS' standards must consider "the actual cost of retaining a private attorney in the relevant jurisdiction for the category of crime charged"); written submission of Velma Hullum, New York State Defenders Association, Client Advisory Board, p. 3 ("The actual cost of retaining a private attorney in the relevant jurisdiction shall be considered. A retainable fee of $5000 to $10,000 is almost [an] impossible feat for most indigent clients.").

One hearing participant concurred with the need to consider the actual cost of retaining private counsel, but identified the challenge of doing so.

> We take into consideration the severity of the case. We take into consideration what we think, you know, what private counsel is realistically going to charge, but I don't, frankly, spend a lot of time trying to figure that out because that's unknowable for me. I've never taken a retainer from anyone in my life for anything and counsel in Wayne County is maybe going to charge something maybe something different from what Rochester is going to charge.[161]

Another speaker identified the same problem, but stated that she overcame the challenge by informally surveying other lawyers about common rates for retaining private representation in different types of criminal cases:

> I tried to get an idea from some of our private – formerly private attorneys who work with the PD's office now as to what the going rate was for retaining attorneys because I didn't know….[162]

H. Consideration of resources of persons other than the applicant

The *Hurrell-Harring* Settlement states that in developing assigned counsel eligibility criteria and procedures, ILS shall consider whether "income and assets of family members should be considered available for purposes of determining eligibility."[163] Our review of the applications for assignment of counsel we received indicate that this is a critical consideration, since many jurisdictions are considering third party income. Indeed, of the 71 application forms we received, 62 (87%) of them ask the applicant to list the income of a third party. Some of the time, these requests are put vaguely, as when application forms instruct applicants to report the income of their whole household, rather than only themselves. However, 46 (65%) applications specifically ask for the income of the applicant's spouse, while 37 (52%) require minor applicants to list their parents' income.

The issue of third party income, particularly parental income for minors charged with criminal offenses, generated a great deal of discussion during the public hearing process, with strong opinions for and against considering third party income. Those who spoke in favor of considering third party income identified two reasons for doing so: 1) parents and spouses have a

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[161] Andrew Correia, First Assistant, Wayne County Public Defender Office, 7th JD public hearing, pp. 71-72.

[162] Leanne Lapp, Ontario County Public Defender, 7th JD public hearing, pp. 99-100. For similar testimony, see written submission of Greg Lubow, Attorney and former Chief Public Defender, Greene County, p. 2 ("Since the Public Defender's job was a part time position and I had an active private law practice which included criminal defense, I had a sense of the real cost to retain private counsel.").

[163] See Settlement, § VI (B)(9)(b).

legal obligation to care for their children and spouses; and 2) counties would face a fiscal burden if third party income is not considered.

> The one area that we do is parental income for those under 21 and I would like to make a few comments on that. I'm an outlier as far as providers go. I do think we should [consider] parental income and spousal income … for a couple of reasons. The first reason is, as far as children, it is a legal obligation of parents to pay for necessary expenses. I find it quite odd that we are trying to claim that legal expenses aren't necessary. I do recognize that certainly [the] right to counsel is a personal thing.... I also, in noting the otherwise excellent work that the New York State Defenders Association has done on this issue, believe spousal income should be imputed to spouses. I think that ultimately if you promulgate standards that will have a financial impact on counties, and I think that it will, this is going to be seen as an unfunded mandate, and if you call for in your mandate that you don't impute spousal income no matter how much money the spouse makes, I think you're making a mistake publicly and politically.[164]

> Where applicant(s) under age 21 years are seeking the appointment of counsel or other services, the assets, income, and expenses of his/her parent(s) or person(s) legally responsible for his/her support should be considered and be made part of the determination regarding eligibility for mandated representation.
>
> With respect to spousal assets, the assets (including assets jointly owned with the applicant), income and expenses of the spouse of an applicant should be included in determining his/her eligibility for counsel except where, due to marital estrangement or other extenuating circumstances, it is unlikely that the respective spousal information of income and assets would be available.... It is patently clear that the Sixth Amendment right to counsel is personal and, therefore, assignment of counsel cannot be denied if the parent(s) or person(s) legally responsible for support refuse to contribute towards the cost of counsel.[165]

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[164] Timothy P. Donaher, Monroe County Public Defender, 7th JD public hearing, pp. 53, 56-57. For similar testimony, see Norman Effman, Wyoming County Public Defender and Executive Director, Wyoming-Attica Legal Aid Bureau, 8th JD public hearing, pp. 114-115 ("NYSDA's position, which I … agree with and is also referenced in the state bar standards, is that the constitutional right to counsel is individual and we, therefore, are obligated to provide attorneys when required to the individual and it's not a family process. But like every other provider that has to deal with budgets and legislatures and inquiries, we certainly do look to parental income in cases where either/or both parents take that individual as a dependent for income tax purposes."); Gary Horton, Director, Veterans Defense Program, New York State Defenders Association, and former Genesee County Public Defender, 8th JD public hearing, p. 35 ("Due to the political climate in my county, I was always required by county government to consider parental income of dependent clients, which has always bothered me.").

[165] Written submission of Patrick J. Brophy, Chief Attorney, Putnam County Legal Aid Society, Inc., p. 2. For similar testimony, see Julia Hughes, Coordinator, Tompkins County Assigned Counsel Program, 6th JD public hearing, p. 46 (noting that parental income is considered in her county); Karri Beckwith,

A significant majority of hearing participants who made a recommendation on this issue, however, recommended against considering third party income. They did so for a variety of reasons. First, many parents refuse to cooperate in the assigned counsel application process for their children, often because parents view the criminal justice system as a mechanism for punishing their children.

> The next issue that came across my desk more times than I would like to have had … is parental income…. [J]ust one example [of why this is a problem.] "Oh, Public Defender, he got arrested, huh? Well, I'm not going to tell you anything…. No, I'm going to teach him or her a lesson. I'm going to let him sit in jail for a while and think about it."… Most times I could convince them to cooperate so we could proceed, but there were times they did not…. There are parents who don't want to pay so they won't even return your calls. What does that do? Causes delay.[166]

The same types of problems can arise in situations regarding spousal income, as illuminated by the following story told by a hearing participant.

> Dorothy, who is 32 years old, and her 13 year old son, resided with Dorothy's boyfriend. Her boyfriend is not the father of Dorothy's child. Dorothy and her son contribute to the shelter costs in the home. The only sources of income that Dorothy and her son have are Dorothy's Social Security disability and SSI benefits (based upon Dorothy's disability), which total $766.00 per month, or $176.77 per week. She and her son also receive $357.00 per month in SNAP... and Medicaid coverage. They are treated as a separate household from Dorothy's boyfriend for both programs. Dorothy was

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Administrator, Chenango County Assigned Counsel Program, 6th JD public hearing, pp. 83-84 ("We do take into account household make-up. If the client, the potential client, is under the age of 21, we do take [into account] any income in the household, parental income, guardian income, as well as any other dependent children that are in the household."); Jerry Ader, Genesee County Public Defender, 8th JD public hearing, pp. 48, 66 ("We do consider the parents' income. If the parents do not want to contribute, then we reassess if we'll take the case…. [I]f they refuse to contribute to the defense or even to provide income, we provide counsel and later seek to recover our costs through action of the county.").

[166] Edward Nowak, President of the New York State Defenders Association and former Monroe County Public Defender, 7th JD public hearing, pp. 23-25. See similarly testimony of Mark Williams, Cattaraugus County Public Defender, 8th JD public hearing, p. 19 ("If I had a dollar for every time I heard a parent say, let him sit in jail for a few days, or let her sit in jail for a few days, I'd probably be a rich man and I wouldn't have any need to be a public defender in Cattaraugus County, I could retire. But we're getting push through from the political side of the county that we should be making those parents pay."); written submission of Samuel Young, Director of Advocacy, and Dennis Kaufman, Executive Director, Legal Services of Central New York, p. 3 ("Insistence on obtaining financial information from an applicant's parents and reliance on cooperation from parents in order to process an application for counsel, can create unacceptable delays in assignment of counsel. In making eligibility determinations, the court should consider only the income and assets of the applicant, not the income or assets of family members over whom the applicant has not control.").

> denied assigned counsel based upon the income of the non-legally responsible boyfriend of $400 to $500 per week…. The denial of assigned counsel was made despite the fact that by definition the woman has inadequate income to meet her needs for food, shelter, and medical care.[167]

Some hearing participants stated that having a legal duty to support a child or spouse does not equate to having a legal responsibility to retain a private attorney for a child or spouse who is facing criminal charges.

> The income of a minor's parents should not be considered available to the defendant in a criminal proceeding for the purpose of determining eligibility. A parent is under no obligation to hire counsel to represent a minor child in a criminal proceeding.[168]

> I want to make sure I don't miss saying this: The issue came up earlier in this hearing about minor children living with their own parents. We would not include the parental parent/grandparent's income in determining eligibility in those circumstances because we really don't see that the duty of the grandparent to support the minor [children] would include the right to counsel, would include – they're not required to retain counsel for their minor children.[169]

At least one hearing participant identified the possible conflict that arises if a defendant is ineligible for assigned counsel because of third party income, and thus cannot obtain representation unless a third party pays for it.

> If a minor was disqualified on the basis of parental income and the parents retained an attorney, I think it puts the retained attorney in a position of conflicting loyalty; who do

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[167] Written submission of James T. Murphy, Legal Services of Central New York, p. 4. Similarly, see testimony of Jonathan E. Gradess, Executive Director, New York State Defenders Association, 10th JD public hearing, p. 17 ("We've had cases where spousal income allows the court to look at it. 'You have your girlfriend, tell her to come in here.' Your girlfriend is not a spouse…. [S]o it's a dangerous area.").

[168] Written submission of David P. Miranda, President, New York State Bar Association, p. 2. For a similar statement regarding spousal income, see Jonathan E. Gradess, Executive Director, New York State Defenders Association, 10th JD public hearing, p. 16 ("Spousal income, once you permit it – first, generally, let me say this, there is no authority for spousal income, no statutory authority for it.").

[169] Peter Racette, Deputy Director, Legal Aid Society of Northeastern New York, 4th JD public hearing, p. 76. See also written submission, New York State Defenders Association, *Assigned Counsel Eligibility of Minors in Criminal Court: No Parental Liability*, p. 1 (analyzing recent case law on parental liability for minor criminal defendants and demonstrating that "there is in fact no binding parental obligation to bear the expense of legal fees necessary to represent a minor being prosecuted as an adult in criminal court.").

> you have the loyalty to, whose determinations do they honor, the client or the person paying the bill? And I think that's particularly dangerous for the child.[170]

In the same vein, several hearing participants noted that the right to counsel is an individual right, and for that reason, third party income should not be considered.

> CDANY believes that the constitutional right to counsel is an individual right and the assignment of counsel should not be dependent on the income or assets of anyone other than the defendant.[171]

> Since the constitutional guarantee of counsel is a personal right, the income of parents and spouses should not be considered available to the defendant for the purpose of determining eligibility.[172]

Finally, some hearing participants pointed out that professional standards consistently state that third party income should not be considered in determining eligibility for assignment of counsel.

> [A] jurisdiction should not deny a defendant the right to counsel because … "friends or relatives have resources to retain counsel."[173]

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[170] Mark Williams, Cattaraugus County Public Defender, 8th JD public hearing, at 35. Similarly, see testimony of Molly Hann, Assistant Public Defender, Essex County Public Defender Office, 4th JD public hearing, p. 104 ("As for applicants 21 and under, we never consider parental or grandparent or, you know, custodial income because they are our client, that minor is our client.").

[171] Written submission of Chief Defenders Association of New York (CDANY), p. 2. See also testimony of Andrew Correia, First Assistant, Wayne County Public Defender Office, 7th JD public hearing, pp. 86-87 ("[I]t's our feeling that as long as children are charged as adults, we treat them as adults… [I]f a 17 year old comes into our office with a misdemeanor charge that could saddle them, you know, depending on their circumstances with their record and the parents are unwilling or reluctant or part of their parenting decision is to punish the child by forcing them to have a public defender and they're not going to obtain counsel, we are willing to take that case. We basically consider eligibility as if they're adults."); written submission of David P. Miranda, President, New York State Bar Association, p. 2 ("[I]n the case of a minor, an individual under the age of 21, the determination of eligibility should be based on that person's individual financial ability to retain counsel. The constitutional right to counsel is a personal right…."); written submission of Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, p. 4 ("The determination must be based on an individual's ability to pay on his own, without regard to the finances of other household members, family, or friends, unless such individuals indicate their willingness to pay in a timely way. In New York State, where we still treat 16 year-olds as adults for purposes of criminal liability, we should also treat them as independent for this eligibility determination.").

[172] Written submission of New York State Defenders Association, p. 6 (citations omitted).

[173] Written submission of Paulette Brown, President of the American Bar Association (ABA), p. 22 (quoting ABA, *Standards for Criminal Justice: Providing Defense Services,* (3rd ed.), Standard 5-7.2).

> [I]nability to pay … is personal, and in determining whether a person should be permitted to proceed as a poor person the State may not take into account the financial ability of relatives or friends. *Fullan v. Commissioner of Corrections of the State of New York*, 891 F.2d 1007 (2nd Cir. 1989); *Matter of Heysham*, [131 Misc.2d 1007 (Fam Ct Oneida County 1986]. *See also* Memorandum of the Judicial Conference of the State of New York, (Nov. 11, 1965); ABA Standards for Criminal Justice, Providing Defense Services (1982), Standard 5-6.1 *Eligibility*; NLADA, Standards for Defender Services Standard II(1) *Eligibility and Scope of Representation;* National Advisory Commission on Criminal Justice Standards and Goals, Courts (1972) Standard 13.2 *Payment for Public Representation.*[174]

IV. Outcomes of the eligibility determination process

Many hearing participants stated that applicants for counsel are overwhelmingly found eligible for assignment of counsel. The following statements were typical.

> I would say 95 percent of the people who come through our office are, in fact, eligible and are clearly eligible.…[T]he five percent that's left over, it is – there's an awful lot of self-evaluation by the defendants and the clients, who will say, thank you, but no thank you, [and will] just retain counsel. And there is a much smaller percentage that will say, I'm not sure where I am in this, but I need your help. So I would on a yearly basis say perhaps two percent [are denied].[175]

> I would say we probably accept about 70 percent of the applications that are handed in, and then of those 30 percent probably half of those are overruled and assigned to us by the particular judges....[176]

> We find out, after all is said and done, about seven percent, I think, is the number that … either are not eligible or are determined to be able to afford counsel.[177]

As part of our survey, we requested actual statistics on eligibility determination. The data we obtained confirms the impression that most applicants for counsel are eventually found eligible.

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[174] Written submission of New York State Defenders Association, *Assigned Counsel Eligibility of Minors in Criminal Court: No Parental Liability*, pp. 6-7.

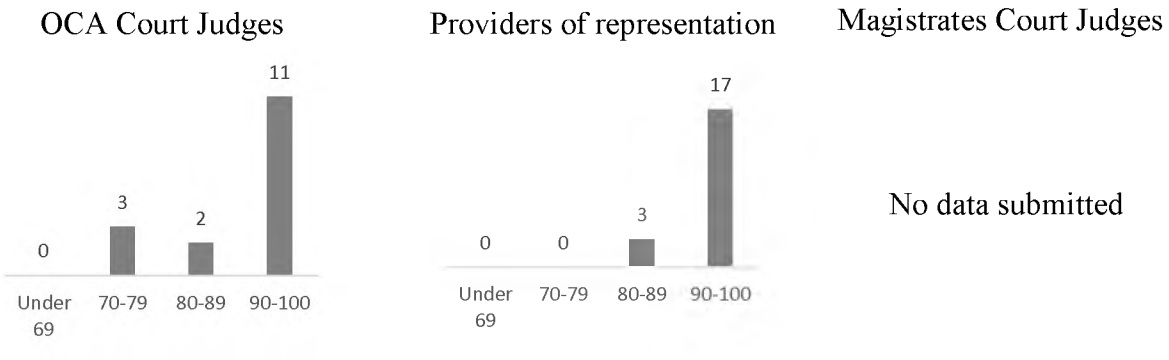
[175] Claire J. Degnan, Executive Director, Legal Aid Society of Westchester County, 9th JD public hearing, pp. 21-22.

[176] Keith Dayton, Cortland County Public Defender, 6th JD public hearing, pp. 100-101.

[177] Robert Convissar, Chief Defender and Administrator, Erie County Assigned Counsel Program, 8th JD public hearing, pp. 72-73.

This data is illustrated in Figure 14.[178] Seventeen of the 20 responses we received from providers of representation contain data showing that over 90% of applicants are found eligible; 11 of 16 OCA judge responses concurred with this rate of assigned counsel eligibility.[179]

Figure 14: What percentage of applicants for counsel are determined eligible?



Not shown: 35 OCA court judge responses did not supply sufficient data for calculation of these statistics; 27 provider responses also did not do so. None of the 17 responses from magistrates court judges submitted statistical data.

The foregoing data notwithstanding, during the public hearings a few hearing participants indicated that in their jurisdictions, a more significant number of applicants are deemed ineligible for assignment of counsel. One participant indicated that in Franklin County, an increase in the

[178] We solicited data from all survey respondents on the number of cases where the right to counsel attached, the number of applications for counsel received, the numbers found eligible and denied (for either financial or other reasons), the number of cases that were appealed or reviewed, the number of reversals of denials of eligibility, and the number of orders for payment by defendants of all or part of the costs of their representation under County Law § 722-d. Twenty-six providers and 22 OCA court judges responded to the request by providing at least some usable, numerical data in response to one or more of these questions. This includes some who provided estimated data.

[179] The numbers in these charts were obtained by dividing the numbers survey respondents reported were found eligible for assignment of counsel by the number of applications (see note 178, *supra,* for full details of the data we requested from respondents). Although we received some numerical data from 26 providers and 22 OCA court judges, the numbers of responses which provided sufficient data to compute the numbers in Figure 14 were only 20 and 16 respectively. Of these, 4 of the provider responses relied on data that respondents indicated were estimates, as did 7 of the OCA judges who responded.

income standards in the eligibility determination criteria in that county could mean "we would have 60 more percent cases than what we have."[180] The following exchange clarified this:

> MS. BURTON: So there's a bunch of people who appeared in court without counsel only because of the very low financial eligibility standards?
> MR. SOUCIA: That's the assessment we have. There's a number of people that are not being adequately represented. It's a grave concern. The courts are conscious of that.[181]

Another hearing participant indicated her office's low rate of determining that applicants are eligible for assigned counsel, acknowledging that this low rate may be due, at least in part, to applicants not being able to complete the application process.

> I did numbers as of July 24th for a public service meeting and we had over a thousand applications as of July 24th. We had over 500 open files and I believe we had about 85 pending. So approximately half [were determined eligible]. Now, whether the half that were denied were failure to complete the application process or retain private counsel or may have been a case we didn't represent on such as violations, I don't know, but as of the end of July, we were about half, little over half.[182]

The survey data and public hearing testimony suggests that in many counties, the vast majority of people who apply for assignment of counsel are deemed eligible, and that therefore, eligibility criteria and procedures that seek to assess "ability to pay" for counsel rather than strict "indigency" (which is often equated with dire poverty) will not significantly enhance caseloads. Still, there are counties that use a strict "indigency" standard, and as a result, criteria and procedures that move to assessing "inability to pay" for counsel will impact their caseloads. It is this concern that prompted the Chief Defender Association of New York to say the following in its written submission:

> **Finally, it is important to note that CDANY strongly believes that the State must assume financial responsibility for any additional resources required by a provider to comply with any promulgated standards.[183]**

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[180] Thomas G. Soucia, Franklin County Public Defender, 4th JD public hearing, p. 137.

[181] Thomas G. Soucia, Franklin County Public Defender, 4th JD public hearing, pp. 137-139.

[182] Marcea Clark Tetamore, Livingston County Public Defender, 7th JD public hearing, p. 127.

[183] Written submission of Chief Defenders Association of New York, p. 2 (emphasis in original).

APPENDIX A

APPENDIX A – RESEARCH METHODOLOGY

In order to obtain as comprehensive a view of the procedures and criteria presently in place for determining eligibility in upstate New York as possible, we adopted a multi-method approach. Our analysis drew upon three sources of data: surveys of providers and judges, application forms used in the assignment of counsel, and oral and written testimony provided during the public hearings. Each of these sources revealed different aspects of the eligibility determination process. The surveys revealed the perceptions of participants of how eligibility determination procedures operate; the application forms showed the types of information gathered as part of those procedures; and the public hearings revealed the views of members of the public on how such procedures ought to operate. Combining all three data sources, we obtained at least some form of information from all but one of the upstate counties, Schoharie being the exception (see Appendix Table 1, below).

Surveys

ILS sent a nineteen-question survey to providers of representation and members of the judiciary in each county. The object of these surveys was to obtain information directly from individuals closely involved with eligibility determination about their understanding of the procedures and criteria that are presently applied across the state.

The surveys covered every aspect of eligibility determination, including, among other things:

1) Whether a standard practice or protocol for eligibility determination exists in the county
2) What requests for written materials from applicants are made, and whether application materials are kept confidential
3) The types of financial information requested and how it is assessed
4) Whether individuals in certain categories are presumed eligible for counsel
5) Whether the financial means of third parties (such as defendant spouses or parents) are considered
6) Whether income guidelines are used
7) The presence or absence of a process to request review of an eligibility determination
8) Statistical information on the eligibility determination process.

Slight adjustments were made to the surveys for different respondent types resulting in three separate survey instruments for providers, judges in OCA (city and county) courts, and judges in town and village courts respectively. We used the website www.surveymonkey.com to send electronic versions of the survey to the chief defender of the primary provider of representation and judicial representatives in each county.[1] The Office of Court Administration assisted by identifying a senior city or county court judge in each county to respond. The New York State Magistrates Association also assisted by directing us to contact the chair of each county Magistrates Association for their responses.

The surveys requested information on the respondent's own knowledge of eligibility determination procedures within the county, including whether and to what degree those procedures were standardized throughout the county. Although our respondents did not always have comprehensive knowledge of how eligibility was determined county-wide, they were nevertheless individuals who were well-informed and familiar with the topics the surveys asked about. Survey responses were downloaded and analyzed using

[1] The 'primary provider' is the provider of first resort in each county, commonly a public defender office. Most counties contain multiple systems for providing representation in order to accommodate cases where the primary provider has a conflicts of interest. In four cases, multiple providers within a single county responded to the survey: we retained all such responses in our analyses. The surveys were also sent to county executives for their information. They were invited to respond if they wished to. None did, however.

Microsoft Excel. Ultimately, we obtained 47 responses to the survey of providers from 43 counties; 51 OCA judges responded to our survey from a total of 44 counties, and 17 magistrates responded from a total of 16 counties. A complete breakdown of the response rates to the surveys is shown in Appendix Table 1.

Application documents

We also sought copies of documents (such as application forms, protocols, instructions or guidelines) used in the eligibility determination process. We did so in order to assess objectively the information requested of applicants for counsel, and the instructions and information issued to them. We requested such documentation from all survey respondents, and followed up with non-respondents to solicit missing forms. We also conducted internet searches in counties where we were missing documentation.

Our analysis focused on the examples application forms we received.[2] We obtained a total of 71 forms covering 51 counties (see Appendix Table 1 below for county-by-county breakdown). We reviewed each form and coded their contents into a spreadsheet in Microsoft Excel. Specifically, we quantified the number of times forms requested specific types of financial information (which we subsequently divided into three broad categories – income, assets and expenditures). We also recorded and quantified:

- The frequency with which language appeared on the forms that requested financial information for parties other than the defendant (such as spouses or parents);
- The number and types of supporting documentation requested, and the appearance of language indicating that failure to submit such documentation may prejudice the application;
- The frequency with which forms included language requiring applicants to attest to the truth of information submitted, or indicated they may be penalized for untruthful declarations;
- Whether application forms included language informing applicants they had a right to request a review of the eligibility determination if they did not agree with it.

Hearing Testimony

We collated all the testimony we received during the eight hearings that ILS conducted in each upstate Judicial District in the months June-August, 2015. This included copies of all written testimony submitted, and also full transcripts from seven of the eight hearings.[3] We reviewed this material in order to gain a more nuanced view of how eligibility determination is done in practice, including the problems and possible solutions members of the public perceived.

We OCRd all the transcripts, uploaded them to NVivo11, and coded them according to a uniform protocol (see Appendix B). This allowed us to quickly collate all commentary on various issues across these sources, and thus to review and understand the breadth of the conversation on each. In analyzing the testimony, we attempted to capture all relevant arguments on each topic and also any material which helped to situate our other data in context. In doing so, we considerably enriched our view of how eligibility determination is accomplished around the state.

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[2] The vast majority of documents submitted to ILS in this process were application forms. We also received a small number of sets of income guidelines, which were generally based on the Federal Poverty Guidelines, and a few examples of public defender 'intake forms'. The intake forms did not always contain questions pertaining to eligibility, but where they did we treated them as application forms and included them in our analysis.

[3] A transcript was not produced from the hearing held in the Fifth Judicial District.

Appendix Table 1: Survey responses and applicant forms received by county.

County	Survey responses received			Application Forms Received
	Providers of Representation	City or County Court Judges	Town & Village Court Judges	
Albany	0	2	0	1
Allegany	1	1	1	1
Broome	1	0	0	1
Cattaraugus	1	1	0	1
Cayuga	1	1	0	1
Chautauqua	0	2	1	1
Chemung	1	1	0	1
Chenango	1	0	0	1
Clinton	1	1	1	1
Columbia	1	1	2	1
Cortland	1	1	0	2
Delaware	1	1	0	1
Dutchess	1	1	0	1
Erie	1	1	0	0
Essex	1	0	0	1
Franklin	0	1	1	1
Fulton	1	0	0	8
Genesee	1	1	0	1
Greene	0	0	0	1
Hamilton	0	1	0	1
Herkimer	0	1	0	1
Jefferson	1	1	0	0
Lewis	0	0	1	1
Livingston	1	1	0	1
Madison	0	1	0	1
Monroe	1	1	1	2
Montgomery	1	1	1	1
Nassau	1	1	1	1
Niagara	1	1	0	1
Oneida	1	2	0	1
Onondaga	1	0	0	2
Ontario	1	1	1	1
Orange	1	1	1	1
Orleans	1	1	0	1
Oswego	1	2	1	0
Otsego	1	2	0	0
Putnam	0	1	0	0
Rensselaer	1	2	1	2
Rockland	0	1	0	1
St. Lawrence	2	0	0	1
Saratoga	2	1	0	1
Schenectady	0	1	0	2

Schoharie	0	0	0	0
Schuyler	1	1	0	1
Seneca	1	0	0	1
Steuben	1	0	0	1
Suffolk	1	1	0	2
Sullivan	2	0	0	1
Tioga	1	1	0	1
Tompkins	1	1	1	1
Ulster	1	1	0	1
Warren	2	1	0	1
Washington	1	1	1	1
Wayne	1	1	1	1
Westchester	0	1	0	8
Wyoming	1	1	0	1
Yates	0	0	0	1
[blank]	0	1	0	0
Total responses	**47**	**51**	**17**	**71**

APPENDIX B

Public Hearings:
Witnesses and Written Submissions

3rd Judicial District Public Hearing, July 16, 2015

***Witnesses*:**

Daniel P. McCoy, County Executive, Albany County

Robert Linville, Columbia County Public Defender

Greg Lubow, Attorney and former Chief Public Defender, Greene County

Hon. Dr. Carrie A. O'Hare, Stuyvesant Town Justice, Columbia County; current Director of the New York State Magistrates Association and former President of the Columbia County Magistrates Association

Lee Kindlon, Attorney, Kindlon Law Firm

James Milstein, Albany County Public Defender

Melanie Trimble, Director of the Capital Region Chapter of the New York Civil Liberties Union

Written submissions:

Robert Linville, Columbia County Public Defender

Daniel P. McCoy, County Executive, Albany County

Melanie Trimble, Director of the Capital Region Chapter of the New York Civil Liberties Union

Hon. Dr. Carrie A. O'Hare, Town Court Justice, Town of Stuyvesant, Columbia County; current Director of the New York State Magistrates Association and former President of the Columbia County Magistrates Association

Greg Lubow, Attorney and former Chief Public Defender, Greene County

4th Judicial District Public Hearing, August 26, 2015

***Witnesses*:**

Senora Bolarinwa, currently incarcerated at the Taconic Correctional Facility

Gerard Wallace, Director, New York State Kinship Navigator Office, and Professor at the University of Albany, School of Social Welfare

Hon. Peter J. Herne, Chief Judge, St. Regis Mohawk Tribal Court

Peter Racette, Deputy Director, Legal Aid Society of Northeastern New York

Molly Hann, Assistant Public Defender, Essex County Public Defender Office

Kellie King, Confidential Secretary, Essex County Public Defender Office

Marcy I. Flores, Warren County Public Defender

Joy A. LaFountain, Administrator/Coordinator, Warren County Assigned Counsel Plan

Thomas G. Soucia, Franklin County Public Defender

Written submissions:

Peter Racette, Deputy Director, Legal Aid Society of Northeastern New York

Daniel L. Palmer, County Manager, Essex County (on behalf of the Essex County Board of Supervisors)

Gerard Wallace, Director, New York State Kinship Navigator Office, and Professor at the University of Albany, School of Social Welfare, ("In Support of Legal Assistance for Kinship Caregivers")

Hon. Peter J. Herne, Chief Judge, St. Regis Mohawk Tribal Court

Susan L. Patnode, Executive Director, Rural Law Center of New York, Inc.

5th Judicial District Public Hearing, July 9, 2015

Witnesses:

Barrie Gewanter, Director of the Central New York Chapter of the New York Civil Liberties Union

Professor Todd A. Berger, Director of the Criminal Defense Clinic, Syracuse University College of Law, Office of Clinical Legal Education

Jason B. Zeigler, Onondaga County Assigned Counsel Panel Attorney and Member of the Onondaga County Gideon Society

Sally Curran, Executive Director, Volunteer Lawyers' Project of Onondaga County, Inc.

Tina Hartwell, Assistant Public Defender, Criminal Division, Oneida County Public Defender Office

Frank J. Furno, Assistant Public Defender, Civil Division, Oneida County Public Defender Office

Geneva Fortune, Advocate, Jail Ministry of Syracuse

Francis Walter, former President of the Board of the Onondaga County Assigned Counsel Program

Written submissions:

Barrie Gewanter, Director of the Central New York Chapter of the New York Civil Liberties Union

Professor Todd A. Berger, Director, and Jason D. Hoge, Practitioner in Residence, Criminal Defense Clinic, Syracuse University College of Law, Office of Clinical Legal Education

Jason B. Zeigler, Onondaga County Assigned Counsel Panel Attorney and Member of the Onondaga County Gideon Society

Tina Hartwell, Assistant Public Defender, Criminal Division, Oneida County Public Defender Office

Samuel Young, Director of Advocacy, and Dennis Kaufman, Executive Director, Legal Services of Central New York

Tina C. Bennett and Beth A. Lockhart, former panel attorneys, Onondaga County Assigned Counsel Program

Patricia Moriarty, Advocate, Jail Ministry of Syracuse

6th Judicial District Public Hearing, August 20, 2015

Witnesses:

Jay Wilbur, Broome County Public Defender

Julia Hughes, Coordinator, Tompkins County Assigned Counsel Program

James T. Murphy, Legal Services of Central New York

Karri Beckwith, Administrator, Chenango County Assigned Counsel Program

Keith Dayton, Cortland County Public Defender

Jonathan Becker, Attorney

John Brennan, Chemung County Public Advocate's Office

Written submissions:

Karri Beckwith, Administrator, Chenango County Assigned Counsel Program (2013 Report to the N.Y. Unified Court System for Chenango County Public Defender)

James T. Murphy, Legal Services of Central New York

7th Judicial District Public Hearing, August 6, 2015

Witnesses:

John Garvey, Ontario County Administrator

Edward Nowak, President of the New York State Defenders Association and former Monroe County Public Defender

Timothy P. Donaher, Monroe County Public Defender

Andrew Correia, First Assistant, Wayne County Public Defender Office

Leanne Lapp, Ontario County Public Defender

KaeLyn Rich, Director of Genesee Valley Chapter of the New York Civil Liberties Union

Marcea Clark Tetamore, Livingston County Public Defender

Velma Hullum, New York State Defenders Association, Client Advisory Board

Charles Noce, Monroe County Conflict Defender

Written submissions:

Velma Hullum, New York State Defenders Association, Client Advisory Board

KaeLyn Rich, Director of the Genesee Valley Chapter of the New York Civil Liberties Union

Timothy P. Donaher, Monroe County Public Defender, (Memorandum, dated December 15, 2014, addressed to staff attorneys regarding "New assignment of counsel procedure pre-arraignment")

8th Judicial District Public Hearing, July 30, 2015

***Witnesses*:**

Mark Williams, Cattaraugus County Public Defender

Gary Horton, Director, Veterans Defense Program, New York State Defenders Association and former Genesee County Public Defender

Jerry Ader, Genesee County Public Defender

Robert Convissar, Chief Defender and Administrator, Erie County Assigned Counsel Program

David C. Schopp, Chief Executive Officer and Executive Director, Legal Aid Bureau of Buffalo

Norman Effman, Wyoming County Public Defender and Executive Director, Wyoming-Attica Legal Aid Bureau

Hon. Mark G. Farrell, former President of the New York State Magistrates Association

David J. Farrugia, Niagara County Public Defender

Robert M. Elardo, Managing Attorney, Erie County Bar Association Volunteer Lawyers Project

Written submissions:

David C. Schopp, Chief Executive Officer and Executive Director, Legal Aid Bureau of Buffalo

John A. Curr, III, Director of Western Regional Chapter, New York Civil Liberties Union

Robert M. Elardo, Managing Attorney, Erie County Bar Association Volunteer Lawyers Project, ("Equal Protection Denied in New York to Some Family Law Litigants in Supreme Court: An Assigned Counsel Dilemma for the Courts," 29 Fordham Urban Law Journal 1125 (2002))

Diana M. Straube, Supervising Attorney, Neighborhood Legal Services, Inc., Buffalo, NY

9th Judicial District Public Hearing, July 23, 2015

***Witnesses*:**

Clare J. Degnan, Executive Director, Legal Aid Society of Westchester County

Tracey Alter, Director, Family Court Legal Program, Pace Women's Justice Center, Pace University School of Law

Joanne Sirotkin, Attorney-in-Charge, Legal Services of the Hudson Valley

Hon. David Steinberg, Town Justice, Hyde Park

Merble Reagon, Executive Director, Women's Center for Education and Career Advancement

Beth Levy, Senior Associate Counsel, My Sister's Place (testifying on behalf of Karen Cheeks-Lomax, Chief Executive Officer, My Sister's Place)

Saad Siddiqui, Attorney and Board Member of the Lower Hudson Valley Chapter of New York Civil Liberties Union

Guisela Marroquin, Interim Director, Lower Hudson Valley Chapter of the New York Civil Liberties Union

Vojtech Bystricky, Attorney, 18-B misdemeanor panel, City of White Plains Criminal Court

Karen Needleman, Chief Administrator, Assigned Counsel Plan, Legal Aid Society of Westchester County

Written submissions:

Tracey Alter, Director, Family Court Legal Program, Pace Women's Justice Center, Pace University School of Law

Joanne Sirotkin, Attorney-in-Charge, Legal Services of the Hudson Valley

Karen Cheeks-Lomax, Chief Executive Officer, My Sister's Place

Merble Reagon, Executive Director, Women's Center for Education and Career Advancement, (written submission and copy of 2010 Self-Sufficiency Standard for New York State)

Guisela Marroquin, Interim Director, Lower Hudson Valley Chapter of the New York Civil Liberties Union

Patrick J. Brophy, Chief Attorney, Putnam County Legal Aid Society, Inc.

James D. Licata, Rockland County Public Defender, and Keith I. Braunfotel, Chair Administrator, Rockland County Assigned Counsel Plan

10th Judicial District Public Hearing, August 12, 2015

***Witnesses*:**

Jonathan E. Gradess, Executive Director, New York State Defenders Association, Inc.

Marguerite Smith, Attorney, New York Federal and State Tribal Justice Forum

William Ferris, former President of the Suffolk County Bar Association

Hon. Andrew Crecca, Supervising Judge of the Suffolk County matrimonial parts

Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law

Kent Moston, Attorney-in-Chief, Legal Aid Society of Nassau County

Laurette Mulry, Assistant Chief Attorney-in-Charge, Legal Aid Society of Suffolk County

Sabato Caponi, East End Bureau Chief, Legal Aid Society of Suffolk County

Amol Sinha, Director of the Suffolk County Chapter of the New York Civil Liberties Union

Jason Starr, Director of the Nassau County Chapter of the New York Civil Liberties Union

Robert M. Nigro, Administrator, Nassau County Assigned Counsel Defender Plan

Michael Demers, concerned citizen

Written submissions:

Marguerite A. Smith, Attorney, New York Federal and State Tribal Justice Forum

Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law

Amol Sinha, Director, Suffolk County Chapter and Jason Starr, Director, Nassau County Chapter of the New York Civil Liberties Union

Laurette D. Mulry, Assistant Chief Attorney-in-Charge, Legal Aid Society of Suffolk County

Other Written Submissions:

Edward Frankel, "Public Hearings on Eligibility for Assignment of Counsel Written Testimony – Eligibility of Children Subject to Adoption Contestment," dated June 29, 2015

New York State Defenders Association (NYSDA) "Statement on the Criteria and Procedures for Determining Eligibility in New York State," dated August 12, 2015, and "Assigned Counsel Eligibility of Minors in Criminal Court: No Parental Liability," dated July 8, 2015

Paulette Brown, President of the American Bar Association (ABA), "Eligibility for Assignment of Counsel," dated August 26, 2015

Chief Defenders Association of New York (CDANY), "Recommendations on the Criteria for Financial Eligibility Determinations," dated August 26, 2015

David P. Miranda, President, New York State Bar Association (NYSBA), letter dated August 26, 2015

Immigrant Defense Project, "Assignment of Counsel and the Immigrant Defendant/Respondent," dated July 13, 2015

Michelle Bonner, Chief Counsel, Defender Legal Services, National Legal Aid & Defender Association (NLADA), "Letter in Support of NYSDA's August 12, 2015 Statement Submitted to the New York State Office of Indigent Legal Services for Public Hearings on Eligibility for Assignment of Counsel"

Emmett J. Creahan, Director, Mental Hygiene Legal Service, Appellate Division, Fourth Department, "Determining Eligibility of County Law 18-B Assignment of Counsel," dated November 5, 2015

Letters from people in the custody of the New York State Department of Corrections and Community Supervision