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# Criteria and Procedures for Determining Assigned Counsel Eligibility

## **BLACKLETTER**



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# Criteria

## I

An applicant shall be eligible for assignment of counsel when the applicant's current available resources are insufficient to pay for a qualified attorney, release on bond, the expenses necessary for a competent defense, and the reasonable living expenses of the applicant and any dependents.

- A. Whether an applicant is eligible for assignment of counsel shall be determined in accordance with the criteria and procedures set forth below.
- B. Counsel shall be assigned unless the applicant is conclusively ineligible.

## II

To streamline the eligibility determination process, there shall be presumptions of eligibility. A presumption of eligibility is rebuttable only where there is compelling evidence that the applicant has the financial resources sufficient to pay for a qualified attorney and the other expenses necessary for a competent defense.

- A. Applicants are presumptively eligible for assignment of counsel if their net income is at or below 250% of the Federal Poverty Guidelines.
- B. Applicants who are incarcerated, detained, or who are confined to a mental health institution shall be presumed eligible for assignment of counsel.
- C. Applicants who are currently receiving, or have recently been deemed eligible pending receipt of, need-based public assistance, including but not limited to Family Assistance (TANF), Safety Net Assistance (SNA), Supplemental Nutrition Assistance (SNAP), Supplemental Security Income (SSI)/New York State Supplemental Program (SSP),

## XV

A determination of eligibility for assignment of counsel shall not be re-examined absent a substantial change of circumstances such that the defendant can pay for a qualified attorney and the expenses necessary for a competent defense.

- A. County Law § 722-d shall be used only after an assignment of counsel has been made, only if prompted by defense counsel, and only after a finding of a substantial change in the defendant's financial circumstances.
- B. Counsel shall not be assigned contingent upon a requirement that the defendant make partial payments to the provider of mandated representation or to the county.

## XVI

Procedure regarding data maintenance

- A. Data shall be maintained regarding the:
  - i) number of applicants who apply for assignment of counsel;
  - ii) number of applicants found eligible;
  - iii) number of applicants found ineligible and the reasons for the ineligibility determination;
  - iv) number of reconsiderations and appeals requested;
  - v) results of these reconsiderations and appeals;
  - vi) number of reports made pursuant to County Law § 722-d regarding the assignment of counsel; and
  - vii) number of orders issued for partial payment or termination of the assignment of counsel under County Law § 722-d.
- B. To ensure the confidentiality of information submitted during the eligibility determination process, the data shall be made available in aggregate form only, meaning that no individual applicant can be identified in the data itself.

- A. Applicants shall not be required to attest under penalty of perjury to the truth of the information provided as part of the eligibility determination process.
- B. Applicants shall not be denied assignment of counsel for minor or inadvertent errors in the information disclosed during the eligibility determination process.
- C. Applicants shall not be required to produce unduly burdensome documentation to verify the financial information provided; nor shall they be denied assignment of counsel solely for the failure to produce documentation where they have demonstrated a good faith effort to produce requested documentation.
- D. Applicants shall not be required to demonstrate that they were unable to retain private counsel to be deemed eligible for assignment of counsel.

## XIV

The determination that applicants are ineligible for assignment of counsel shall be in writing and shall explain the reasons for the ineligibility determination. Applicants shall be provided an opportunity to request reconsideration of this determination or appeal it, or both.

- A. Screening entities shall promptly inform applicants of their eligibility recommendation. If their recommendation is that the applicant be denied assignment of counsel, they shall provide the reason for the denial in writing along with written notice that the applicant can ask the screening entity to reconsider or can appeal to the court, or both.
- B. If a court determines that an applicant is ineligible for assignment of counsel, the court shall inform the applicant of this decision in writing with an explanation as to the reason for the denial. The court shall also entertain an applicant's request to reconsider a decision that the applicant is ineligible for assignment of counsel.

- Medicaid, or Public Housing assistance, shall be deemed presumptively eligible for assignment of counsel.
- D. Applicants who have, within the past six months, been deemed eligible for assignment of counsel in another case in that jurisdiction or another jurisdiction shall be presumed eligible. Appellate courts shall assign appellate counsel to appellants who were deemed eligible for assigned counsel by their trial court.

## III

Ability to post bond shall not be sufficient, standing alone, to deny eligibility for assignment of counsel.

## IV

The resources of a third party shall not be considered available to the applicant unless the third party expressly states a present intention to pay for counsel, the applicant gives informed consent to this arrangement, and the arrangement does not interfere with the representation of the applicant or jeopardize the confidentiality of the attorney-client relationship.

- A. The resources of a spouse shall not be considered available to the applicant, subject to the above exception.
- B. The resources of a parent shall not be considered as available to minor applicants, subject to the above exception.

## V

Non-liquid assets shall not be considered unless such assets have demonstrable monetary value and are readily convertible to cash without impairing applicants' ability to provide for the reasonable living expenses of themselves and their dependents.

- A. Ownership of a vehicle shall not be considered where such vehicle is necessary for basic life activities.
- B. An applicant's primary residence shall not be considered unless the fair market value of the home is significant, there

is substantial equity in the home, and the applicant is able to access the equity in a time frame sufficient to retain private counsel promptly.

## VI

Any income from receipt of child support or need-based public assistance shall not be considered as available to applicants in determining eligibility for assignment of counsel.

## VII

Debts and other financial obligations, including the obligation to provide reasonable living expenses for the applicant and his or her dependents, shall be considered in determining eligibility for assignment of counsel.

## VIII

Eligibility determinations shall take into account the actual cost of retaining a private attorney in the relevant jurisdiction for the category of crime charged.

# Procedures

## IX

These criteria and procedures shall be applied uniformly, consistently, and with transparency.

## X

Courts have the ultimate authority to determine eligibility, but may delegate the responsibility for screening and making an eligibility recommendation.

- A. Entities responsible for screening and making a recommendation should be independent and conflict-free.

- B. Where there is no entity that is independent and conflict-free, courts may delegate the screening responsibility to the provider of mandated representation.

## XI

The confidentiality of all information applicants provide during the eligibility determination process shall be preserved.

- A. The eligibility screening process, whether done by another entity or the court, shall be done in a confidential setting and not in open court.
- B. Any entity involved in screening shall not make any information disclosed by applicants available to the public or other entities (except the court).
- C. Any documentation submitted to the court shall be submitted *ex parte* and shall be ordered sealed from public view.

## XII

Counsel shall be assigned at the first court appearance or immediately following the request for counsel, whichever is earlier.

- A. Eligibility determinations shall be done in a timely fashion so that assignment of counsel is not delayed.
- B. Counsel shall be provisionally appointed for applicants whenever they are not able to obtain counsel prior to a proceeding which may result in their detention, or whenever there is an unavoidable delay in the eligibility determination.

## XIII

The eligibility determination process shall not be unduly burdensome or onerous.