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# **Criteria and Procedures for Determining Assigned Counsel Eligibility**

## **Report on Implementation in the *Hurrell-Harring* Counties**

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April 4, 2018

Submitted by the New York State Office of Indigent Legal Services in accordance with  
Section VI(C) of the *Hurrell-Harring v. The State of New York* Stipulation and Order of Settlement

**NEW YORK STATE  
OFFICE OF INDIGENT LEGAL SERVICES**

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## I. INTRODUCTION

Section VI (C) of the *Hurrell-Harring v. The State of New York* Stipulation and Order of Settlement (“*Hurrell-Harring* Settlement” or “Settlement”) requires the New York State Office of Indigent Legal Services (“ILS”) to submit annual reports assessing the criteria and procedures being used in the five Settlement counties to determine whether a criminal defendant is financially eligible for an assignment of counsel. Specifically, ILS is required in each annual report to analyze (1) the criteria and procedures that are currently being used to determine whether a person is eligible; (2) who is making these determinations; (3) whether and to what extent decisions that applicants are ineligible are being reconsidered and/or appealed; and (4) whether and to what extent the criteria and procedures being used differ from the criteria and procedures set forth in the *Criteria and Procedures for Determining Assigned Counsel Eligibility* (“Eligibility Standards” or “Criteria and Procedures”), which ILS issued in April 2016.

Pursuant to the terms of the Settlement, on April 4, 2017, ILS issued its first annual report on eligibility in a document entitled, *Criteria and Procedures for Determining Assigned Counsel Eligibility: Report on Implementation in the Hurrell-Harring Counties*. In that report, we discussed for each of the five counties separately the criteria and procedures used prior to implementation of the Eligibility Standards, the steps taken to implement the Eligibility Standards, an assessment of compliance with the Eligibility Standards since implementation, and the barriers and ongoing challenges to implementation.

ILS submits this second annual report to discuss the ongoing implementation of the Eligibility Standards in the five Settlement counties since the issuance of the April 2017 report. This report includes, among other things, a description of the current processes for determining whether a person is eligible for an assignment of counsel, a brief summary of the status of implementation at the time of the 2017 annual report, and the extent to which each county’s current eligibility determination processes are in compliance with the Eligibility Standards. Additionally, this report includes a brief analysis of the data from calendar year 2017 collected from each county.

This report is based on information gleaned from our on-going conversations with the providers in each county, our review of the data each provider sent to ILS, the numerous court observations ILS attorneys conducted over the past year, and the structured interviews we conducted of providers and their staff members who are involved in the eligibility determination process.

Below is a summary of the court observations and structured provider interviews that were conducted between April 2017 and March 2018:

### ***Court Observations***

Between April 2017 and August 2017, and in February 2018, ILS observed a total of 52 sessions in a variety of courts, including the following:

Onondaga County: Syracuse City Court (Traffic part, Felony part, Drug Court part, DV part, Part 4); Clay Town Ct; DeWitt Town Ct, Camillus Town Ct; Salina Town Ct.

Ontario County: Canandaigua City Ct; Geneva City Ct; Canandaigua Town Ct.

Schuyler County: Montour Falls Village Ct; Watkins Glen Village Ct.

Suffolk County: District Court (Parts D-11, D-41, D-42, D-43, D-52, D-54, D-55, D-56, Domestic Violence Court; Prisoner Part, Drug Court, Mental Health Court, Felony Part); and Riverhead Town Ct (including Drug Court).

Washington County: Ft. Edward Village Ct; Ft. Edward Town Ct; Kingsbury Town Ct.

### ***Structured Interviews***

Between February and March 2018, ILS staff conducted structured interviews of the administrators and support staff of providers involved in determining assigned counsel eligibility, as follows:

Onondaga ACP: Executive Director; 2 ACP staff members

Ontario PD: Public Defender; 1 staff member

Schuyler/Tompkins Regional ACP: Administrator; 1 part-time staff member

Schuyler PD: Public Defender; 1 staff member

Suffolk ACP: Administrator; Deputy Administrator; 1 staff member

Suffolk LAS: Chief Legal Operating Officer; 1 staff member

Washington ACP: Supervising Attorney; Administrator

## II. Implementation of the Eligibility Criteria and Procedures in the *Hurrell-Harring* Counties

### Onondaga County

#### A. Current process for deciding assigned counsel eligibility

The primary provider of mandated representation in Onondaga County is the Onondaga County Bar Association's Assigned Counsel Program (ACP) to which the County's judiciary has delegated the responsibility of screening defendants and making assigned counsel eligibility recommendations. There are four different processes for assessing assigned counsel eligibility in Onondaga County depending on whether the defendant is arraigned (i) in one of the Town and Village Courts; (ii) in Syracuse City Court as an in-custody arraignment; (iii) in Syracuse City Court as an out-of-custody, or appearance ticket, arraignment; or (iv) in the Centralized Arraignment Part (CAP).

For arraignments done in **Town and Village courts**, an ACP attorney is available to represent every defendant at arraignment. The arraigning attorney will retain the case as the provisionally assigned attorney, unless the defendant has a private attorney or has another assigned attorney on a pending case. The provisionally assigned attorney then obtains from the defendant the information needed to complete the ACP's assigned counsel application form and submits the completed application to the ACP for review.

For the **in-custody arraignments in Syracuse City Court**,<sup>1</sup> the ACP assigns two or three attorneys, depending on the day of the week, to represent these defendants at arraignment. Starting at 8:00 a.m. every morning, the arraignment attorneys meet with the defendants at the jail before they are transported to court. The attorneys interview the defendants and collect information from them to complete the assigned counsel application form. Once the case is called, the attorney informs the judge whether the defendant qualifies for counsel, and if so, at the conclusion of the arraignment, the judge provisionally assigns an attorney to represent the defendant. The arraignment attorney then delivers the assigned counsel application form to the ACP for review.

The procedure is different for the **out-of-custody arraignments in Syracuse City Court**. The ACP assigns an office clerk to sit at a desk just outside the entrance to Part 4 (the arraignment Part in City Court). Starting at 9:00 a.m., the clerk announces to all persons who approach the courtroom to stop and see her if they wish to have an attorney assigned to their case. The arraignment attorney also makes the announcement inside the courtroom before the start of the court session. The office clerk then assists defendants in filling out the application form to ensure that the form is filled out accurately. She asks for only enough information to ascertain whether or not the defendant is presumptively eligible, then she passes each completed form to the arraigning attorney, who reviews it and informs the judge whether the defendant qualifies for

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<sup>1</sup> This is also considered the morning portion of the County's Centralized Arraignment Program, which means that people arrested throughout Onondaga County and detained prior to arraignment are arraigned in this session, not just individuals arrested in the City of Syracuse.

an assignment of counsel. The judge will assign an attorney to represent the defendants deemed eligible. The arraigning attorney then submits the completed application form to the ACP for its review.

Defendants who are arraigned in the **Centralized Arraignment Part** are all in custody. The ACP generally assigns two attorneys to cover arraignments in this Part. Starting at 4:00 p.m. each day, the attorneys meet with an ACP office clerk at the Public Safety Building next door to City Court. The clerk gives the attorneys i-Pads, which they bring to the jail to interview the defendants to be arraigned, and collect information to complete the application form. The defendants are then transported to the Public Safety Building, where the attorney represents them at arraignment. If the case is not disposed of at arraignment, the judge provisionally assigns an attorney. The arraignment attorneys then submit the completed application to the ACP electronically.

\* \* \* \* \*

Every provisionally assigned attorney is notified by the court, the ACP, or both, of the assignment. In City Court, following each arraignment session, the arraigning attorney returns the charging documents to the court clerk. The court clerk takes the documents to the City Court Clerk's office and places them in the assigned attorney's document bin. Upon receiving notification of the assignment, the attorney goes to Room 130 and retrieves the documents. In CAP, the charging documents are electronically transmitted to the ACP and the provisionally assigned attorney. In the Town and Village courts, the assigned attorney maintains the documents.

Upon receiving the application forms from the attorneys, the ACP staff immediately scan the forms, enter the scanned forms in an electronic folder, and enter the data from them into their computer management system. An ACP eligibility specialist then reviews every application to ascertain whether the applicant qualifies for assigned counsel, or whether additional information should be requested of the defendant before a final determination of eligibility is made. The ACP then either (i) informs the assigned attorney that the defendant is eligible for assigned counsel and that the attorney should continue on the case; (ii) sends the attorney a "pending" notice identifying missing information, thus making it incumbent upon the attorney to obtain and provide the missing information, most often, the charges or the defendant's name; or (iii) sends the attorney an "ineligible" notice stating that the defendant is not eligible for assigned counsel and the attorney must submit to the court a motion to withdraw as counsel. In the latter cases, the attorney must also provide an ineligible notice to the defendant as well as a written notice provided by the ACP (i.e., the "Notice of Right to Seek Review") of the right to request reconsideration or to appeal the denial, or do both. If the court denies the motion to withdraw, the attorney is ordered to continue to represent the defendant. If the motion is granted, the defendant is instructed to retain counsel.

## **B. The status of implementation of the Criteria and Procedures at the time of the 2017 Eligibility Report.**

Implementation of the Eligibility Standards in Onondaga County commenced in September 2016. For the County, implementation meant a significant shift in the processes that the ACP had long used in screening for eligibility, and the elimination of barriers to applying for counsel that those processes created. Under the direction of the new ACP Executive Director, Kathy Dougherty, by the time of the April 2017 Eligibility Report, the ACP had made the following notable changes:

- *Barriers to applying eliminated:* Applicants were no longer required to provide voluminous, unnecessary documentation -- such as paystubs, bank statements, tax returns, and financial information of third parties – to verify the financial information they provided. Nor were they required to affirm to the truthfulness of the information they gave, and be cautioned that the information would be investigated and that they could be prosecuted for any false information they provided – warnings which had dissuaded people from applying or completing the application process. Rather, as of April 2017, the ACP requested verification only when there was missing information, when there was reason to believe that the information defendants provided was inaccurate, or in close-calls.
- *Confidentiality of client information no longer waived:* Applicants were no longer required to waive the confidentiality of the information they provided, and authorize the release of information by various entities, such as banks, the Department of Social Services, and an employer, to the ACP, the Court, or the County.
- *Partial payment orders were no longer requested to be issued simultaneously with orders to continue as counsel:* Prior to implementation, a provisionally assigned attorney would be required to submit a motion to the court to withdraw as counsel whenever the ACP, after reviewing an assigned counsel application, deemed an applicant ineligible for counsel. The motion would be accompanied by a form entitled, “Order Upon Request to Withdraw as Assigned Counsel,” giving the judge the option to order the attorney to remain on the case and simultaneously to order that the defendant reimburse the County for the costs of his or her representation. By the time of the April 2017 report, that practice had been discontinued.
- *The number of ways applicants can be deemed presumptively eligible had been increased from one to four:* Prior to implementation of the Eligibility Standards, the ACP deemed applicants presumptively eligible only if they could provide a benefits card or some other proof of their receipt of public assistance benefits. By April 2017, applicants were presumed eligible under one of the four presumptions delineated in the Eligibility Standards.
- *Applicants were no longer denied merely because their income exceeded the Federal Poverty Guidelines (FPG):* By April 2017, the ACP was using as an income guideline 250% of the FPG, rather than the 125% it previously used, and no longer applied this

guideline as an eligibility cap. Thus, applicants were no longer being denied just because their income exceeded the income guideline. Additionally, in assessing whether an applicant's income fell within this guideline, the ACP now considered the applicant's net income (take home pay) rather than gross income.

- *Third-party income and resources were no longer included in the eligibility assessment:* Prior to implementation, the ACP had required applicants to list the resources of third parties, including parents, spouses, and household members, and to obtain financial information from these third parties. By April 2017, in assessing whether applicants had the resources to retain private counsel, the ACP no longer assumed that the resources of third-parties, such as a parent, spouse, or other household member, was available to the applicant to pay for private counsel.
- *An applicant's receipt of child support or need-based public assistance was no longer considered as income available to the applicant for an attorney:* The ACP no longer included, as available to the applicant, child support received and need-based public benefits, such as public assistance and SSI, in its assessment of whether an applicant had the financial ability to retain counsel, although the application asked whether the applicant was receiving public assistance for the purpose of determining presumptive eligibility.
- *Possession of non-liquid assets was no longer an automatic disqualification for assigned counsel eligibility:* The ACP no longer asked about an applicant's primary residence or possession of a vehicle that was being used for basic life necessities. ACP staff had reported that very few applicants had non-liquid assets, but that, in the few cases in which applicants had reported their possession of those assets, the ACP would consider the value and equity in those assets before deciding whether possession of them disqualified the applicant for assigned counsel.
- *An applicant's financial obligations were now made a part of the assessment process:* Recognizing that this was the only way to get a true assessment of applicants' disposable income and, thus, their ability to pay for counsel, by April 2017, the ACP considered a non-exclusive list of applicants' financial debts and liabilities, and not just payment of child and spousal support, as it did before.
- *The applicant's ability to pay cash bail was no longer a basis for disqualifying him from assigned counsel eligibility:* Previously, the ACP would disqualify applicants if they were released on cash bail. The assumption was that the cash spent on bail could instead be used as a retainer for a private attorney, even if the bail was paid by someone other than the defendant. By April 2017, this practice was discontinued.



### **C. Assessment of compliance with the Eligibility Criteria and Procedures since the 2017 Eligibility Report.**

By having substantially revised its practices to comply with the Eligibility Standards, the ACP effectively dismantled the barriers to applying for counsel that had resulted from its earlier processes. Applicants are no longer dissuaded by the process of having to submit voluminous and sometimes hard-to-obtain documentation, the process of waiving the confidentiality of their financial information, the threat of facing prosecution if they inadvertently included misinformation on their applications.

To assess the ACP's continued compliance with the Criteria and Procedures, ILS conducted court observations both in City Court and in several of the Town and Village Courts, obtained unsolicited feedback from panel members about the effects of the changes on their representation of clients, and conducted structured interviews of the ACP administration and staff. The following is a brief assessment of how each Criteria and Procedure has been implemented over the past year:

- *Criteria I (core eligibility standard):* The ACP continues to decide applications for assignment of counsel only after it has thoroughly assessed whether an applicant has the resources to retain counsel. Applicants are no longer automatically denied merely because their gross income exceeds the stated FPG multiple. And, in the event of a close call, the screening staff continues to consult with Ms. Dougherty.
- *Criteria II (eligibility presumptions):* The ACP uses the four delineated presumptions of eligibility, applying the income guideline to the defendant's net, rather than gross, income that is at 250% of the FPG. Staff estimates that 90% of the applications are decided based on at least one of the four presumptions. If the applicant is not presumptively eligible, staff will request and assess information regarding the applicant's assets and liabilities.
- *Criteria III (ability to post bond or pay bail):* The ACP does not deny eligibility just because someone has posted bond or paid cash bail, or has the ability to do so. Thus, defendants are not faced with the choice of paying for bail or paying for their defense. However, the ACP asks about a defendant's release status as a key piece of data to maintain for a variety of reasons unrelated to assigned counsel eligibility.
- *Criteria IV (third-party resources):* The ACP understands that third parties may pay for counsel if that party is willing to pay, the applicant consents to this arrangement, and the arrangement does not interfere with or jeopardize the confidentiality of the attorney-client relationship. In such situations, people do not apply for counsel and instead inform the ACP that they plan to retain counsel. Accordingly, the ACP does not require applicants to list third-party resources, including those of parents, spouses and other household members. Moreover, applicants are not required to submit financial information from third parties who have no intent of paying the costs of private counsel.

- *Criteria V (non-liquid assets)*: The ACP no longer automatically denies assigned counsel eligibility to applicants who own a vehicle or a home. Rather, the ACP’s assigned counsel application asks applicants to identify real estate that they own (including the value and amount owed), and to list liquid assets (such as bank accounts and 401(k) accounts). It also provides a space for applicants to list “other assets,” and the value of such assets.
- *Criteria VI (child support and public assistance)*: The application does not require defendants to list child support received, since this is not income available to the defendant. However, the application lists child support paid, which the ACP treats as a financial liability of the defendant. Similarly, the application asks whether the applicant receives need-based public assistance, but only for the purpose of deciding presumptive eligibility, and not to consider it as income available to the applicant to retain an attorney.
- *Criteria VII (financial obligations)*: The application contains a list of financial obligations which the ACP considers, and the application prompts the applicant to identify other possible expenses. If an applicant lists an expense which, to the screener, appears questionable, the screener will confer with Ms. Dougherty.
- *Criteria VIII (cost of retaining counsel)*: The application prompts the decision maker to assess the costs of a defense where the applicant is not presumptively eligible. Ms. Dougherty recently informed us that the ACP makes this assessment whenever the applicant’s income exceeds his or her liabilities. The matter is referred to her, and she makes a decision based upon her own personal knowledge, and the personal knowledge of Dave Savlov and Laura Fiorenza, as to the costs of retaining an attorney locally.
- *Procedure X (responsibility for screening)*: In April 2017, we reported that prior to implementation of the Eligibility Standards, judges had been actively overruling the ACP’s ineligibility determinations and issuing “judge ordered” assignments, i.e., orders denying a provisionally assigned attorney’s motion to withdraw and ordering the attorney to continue representing the defendant. Since implementation, the number of “judge ordered” assignments has significantly decreased because the ACP is now deeming most applicants to be eligible for assigned counsel. There are still some “judge ordered” assignments, but, many occur because the provisionally assigned attorneys skip the steps of completing and submitting the application form to the ACP for its review, and instead ask the judge to assign them to the case directly.
- *Procedure XI (confidentiality)*: The ACP has implemented policies and procedures to protect the confidentiality of the applicants’ financial information. Immediately upon receiving an application form, a staff member scans the document and saves it in an electronic file. The application (and electronic file) is shared only with ACP staff and the assigned attorney. Additionally, the ACP does not require that applicants waive the confidentiality of the information they provide. Upon deeming an applicant ineligible, the screener concisely states on the “ineligibility” notice the reasons for the ineligibility recommendation, without including unnecessary details of the applicant’s finances, mindful that the notice may be sent to the judge with the motion to withdraw and become

public record. Finally, as for information being solicited in open court, ACP staff members report that judges no longer ask defendants detailed questions about their financial circumstances in open court. Rather, and as corroborated by ILS' court observations over the past year, judges generally limit their inquiry to whether the defendant is employed and whether he or she wishes to apply for assigned counsel.

- *Procedure XII (timeliness of decision)*: Prior to implementation, it would generally take more than 2 weeks for the ACP to process applications, particularly if there was missing information. Now eligibility determinations are made within 3 days of the ACP's receipt of the application. Also, office staff refer to Ms. Dougherty (or in her absence, Ms. Fiorenza or Mr. Savlov) any calls they receive from individuals seeking assignment of counsel prior to court involvement (i.e., when a person is being investigated by law enforcement). In those cases, where appropriate, Ms. Dougherty assigns counsel provisionally, then conducts the eligibility screening afterwards. According to Ms. Dougherty, the ACP received a handful of such calls in 2017. In one instance, an ACP attorney received a call from the mother of a young man who was being interrogated by the police for an alleged sex offense. The ACP attorney responded immediately, contacting the police to assert the right to counsel. Immediately after, she notified the ACP of what had occurred, and was assigned to the case after the ACP obtained the information needed to determine that the young man was eligible for assignment of counsel. Ms. Dougherty will soon be instituting a process to ensure that eligibility screening is conducted for individuals who call the ACP and state that they have been issued an appearance ticket and cannot afford to retain counsel. In the interim, office staff, upon receiving those calls, inform callers to appear in court where an attorney will represent them.
- *Procedure XIII (burden of application process)*: In the April 2017 report we wrote, "The ACP has made great strides in ensuring that the assigned counsel application process is not unduly burdensome. Applicants are no longer told that the information they provide will be investigated and that they can be prosecuted for providing inaccurate information, they no longer are asked to waive the confidentiality of the information they provide, and they no longer are required to provide unnecessary documentation. The ACP does occasionally ask for verification, most often when there is missing information or reason to believe that the applicant may have more financial resources than reported on the application." These practices continue today and have had a noticeable impact on the panel attorneys' representation of their clients. During a conversation with an ILS staff attorney, one ACP panel attorney remarked that implementation of the Eligibility Standards has made a positive difference because he no longer must spend an inordinate amount of time "chasing the clients' documentation." He added: "Now, you can cut straight to the representation and get rid of administrative burden."
- *Procedure XIV (written notice of ineligibility decision)*: Upon deeming a defendant ineligible for assigned counsel, the ACP sends to the provisionally assigned attorney an "Ineligibility" notice, stating the reasons for the decision. The notice instructs the attorney to provide the defendant a copy of the Ineligibility notice and a copy of the

written “Notice of Right to Seek Review”, which informs the defendant of the right to request reconsideration or appeal to the judge, or do both, and describes the steps for doing so. Attorneys are also instructed to discuss these notices with the defendant.

An ACP staff member recently informed us that, although he cannot know for sure that the attorneys are giving these notices to defendants, there is an increase in the number of defendants who ask the ACP to reconsider ineligibility decisions. The staff member said that, given this, he thinks that most attorneys are providing such notices. “Everyone is communicating better now,” he remarked.

- *Procedure XV (reconsiderations)*: Prior to implementation, the ACP’s form Order to Withdraw contained language that encouraged judges to order partial payment toward the cost of representation at the time of assigning counsel. With ILS’ assistance, the ACP revised its form to remove that option so that judges are no longer prompted to do so. In a January 30, 2018 email transmittal to ILS, a staff member noted: “We have not been encouraging orders for partial or full repayment for assigned counsel services the way [we] formerly [did] by including that as a specified option for the judge to select on the back of our Order to Withdraw or Continue forms.”

Procedure XVI requires the collection, maintenance, and reporting of data pertaining to the assigned counsel eligibility process. On January 30, 2018, the ACP sent ILS a report containing assigned counsel eligibility data for January 1, 2017 – December 31, 2017. The report revealed that a total of 16,871 defendants applied for assigned counsel, 237 applications of which are “pending” while the ACP obtains additional information. This means 16,634 applications were processed in calendar year 2017. Of these:

- 15,399 applicants were deemed eligible by the ACP.
- 1,168 applicants were deemed eligible by a judge. Unfortunately, the ACP cannot discern between the judge-ordered eligibilities that resulted because the attorney bypassed the application process and went directly to the judge, or the ones that resulted because the ACP found the defendant ineligible, and the defendant appealed to the judge and was found eligible.
- 67 applicants were deemed ineligible.

This data, when compared to the data reported in the April 2017 report, clearly shows that the ACP continues to make fewer ineligibility recommendations and that judge involvement is required far less often. As we reported in 2017, immediately prior to implementation, the ACP’s ineligibility rate was 39.9%, but judges reversed most of these ineligibility determinations (i.e., “judge-ordered” eligibilities). As noted in the last report, for the last quarter of 2016, this rate dropped to 15.1% in November 2016 and 17% in December 2016. Currently, because we do not know how many of the 1,168 “judge-ordered” eligibilities occurred because the ACP deemed a defendant ineligible and the defendant successfully appealed to the judge versus those that reflect the provisionally assigned attorney skipping the ACP application process and instead asking the judge to assign counsel, it is not possible to discern precisely how often the ACP deems defendant’s ineligible for assigned counsel. However, if we assume that all the “judge-ordered” eligibilities arose from the ACP originally deeming defendants ineligible for assigned counsel,

the ACP's rate of ineligibility for calendar year 2017 is 7.42%. This is less than half of what it was in November and December 2016.

#### **D. Barriers to full implementation and ongoing challenges**

Onondaga County has continued to make great strides in dismantling the barriers to applying for assigned counsel which existed prior to implementation, and ensuring that defendants who need counsel are assigned counsel. One challenge the ACP currently faces is its inability to ensure that defendants whom the ACP deem ineligible for counsel are, in fact, given the written notice of their right to request reconsideration or appeal. Currently, the ACP relies on the provisionally assigned attorney to provide these notices, which is appropriate since the attorney has a relationship with the defendant. At a recent meeting with ILS representatives, when asked whether the attorneys are providing this notice to their clients, the ACP staff member said he could not tell if they were. As previously stated, he believes most attorneys are because of the increase in applicants seeking reconsideration, but he suspects that some attorneys occasionally fail to provide these notices. The ACP Executive Director, Ms. Dougherty, said that she will increase the frequency with which she reminds ACP attorneys of this requirement to better ensure that these notices are distributed.

As indicated above, the ACP also needs to improve its capacity to collect and maintain data on the number of applicants it deems ineligible for assigned counsel, and of these, the number who ask the ACP to reconsider and the number who appeal to the judge. The ACP is working to improve its data collection and maintenance capacity and has contracted with a new case management/voucher processing provider, which is currently in the process of creating a new database for the ACP and migrating the old data. Additionally, over the past year, with the assistance of some caseload relief funding, the ACP has increased its clerical support staff, thereby increasing its ability to collect and maintain the required data. Once the new case management/voucher processing system is in place, ILS will work with the ACP to improve its capacity to collect and maintain complete data regarding the assigned counsel eligibility process.

### Ontario County

Ever since its creation in 2010, the Ontario County Public Defender Office, currently headed by Leanne Lapp<sup>2</sup>, has assumed the responsibility of screening for and making recommendations of assigned counsel eligibility in criminal cases in Ontario County Court, Geneva and Canandaigua City Courts, and the County's 17 Town and Village courts. Prior to 2010, that function was performed by the County's Assigned Counsel Program ("ACP").

#### **A. Current process for deciding assigned counsel eligibility in Ontario County**

As set forth in ILS' 2017 report about the progress of Settlement implementation,<sup>3</sup> the Ontario County Public Defender Office has programs in place to represent all defendants at arraignment. Time permitting, defense counsel appearing at arraignments screen defendants for assigned

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<sup>2</sup> Ms. Lapp assumed her role as Public Defender in 2012.

<sup>3</sup> See *Implementing the Hurrell-Harring v. The State of New York Settlement: 2017 Update*.

counsel eligibility and notify the judge if they deem a defendant eligible, thereby enabling the judge to assign counsel at that point. If they are unable to do so, counsel instructs the defendants to contact the Public Defender Office so they can be interviewed and screened, either by phone or in person, for assigned counsel eligibility. Defendants who are already being represented by the Public Defender Office on another case unrelated to the charge for which they are being arraigned are automatically assigned counsel on the new case.

To ascertain whether there were any missed arraignments, and to identify those defendants who are detained but were not represented at arraignment, staff from the Public Defender Office check the jail logs 6 days weekly, and, if there are any such defendants, staff visit with, and interview them that day. Ms. Lapp recently described this process as an effective safety net. The interview conducted by staff is designed not only to determine eligibility for assigned counsel, but also to ascertain if there is a need to immediately calendar the case, for example, to argue that the defendant should be released. And, in the rare instances in which defendants are arraigned without counsel and not detained, judges will typically inform the defendants to contact the Public Defender Office to apply for assigned counsel.

During a meeting with ILS in 2016, Ms. Lapp explained that the office uses the application for assignment of counsel to collect the defendants' financial information, not only to determine eligibility for assigned counsel, but also for bail arguments and plea negotiations. She added that the form, which she considers to be an intake form, is also used to elicit as much information as possible about the defendants, including their criminal history, medical and mental health history, place of birth, and family. As such, the intake form is considered a privileged document with confidential client information, and therefore should not be disclosed to any entity outside the Public Defender Office, including the courts.

Office staff make decisions regarding eligibility soon after receiving the applications, most often on the day of receipt, unless the application raises issues requiring consultation with Ms. Lapp. If staff determine that an applicant is ineligible for assigned counsel, or if there is a close call, Ms. Lapp will review for further assessment of whether the applicant can, in fact, afford to pay for counsel. If deemed ineligible, those applicants are immediately sent written notification of the ineligibility determination and of their right to ask the provider to reconsider, appeal to the judge, or do both. In 2017, three applicants who were deemed ineligible requested reconsideration. In all three cases, Ms. Lapp reversed the ineligibility decision and assigned counsel.

#### **B. The status of implementation of the Criteria and Procedures at the time of the 2017 Eligibility Report.**

For the most part, even prior to implementation of the ILS Criteria and Procedures, Ms. Lapp and her office staff were already using criteria and procedures that were consistent with the Eligibility Standards. To prepare for implementation, she had made some necessary changes, including modifying the intake form to bring it into compliance with the Eligibility Standards. By the time of the April 2017 Report, the following criteria and procedures were being implemented by her office:

- *Truth affirmations or attestations were not requested:* As it was even prior to implementation, the intake form did not require applicants to sign, swear or affirm to the truthfulness of the information they provided.
- *Verifying documentation were being requested only under specified circumstances:* The Public Defender Office traditionally requested verifying documentation only when necessary, and not in every case. As we reported in April 2017, the office required verification when 1) the defendant's financial liabilities exceeded the income reported; 2) the defendant's reported income seemed sufficient to retain a lawyer, but the defendant reported excessive debts and financial liabilities; and 3) the defendant was self-employed and his or her net income was not easily discernible.
- *Partial payment orders under County Law § 722-d were no longer recommended:* The Public Defender Office no longer recommended that a judge order partial payment of representation at the time of assigning counsel.
- *Third-party income was no longer considered:* Although the intake form asked for parental income, the office no longer considered spousal or parental income in its eligibility assessments, unless the spouse or parent expressed a willingness to pay, the defendant consented to the payment arrangement, and the arrangement did not jeopardize the attorney-client relationship.
- *The number of eligibility presumptions used were increased from two to four:* In April 2017, the Public Defender Office no longer decided presumptive eligibility based on whether an applicant met a graduated set of income guidelines, but, consistent with the ILS Eligibility Standards, found applicants presumptively eligible based on all four categories delineated in the Eligibility Standards, including whether the applicant's net, rather than gross, income is at or below 250% of the Federal Poverty Guidelines.
- *Applicants' ability to post bond or pay cash bail not considered:* As it did even prior to implementation of the Eligibility Standards, the Public Defender Office did not deny assignment of counsel just because a defendant pays bail or posts bond.
- *Possession of non-liquid assets were considered, but not as a basis for automatically denying eligibility:* The Public Defender Office did not automatically deny eligibility based on an applicant's possession of non-liquid assets, but, as noted in the 2017 Report, viewed these assets in the context of the defendant's total financial circumstances. For example, a car that a defendant used for basic life necessities might be considered a financial liability because of all the expenses associated in operating it. Additionally, and in accordance with the Eligibility Standards, the office considered real estate owned by the applicant, but only after assessing its fair market value and equity.
- *An applicant's receipt of need-based benefits, unemployment benefits and child support were no longer considered as income in assessing eligibility:* Although the Public Defender's intake form elicited information on whether an applicant received unemployment, food stamps and SSI, staff no longer considered these receipts in its

assessment of whether the applicant could afford to retain counsel. Nor did the office any longer consider the receipts of child support as income available to the applicant, and the intake form did not request that information.

- *The Public Defender Office considered a non-exhaustive list of financial liabilities in its assessment:* As we noted in April 2017, the Public Defender Office had traditionally considered an array of financial liabilities, including housing, utilities, transportation costs, child care and child support obligations, student loans, and other debts. The intake form also asked the applicant to list any other hardship factors that should be considered.
- *Applicants deemed ineligible were provided written notification of ineligibility determinations and reconsiderations:* By April 2017, the Public Defender office was sending written notification to applicants deemed ineligible for assigned counsel of the ineligibility determination, as it did before, and of the applicant's right to request reconsideration, or appeal, or do both.
- *The intake form prompted the screener to consider the cost of retaining a private attorney:* Unlike the intake form that existed prior to implementation, by April 2017, the revised intake form included a section that prompted the screener to consider the cost of retaining a private attorney in the same jurisdiction for the category of crime with which the defendant is charged.

### **C. Assessment of compliance with the Eligibility Criteria and Procedures since the 2017 Eligibility Report.**

The following is ILS' assessment of Ontario's compliance with the Eligibility Standards. We base this assessment on discussions we held with Ms. Lapp and Leah Morrow, a paralegal with the Public Defender Office; our review of the quarterly eligibility data reports which Ms. Morrow sent to us; and the several court observations ILS attorneys conducted throughout the County in 2017:

- *Criteria I (core eligibility standard):* The Public Defender Office continues to make eligibility determinations only after a complete assessment of the applicant's income, assets, and liabilities, thereby ensuring that defendants who cannot afford to pay for counsel are assigned counsel. And, in close calls and before any determination of ineligibility is made, Ms. Lapp reviews those applications to further assess whether the applicant lacks the ability to pay for counsel.
- *Criteria II (eligibility presumptions):* As it did at the time of the 2017 Report, the Public Defender Office uses all four eligibility presumptions, and applies the income guideline to defendants' net (rather than gross) income that is at or below 250% of the Federal Poverty Guidelines. Ms. Lapp estimates that in 2017, most eligibility decisions were based on one of the presumptions, primarily on the income guideline.
- *Criteria III (ability to post bond or pay bail):* A defendant's ability to pay bail or post bond has never been used as a reason to deny assignment of counsel.



- *Criteria IV (third-party resources)*: Although the intake form elicits information about parental income, the Public Defender Office does not consider the financial income of parents, spouses, or other third parties in its eligibility assessments, unless there is a third party willing to pay for counsel, the defendant consents to the arrangement, and the arrangement does not jeopardize the attorney-client relationship.
- *Criteria V (non-liquid assets)*: As before, the Public Defender Office does not automatically deny applicants based solely on their possession of non-liquid assets. Rather, the staff considers, as in the case of real estate owned by the defendant, whether the asset has significant value and substantial equity against which a loan can be secured to retain an attorney.
- *Criteria VI (child support and public assistance)*: The intake form elicits information about need-based public benefits, such as welfare and SSI, but only for the purpose of determining presumptive eligibility, and not as income available to the applicant.
- *Criteria VII (financial obligations)*: The Public Defender Office’s intake form contains a non-exclusive list of debts and obligations that are considered, including “[a]ny other hardship factors that should be considered.” Ms. Lapp explained that she considers as a hardship such factors as the costs to the applicant of providing care for a poor or ill relative, that the applicant is collecting Workers Compensation benefits due to a work injury, or that the applicant is receiving chemotherapy because of a cancer diagnosis.
- *Criteria VIII (cost of retaining counsel)*: Prior to implementation, the intake form did not include a section to report the actual cost of retaining an attorney. Nonetheless, the Public Defender Office did consider this factor in assessing whether a defendant had the financial resources to retain a private attorney. At the time of the 2017 Report, the revised intake form contained such a section, thereby prompting the screener to consider the cost of retainers for the category of crime for which the defendant is charged. Ms. Lapp recently informed ILS that, in assessing the actual cost of retainers, she relies on information she receives from those applicants who have sought to elicit quotes from private attorneys.
- *Procedure X (responsibility for screening)*: Ms. Lapp reports that courts accept the recommendations of her office regarding assigned counsel eligibility, and she could not recall any instances during the past year when a judge has disagreed with their recommendation.

*Procedure XI (confidentiality)*: We noted in the 2017 report that, because courts delegate the assigned counsel screening function to the Public Defender Office, defendants are not asked to disclose their financial information in open court and on the record. Ms. Lapp recently told ILS that judges may sometimes ask defendants if they have a job and how long they have been working, but not to determine eligibility; rather, for the purpose of determining bail. As for steps taken to guard the confidentiality of information it receives during the intake interview, the Public Defender Office treats this information as privileged and confidential. However, when the interview is done at arraignment, it is

not always possible to do so in a confidential setting, either because one is not available or because law enforcement officers will not leave the defendant alone with the attorney. Public Defender Office staff take steps to protect the clients' confidentiality under those circumstances by, for example, limiting the interview to ensure that there is no discussion about the defendants' financial circumstances or the substance of the charges. Further, to ensure that the confidentiality of defendants is maintained, even after deeming them ineligible for counsel, the Office provides written notification to those defendants, warning them that, if they appeal to the judge, the judge may want to see their financial paperwork, which, once received, may become public record.

- *Procedure XII (timeliness of decision):* The Public Defender Office makes eligibility decisions as soon as possible after receiving the applications, most often within 24 hours of receiving them. Additionally, when applicants call the Office and request counsel after learning that they are being investigated by law enforcement, even though no charges have yet been filed, or, after receiving an appearance ticket, the Public Defender immediately screens those applicants for eligibility and provisionally assigns an attorney until the court can act. Ms. Lapp notes that, because of her office's involvement in cases at the investigatory stage, these persons did not make inculpatory statements. She recalled one case, for example, in which her office conducted its own investigation while the witnesses were still available, and information and memories were fresh.

*Procedure XIII (burden of application process):* The Public Defender Office requires verifying documentation, but, as noted previously, it does so only when necessary, such as, when the income applicants report do not cover the debt payments they reveal, or when applicants are self-employed and their net income cannot be easily discerned.

- *Procedure XIV (written notice of ineligibility decision):* No determination of ineligibility is made until Ms. Lapp has personally reviewed the application and confirmed that the applicant does, in fact, lack the ability to pay for private counsel. Once made, the Public Defender Office sends to applicants it deems ineligible written notification of the ineligibility determination and of their right to seek reconsideration by the office, appeal to the judge, or both.
- *Procedure XV (orders for partial payment):* The Public Defender Office no longer recommends to courts that counsel be assigned contingent upon a County Law § 722-d order authorizing defendants to make partial payments for the costs of their representation.

In compliance with the data collection requirements set forth in Procedure XVI of the Criteria and Procedures, the Public Defender Office was diligent in sending us timely reports for the four quarters of 2017. Our review of the data revealed that, in calendar year 2017:

- The office received 2,878 applications for assigned counsel.
- Of those, 2,818 were deemed eligible for counsel.
- 60 applicants were found to be ineligible.
- 3 applicants requested reconsideration and were ultimately deemed eligible.

Ms. Lapp explained that the 60 applicants reported as “ineligible” represent only applicants who were denied for financial reasons. Occasionally, an applicant is denied counsel because the applicant is not statutorily eligible for assignment of counsel, such as where the applicant is charged for a speeding violation, or, as has happened, the Public Defender discovers that the charges were lodged in a different jurisdiction. These numbers are not included in the count the Office reported to ILS. Also, according to the Public Defender Office’s data, there were no requests for appeals or for County Law § 722-d orders.

#### **D. Barriers to implementation and ongoing challenges**

There currently are no identifiable barriers to implementation.

#### Schuyler County

Until 2016, the Schuyler County Public Defender Office, headed by Wesley A. Roe, conducted all the financial screening for assigned counsel eligibility in criminal cases in the County Court and the 11 Town and Village Courts (“justice courts”). As we reported in the April 2017 Eligibility Report, as part of its initiative to improve the quality of public criminal defense, in April 2016, the County terminated its Conflict Defender contract and, through an Inter-Municipality Cooperative Agreement (“IMA”) with Tompkins County, contracted for a regional Assigned Counsel Program (“ACP”) to be administered by the Tompkins County Assigned Counsel Program. The regional ACP handles only those cases in which the Public Defender Office is conflicted or otherwise disqualified from representing a defendant, and pursuant to the terms of the cooperative agreement, it screens for assigned counsel eligibility in known conflict cases. The Public Defender Office screens for eligibility in non-conflict cases.

##### **A. Current process for deciding assigned counsel eligibility**

###### *i) The Schuyler County Public Defender Office*

To ensure the rights of defendants to assigned counsel, Mr. Roe has instituted several avenues by which a defendant in need of assigned counsel can apply. In consultation with ILS, in early 2016, soon after the release of the Eligibility Standards, Mr. Roe revised the Schuyler County assigned counsel application to bring it into compliance with the Eligibility Standards. He immediately distributed copies of the application to the County Court judge and all the Town and Village Court justices. In a telephone conversation with ILS on July 19, 2016, Mr. Roe reported that judges were distributing the applications to people who wanted assigned counsel and were directing them to the Public Defender Office, and that these persons were, in fact, filling out the new applications and returning them to the office. Mr. Roe has also distributed the applications to the Schuyler County Sheriff, and jail staff make them available to pre-trial detainees who are presumptively eligible for assigned counsel.

With the advent of the Counsel at Arraignment program in Schuyler County, staff attorneys from the Public Defender Office now bring the assigned counsel applications to arraignments. Either

the judge or the defense attorney will inform defendants of their right to have counsel assigned if they cannot afford to retain one. Time permitting, the attorney will assist each defendant in filling out the application, which the attorney then brings back to the office for processing. “It is always better when we assist them with the application,” Mr. Roe recently told ILS. If time does not allow, the attorney will tell the defendant how to complete and submit the application. The Public Defender attorneys will continue to represent these defendants provisionally until an eligibility determination is made. Defendants in custody are presumed eligible for counsel, but the Public Defender Office will have them fill out the application so that the Office can collect from them relevant information and data.<sup>4</sup> The Public Defender has contracted with the Tompkins County Office of Opportunities, Alternatives and Resources (O.A.R.), to have, among other things, an O.A.R. staffer meet with defendants at the jail and assist them in filling out the assigned counsel application. If there is a defendant who was not represented at arraignment, the O.A.R. staffer will meet with that person immediately and assist the person in completing the assigned counsel application.

Additionally, some defendants with appearance tickets who have not yet had their first court appearance, will come to the Public Defender Office and apply. Office staff provide an application to everyone who asks for it, though some individuals change their minds about applying. A staff member will also assist any defendant who requests assistance with the form. If no staff member is in the office when defendants come to the office, defendants can find copies of the application on the bulletin board outside the office. The application form can also be located on the Public Defender’s website. Completed applications can then be faxed, emailed, or personally delivered to the office. Once received, staff review them and determine eligibility within three days, sometimes sooner, depending on the day of the week that the office receives the application.

The Public Defender Office did not deem any applicant ineligible for assigned counsel in 2017. Nonetheless, the office has a notification process in place in the event an application should be denied. In 2016, Mr. Roe had modified for his Office’s use the ILS Sample Notice of Eligibility Recommendation and Notice of Right to Seek Review. The forms are to be used for applicants who are deemed ineligible so they are informed, in writing, of the reasons for the denial and the right to seek review.

ii) *The Tompkins/Schuyler Regional ACP*

Pursuant to the Inter-Municipality Cooperative Agreement mentioned above, once the Schuyler County Public Defender determines that his office is conflicted on a case, he immediately refers the case to the Tompkins/Schuyler Regional ACP, which then becomes responsible for screening and making a recommendation on assigned counsel eligibility. Under the IMA, the ACP uses the same assigned counsel application as is used by the Schuyler Public Defender Office, and conducts its screening in accordance with the ILS Eligibility Standards.

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<sup>4</sup> The assigned counsel application is used not just for eligibility purposes, but also to collect relevant personal information from defendants. Thus, it is important that defendants deemed presumptively eligible complete it.

**B. The status of implementation of the Criteria and Procedures at the time of the 2017 Eligibility report**

The Public Defender Office began implementation of the Eligibility Criteria and Procedures in July 2016, and by the October 3, 2016 implementation deadline, was in full compliance with those Standards. At the time of the 2017 report, ILS noted the following:

- *Existing barriers to implementation had been eliminated:* Prior to implementation, the Public Defender's assigned counsel application required applicants to affirm that the information they provided was true and accurate. With its use of the revised application form, the Public Defender Office no longer required that applicants attest to the truthfulness of the information they provided. Nor does it any longer ask for the name and address of the applicant's bank, thereby eliminating any fear that the provided information will be investigated.
- *Applicants deemed ineligible were now advised that they could seek reconsideration of the denial, appeal to the judge, or do both:* Prior to implementation, applicants whom the Public Defender deemed ineligible for assigned counsel were notified of their appeal rights in writing. However, they were advised only that they could appeal the denial to the judge. Mr. Roe subsequently adopted the ILS Sample Notice of Right to Seek Review, so now applicants were told that they could request that the Public Defender reconsider the ineligibility decision, they could appeal the decision to the court, or they could do both.
- *Presumptive eligibility was now based on all four delineated factors in the Eligibility Standards:* By April 2017, the Public Defender Office no longer presumed an applicant's eligibility based only on one of two factors, namely, income at or below 125% of the FPG, and students or applicants 18 years or younger. Instead, applicants were now presumed eligible based on any one of the four factors set forth in the Criteria and Procedures. Additionally, the Public Defender and the ACP now considered applicants' net, rather than gross, income in assessing whether their income was within the income guidelines.
- *Spousal income was no longer considered as available to an applicant for an assignment of counsel:* The Public Defender Office previously considered, in its assessment of an applicant's eligibility for counsel, the financial resources of an applicant's spouse, unless the spouse was the complaining witness. The application no longer asked about spousal income although the Public Defender Office knows that it may be considered if the spouse is willing and able to pay and the applicant agrees to the payment arrangement.
- *Child support, unemployment benefits and SSI were no longer considered as income in the eligibility assessment:* Although the Public Defender Office did not consider an applicant's receipt of public assistance as income available to retain an attorney, the Office considered as income other need-based assets, such as SSI, as well as unemployment benefits and child support received. The revised application still asks about these receipts, but only for the purpose of determining presumptive eligibility.

- *An applicant's ability to post bond or pay bail has never been considered in assessing eligibility:* Historically, the Public Defender Office, under Mr. Roe's leadership, has never considered applicants' ability to post bond or pay bail as a factor in determining whether they are eligible for assigned counsel. The revised application asks whether bail had been set, and in what amount, but only for reasons unrelated to assigned counsel eligibility.
- *An applicant's debts and financial obligation were now a part of the eligibility assessment:* In assessing whether defendants had the disposable resources to retain private counsel, the Public Defender Office considered only their income and assets, but not their debts and financial obligations. By April 2017, the revised application contained a non-exhaustive list of debts and financial obligations that were considered.
- *Non-liquid assets were generally not considered in the assessment of eligibility:* Although applications were not automatically denied just because an applicant owned a house or a vehicle, the former application asked applicants if they owned a home or a vehicle, and asked them to list other non-liquid assets, such as motorcycles and snowmobiles. The revised application asks about the applicant's ownership of all real estate, and all vehicles that are not being used for basic life necessities, and, in each case, it solicits sufficient information to allow an assessment of whether there is significant equity in the asset.

**C. Assessment of compliance with the Eligibility Criteria and Procedures since the 2017 Eligibility Report**

As we did in preparing the April 2017 Eligibility Report, to assess Schuyler County's continued compliance with the Criteria and Procedures, ILS engaged in periodic conversations with the Public Defender and his office staff person, observed several court proceedings throughout the county, and reviewed the data they sent to us. The following is our assessment:

- *Criteria I (core eligibility standard):* Except for making a minor subsequent modification to the revised application that allows it to track missed arraignments, the Public Defender Office continues to use the revised form which ensures that the office staff consider applicants' debts and financial liabilities, in addition to their income and assets, in deciding whether they can afford to retain private counsel. The ACP also continues to use this form. Both report that implementation has gone smoothly with this revised application and the relevant notification forms.
- *Criteria II (eligibility presumptions):* The revised application incorporates the Eligibility Standard's four eligibility presumptions on the first page. Once the screener identifies that a presumption is met, she asks the applicant to sign and date the form, and ends the screening. Mr. Roe estimates that probably 85% of the applications received are decided based on one of the presumptions. In Tompkins, the ACP estimated that the rate is about 95%.

- *Criteria III (ability to post bond or pay bail):* The Public Defender Office and the ACP do not deny assigned counsel eligibility just because a defendant can pay cash bail or post bond.
- *Criteria IV (third-party resources):* The Public Defender Office and the ACP do not consider spousal income or any third-party resources in its assessment of eligibility, unless a third party states a present intention to pay for counsel, the defendant gives informed consent to that arrangement, and the arrangement does not threaten to jeopardize the confidentiality of the attorney-client relationship.
- *Criteria V (non-liquid assets):* The assigned counsel application asks only about vehicles that are not being used for basic life necessities and any real estate owned. With regard to both, the application also asks for information about the equity of such assets. Regarding the defendants' ownership of these assets, Mr. Roe recently told ILS that if a defendant only has one vehicle, it is obvious that it is needed for basic life necessities, and therefore it is not considered in the eligibility assessment. He also noted that his office has not had any applicants with enough equity in their home to retain private counsel. The ACP follows the same criteria when considering vehicles and home ownership. Regarding other non-liquid assets, the ACP recalled two cases over the past year in which it considered the defendants' possession of a business. In both cases, the ACP inquired further and discovered that neither business was sufficiently lucrative to allow the defendant to retain counsel. It approved both applicants for assigned counsel.
- *Criteria VI (child support and public assistance):* The assigned counsel application does not require defendants to list child support received, and the Public Defender Office and the ACP do not consider this as income available to the defendant. According to Mr. Roe, the amount of child support that Schuyler County residents receive is so small that it would hardly make a difference in the eligibility assessment. The application asks about need-based public assistance, but only for the purpose of deciding presumptive eligibility.
- *Criteria VII (financial obligations):* The Public Defender and the ACP consider an applicant's financial obligations, such as food, housing, utilities, transportation, child care, medical expenses, child support and alimony payments, thereby allowing a more complete and accurate assessment of whether the applicant can, in fact, pay for counsel.
- *Criteria VIII (cost of retaining counsel):* The application prompts the decision-maker to assess the costs of a defense, and the Public Defender Office and the ACP do so informally, based on their knowledge of local practice.
- *Procedure X (delegation of screening responsibility):* Although they have the ultimate authority to decide assigned counsel eligibility, according to Mr. Roe, Schuyler County judges and magistrates have consistently followed the recommendations of his office and have not intervened into the Public Defender's eligibility determination process. The ACP similarly reports that the courts have not rejected their recommendations of eligibility.

- *Procedure XI (confidentiality)*: As was stated in April 2017, because courts delegate the assigned counsel screening function to the providers of mandated representation, defendants are not required to disclose their financial information in open court and on the record. Both the Public Defender Office and the ACP take steps to ensure that the assigned counsel application forms remain confidential. If a judge requests to see an application, the attorney will hand it up to the judge to review, and then take it back so that it is not filed with the court and therefore does not become part of the public court file. As with many jurisdictions, not all courts have confidential meeting spaces for attorneys and their clients. At times, Public Defender staff must find a quiet location to have a confidential conversation, and may, for example, step outside the courthouse building to do so. If a confidential conversation is not possible, staff will give defendants a copy of the application and tell them they can complete it there or take it with them to complete and send to the Public Defender Office.
  
- *Procedure XII (timeliness of decision)*: Both the Public Defender Office and the ACP decide eligibility applications promptly, usually within 3 days of receiving them, if not sooner. The ACP reports that, if upon receiving an application, it is noted that the applicant is due in court the following day, the ACP will decide the application immediately. Regarding applicants who contact the Public Defender Office because they believe they are being investigated, or are otherwise facing a possible criminal prosecution, Mr. Roe talks to such individuals, and where appropriate, provisionally assigns counsel pending an eligibility screening. He reports that his office received three or four such calls in 2017; in each case, the defendant was ultimately deemed eligible for assigned counsel. Most memorable was an individual who was being investigated for welfare fraud. “Because we jumped in when we did, the client did not make an incriminating statement and we were able to get the charge reduced from a felony to a violation,” he recalled.
  
- *Procedure XIII (burden of application process)*: Under Mr. Roe’s leadership, the assigned counsel application process has never been burdensome. The one objectionable requirement that applicants affirm to the truthfulness of the information they provide has been eliminated. As for verifying documentation, Mr. Roe recently told ILS that, since implementation began, his office has not had reason to ask for documentation. He added that if the office were to request documentation that the applicant could not produce, the office would not deny eligibility, but would work with the applicant to ensure that the eligibility decision is based on complete information.

The ACP will ask for paystubs or bank statements where there is incomplete information, where more information is needed, or where the defendant is a small business owner (which, as stated above, occurred twice over the past year). According to the ACP, this was necessary only in a few instances.

- *Procedure XIV (written notice of ineligibility decision)*: Although neither the Public Defender Office (nor the ACP in conflict cases) has deemed any applicant ineligible during the past year, in the event they were to deem someone ineligible, they both have in



place written notifications explaining the reason for the denial and separately informing applicants of their right to seek reconsideration or appeal.

- *Procedure XV (partial payment orders)*: The Public Defender Office and the ACP do not request that judges issue partial payment orders at the time of assigning counsel, and judges have traditionally not issued such orders on their own.

Regarding the data collection, maintenance, and reporting requirements set forth in Procedure XVI of the Eligibility Standards, both the Public Defender Office and the ACP submitted 2017 eligibility data to ILS. The data ILS received show the following:

- i) Of the 500 applications considered by the Schuyler County Public Defender Office, all were deemed eligible. There were no requests for eligibility screening reconsiderations, appeals, or County Law § 722-d orders.
- ii) Similarly, regarding the criminal conflict cases sent to the Schuyler/Tompkins ACP, all 102 applicants screened were deemed eligible for assigned counsel. Thus, there were no requests for eligibility screening reconsiderations, appeals, or County Law § 722-d orders.

#### **D. Barriers to implementation and ongoing challenges**

There continues to be no identifiable barriers to implementing the Eligibility Standards in Schuyler County and with respect to the conflict cases screened by the Tompkins County ACP.

#### Suffolk County

As noted in the April 2017 Report, Suffolk County's criminal court system is divided between the District Court, located in Central Islip on the County's West End, and ten town and village courts ("justice courts") on the East End. Criminal cases typically originate in the District Court -- which has criminal court jurisdiction for the five West End towns -- and in the East End justice courts. Accordingly, most eligibility decisions are initially determined in District Court or in one of the East End justice courts. The County Court is located on the East End in Riverhead.

Unlike three of the other *Hurrell-Harring* counties, wherein assigned counsel eligibility screening is conducted by a single entity (either the Public Defender Office or the office of an Assigned Counsel Program),<sup>5</sup> in Suffolk County, there is no single entity that conducts all the screenings for assigned counsel eligibility. As a result, eligibility determinations are made using different processes and mechanisms, depending on whether the defendant is arraigned in the District Court or in one of the East End justice courts.

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<sup>5</sup> As previously stated, in Schuyler County the Public Defender Office and the Regional Schuyler/Tompkins ACP coordinate efforts to screen defendants for assigned counsel eligibility.

## **A. Current processes for deciding assigned counsel eligibility in Suffolk County**

Following are the processes currently used in District Court and in the East End justice courts for deciding assigned counsel eligibility:

### *1. District Court*

In District Court, there are two parts for arraigning defendants: 1) D-11, where defendants who are detained after their arrest are arraigned; and 2) the Street Appearance Part (SAP), where defendants who are issued appearance tickets following their arrest are arraigned. In both parts, Suffolk County has taken advantage of ILS' grant and distribution funding to ensure that defendants are represented by defense counsel at arraignment. In D-11, arraignments are covered by attorneys from the Suffolk County Legal Aid Society (SCLAS), unless there is a conflict, in which case, the arraignment is handled by a Suffolk County Assigned Counsel Defender Program (ACDP) attorney. In SAP, arraignments are handled by one of two ACDP attorneys who staff each arraignment session, unless the SCLAS already represents the defendant on another matter and knows of the new case, in which case, a SCLAS attorney will appear and represent the defendant at this arraignment.

#### *(i) D-11*

The Suffolk County Department of Probation has traditionally conducted pre-arraignment screenings of defendants who are arrested and detained prior to arraignment ("in-custody defendants") to assess whether the defendants should be released on their own recognizance ("ROR screening"). At some point, Probation decided as a courtesy to the courts to also screen those in-custody defendants in D-11 for assigned counsel eligibility and make recommendations of eligibility to the judge. Although Probation used a written screening instrument, they conducted the screening without any written criteria regarding financial eligibility for assigned counsel, and did not collect or maintain any data regarding the number of applicants they screened, the number and nature of their recommendations to the court, how often the courts accepted or rejected their recommendations, and the criteria the courts utilized in making their final determinations of eligibility.

In 2016, ILS contacted the then-Suffolk County Probation Director, Patrice Dlhopsky, to discuss Probation's assigned counsel eligibility screening and their capacity to implement the Eligibility Standards. It was agreed that, because of Probation's limited staff and the limited time available to conduct the screening, Probation would screen only for presumptive eligibility for assignment of counsel. Thus, ILS worked with Ms. Dlhopsky on modifying Probation's ROR instrument to obtain financial information from the defendants sufficient to determine if they are presumptively eligible for assignment of counsel. The modification involved an addendum to the screening instrument that listed the presumptions, and noted the number of financial dependents and the defendant's net pay. However, maintaining the confidentiality of the financial information disclosed during screening would remain challenging since the screening had to be conducted in the courthouse holding pens immediately prior to arraignment.

Upon screening the defendants, Probation makes a recommendation to the court and provides the completed screening instrument to the judge. However, neither Probation nor the court collects and maintains data as to how frequently the judge accepts or rejects the recommendation of presumptive eligibility, or the extent to which courts rely on the information provided by Probation. Nonetheless, since October 2016, when Probation updated its ROR instrument to comply with the Eligibility Standards, Probation has consistently provided ILS with written monthly reports of the number of defendants screened, and, of these, the number Probation deemed presumptively eligible for assignment of counsel. This data is further discussed below.

As was noted in the 2017 Report, for defendants who are not presumptively eligible for assignment of counsel, the court must determine if further screening is necessary. Generally, judges assign counsel to those defendants who are remanded to pre-trial detention and say they cannot afford to retain counsel. Additionally, judges are more likely to assign counsel to those who are arraigned on felony offenses. In other cases, judges give defendants a one-page written notice instructing them to bring to their next court appearance an array of documents: identification; names, addresses and phone numbers of at least two friends or family members who can verify the defendant's information; bank books and statements; income tax returns or W-2 and 1099 forms; recent paystubs for all household members; proof of any financial hardship; proof of Social Services awards; proof of any other benefits; and the parent or guardian of any defendant under 21 years of age.

Based on our court observations, ILS learned that at least one judge urges defendants to retain private counsel instead of telling them how to apply for assigned counsel. For defendants who were not remanded to custody, this judge informed them that the attorney who represented them at arraignment was no longer their attorney and had been relieved from further representation. The judge instructed the defendants to retain an attorney for the next court date. If they could not afford a private attorney, they should wait until the next court date and ask that judge to screen them for assigned counsel eligibility.

(ii) *SAP*

Until May 30, 2017, the District Court's Street Appearance Part did not have an entity that screened defendants and made recommendations regarding eligibility. Thus, as we reported in April 2017, judges were solely responsible for obtaining information from defendants to determine eligibility for assignment of counsel, and, in doing so, utilized various criteria and procedures to determine assigned counsel eligibility, as there was no common procedure or criteria for doing so.

In May 2017, the ACDP initiated a program to screen for assigned counsel eligibility in SAP, and designated Andrew Poppo, one of its staff members, as the screener to use a 4<sup>th</sup> floor office space in the District Court building for screening. In early May, ILS worked with the ACDP in finalizing its assigned counsel application form and other eligibility documents in time for the program launch on May 30, 2017. ILS has since visited the 4<sup>th</sup> floor screening office, and has also spoken with Andrew, ACDP Administrator Daniel Russo, and Deputy Administrator Stephanie McCall, regarding the processes currently being used for screening SAP defendants for assigned counsel eligibility. ILS learned the following:

In SAP, at the beginning of the court calendar, judges announce to everyone in the courtroom that defendants have the right to counsel and the right to an assigned counsel if they cannot afford an attorney. At times, the arraigning attorney will do so, and, as observed by ILS, will repeat the announcement at various times during the court proceedings to ensure that it is heard by everyone who enters the courtroom.

Following arraignment, the judge refers those defendants who were not remanded to pre-trial detention to the 4<sup>th</sup> floor SAP Screening Office for screening. ILS observed one judge, for instance, telling each defendant: “I am adjourning your case, and you need to return to court with a lawyer. If you cannot hire your own, go right next door and speak to the person so they can screen you for a Legal Aid attorney. Right next door.”

Additionally, the arraigning attorney provides written notification to those defendants, informing them of the time, date and location of their next court appearance, and informs them to retain an attorney for that next scheduled date. For those defendants who cannot afford to pay for an attorney and wish to apply for an assignment of counsel, the notice instructs them to “immediately go to the SAP Screening Office on the 4<sup>th</sup> floor of th[e courthouse] building,” and bring with them all the paperwork pertaining to their cases.<sup>6</sup>

At the screening office, the eligibility interview is conducted in a confidential setting where Andrew assists each defendant in completing the application form. Andrew reviews the information provided and makes a decision while the applicant is still in the office. He then fills out a three-part Notice of Financial Eligibility Recommendation, listing the applicant’s name, address, docket number of the case, and the name of the judge, and indicating that a recommendation will be made to the judge that the applicant is either financially eligible for an assignment of counsel, or is not. Andrew retains the original of the document for the ACDP files, and hands the remaining two copies to the defendants with instructions that, on their next court date, they should provide one copy to the court to inform the court that they have been screened and found eligible, and that they should retain the second copy for their records. He also tells them that, on the adjourned date, an attorney will be assigned to their case, unless the judge has a problem with the eligibility recommendation. SCLAS staffs all court appearances in the District Court, and so, a SCLAS attorney will always be present at that second court appearance to accept the assignment, unless there is a conflict, in which case the matter is assigned to the ACDP panel attorney assigned to that courtroom.

For those defendants whom Andrew deems ineligible, a Reason for Ineligibility Recommendation form, on which Andrew concisely explains the reasons that the application has been denied, is given to the defendant. Additionally, Andrew provides the defendant with a copy of ILS’ Sample Right to Seek Review, which the ACDP adopted for its use.

Several District Court judges are assigned to SAP on a bi-weekly rotating basis. Andrew recently told ILS that all except two of those judges consistently send defendants to him to be screened. Of the two judges who do not use the SAP Screening Office, one instructs the

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<sup>6</sup> This notice was one of the eligibility documents that ILS assisted the ACDP in finalizing. It, and any other document mentioned in this report, can be made available for review upon request.

defendants to return to court with an attorney. If the defendants indicate that they cannot afford to retain an attorney, the judge will hand them a notice listing documents that they should bring back to court on the next court date to be assessed for assigned counsel eligibility. The second judge conducts a brief on-the-record inquiry, to determine if defendants are eligible for assigned counsel.

The ACDP has reported to ILS the data it has collected and maintained on the number of applicants screened and, of these, the number deemed eligible and the number deemed ineligible, as well as the names of the arraiging judges. This data is discussed in more detail below.

## 2. *East End Justice Courts*

The eligibility determination process is different on the County's East End. As noted in the last Eligibility Report, if a defendant is arraigned and remanded in one of the East End justice courts, the judge will presume the defendant financially eligible and assign counsel, unless the defendant is already being represented by private counsel. If the defendant is not remanded, the judge will conduct a brief inquiry into the defendant's financial situation, asking, for example, whether or not the defendant is working. If it is obvious that the defendant cannot afford private counsel, the judge will assign counsel. If the defendant's ability to pay for counsel is not obvious, the judge will instruct the defendant to go to SCLAS to apply for assigned counsel, and provide the defendant with a form containing the directions to SCLAS and a list of the documents to bring. If SCLAS has a conflict, the case is referred to the ACDP.

Defendants who go to SCLAS are interviewed by a SCLAS investigator and assessed for assigned counsel eligibility. To ensure legibility, the SCLAS investigator personally completes the application based on the information the applicant provides.

### **B. The status of implementation of the Criteria and Procedures at the time of the 2017 Eligibility Report**

The following assessment is a brief summary of the information ILS reported in the April 2017 Eligibility Report – information we gleaned from the court observations we conducted, discussions we held with attorneys who practice in the Suffolk County courts, and the data we received from the individual screening entities:

#### *(i) D-11*

- *The addendum to Probation's screening instrument enabled transparency in its presumptive eligibility assessments:* Probation modified its screening instrument to include those categories necessary to determine whether an applicant is presumed eligible, thereby affording transparency to its assessment process.
- *Probation screened for presumptive eligibility consistent with the Eligibility Standards:* In deciding whether someone was presumptively eligible for assigned counsel, Probation applied the factors delineated in the Eligibility Standards.

- *The screening of defendants was not being conducted in a confidential setting:* Because Probation must interview and screen defendants in the D-11 holding cell, defendants divulge their information within the hearing of others. Hence, there was no confidentiality in the interview process.
- *The modifications to Probation’s screening instrument ensured that Probation considered net, and not gross, income in its assessment:* Prior to modifying its screening instrument, Probation elicited information about the defendant’s salary, without specifying gross or net salary. Therefore, without the modification, it would have been impossible to tell whether Probation applied the defendant’s net, rather than gross, income in its assessment of presumptive eligibility. By specifically asking for the “amount of net (take-home) pay,” the addendum prompted the screener to obtain the information to properly assess whether the defendant met the income guideline for presumptive eligibility.
- *The screening instrument elicited information that, although not necessary for a determination of presumptive eligibility, could potentially impact the judge’s ruling on whether a defendant should be assigned counsel:* Prior to modification, the Probation screening instrument elicited information about the defendant’s bank account, possession of a car, monthly car loan and mortgage payments. This information did not appear necessary for ROR screening and was not necessary to determine if a person was presumptively eligible for assignment of counsel. However, its inclusion in the screening instrument prompted some judges to reject Probation’s eligibility recommendations without further inquiry simply because a defendant owned a home or a car, which is inconsistent with the Eligibility Standards.
- *In rejecting Probation’s eligibility recommendations, judges have been heard to improperly discuss the defendant’s financial circumstances in open court:* By the time of the 2017 Report, ILS had learned, through court observations and conversations with attorneys who practice in D-11, that some judges announced their reasons for rejecting a Probation recommendation of presumptive eligibility<sup>7</sup>, and, in doing so, disclosed the defendant’s financial circumstances on the record in open court.
- *Defendants who were ROR’d were without representation until a further court date:* At least one judge in D-11 was observed to release the arraigning attorney from further representation of defendants following arraignment, and instruct those defendants either to retain counsel or to request an assignment of counsel on their next court date. ILS was told that some of these defendants would often have to make several court appearances before the judge would assign counsel. As we noted in our last report, this resulted in a needless and lengthy gap in representation that disrupted lives, and often undermined the quality of representation. It also negatively impacted judicial efficiency.

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<sup>7</sup> As noted earlier, when a judge does so, it is unclear whether the judge is rejecting Probation’s recommendation that the defendant is presumptively eligible, or because the judge is conducting her own independent screening following Probation’s recommendation that the defendant is not presumptively eligible for assigned counsel.

- *The assigned counsel application process is made unduly burdensome for those defendants who are ROR'd and must request an assignment of counsel:* Requiring defendants who are ROR'd to produce, at their next court appearance, a list of sometimes hard-to-obtain documents, such as tax returns, proof of financial hardship, and recent paystubs for all household members, was unduly burdensome, and created a disincentive for applicants either to apply or to complete the application process.

(ii) *SAP*

Because the ACDP pilot screening program did not commence until May 2016, there was no screening entity for those defendants who appeared for arraignment in the District Court's Street Appearance Part at the time ILS prepared the 2017 Eligibility Report. Rather, defendants whose cases were not disposed of at arraignment were instructed to bring with them to the next court appearance a list of documents for the judge to review to determine eligibility for assigned counsel. From discussions held with attorneys who appear in the Street Appearance Part, ILS has learned that several judges rotate on a bi-weekly basis in SAP, and each tended to use his or her own variation of criteria, without any written standards, in assessing whether a defendant is eligible for counsel. In the absence of written eligibility standards, and, because courts do not collect and maintain data on the number of defendants who apply for counsel as well as the number of those to whom the judges assign counsel, we could not report on the extent to which the criteria the judges utilized were consistent with the ILS Eligibility Standards. It seemed evident, however, that, like the ROR'd defendants in Part D-11, the SAP defendants faced the onerous task of producing voluminous and unnecessary verifying documentation in order to be considered for assigned counsel, and some had to make several court appearances before a determination of eligibility was made.

(iii) *The East End Town and Village Courts*

In screening for assigned counsel eligibility in the East End justice courts, SCLAS had already been applying criteria and procedures that were consistent with the ILS Eligibility Standards. Thus, very little was needed to be done in preparation for implementation, and, by April 2017, SCLAS was implementing as follows:

- *SCLAS used all four of the ILS eligibility presumptions:* SCLAS had traditionally used all four of the delineated factors in deciding whether an applicant was presumptively eligible for counsel. By 2017, it had changed the income presumption from at or below 125%, to at or below 250% of the FPG. In addition, SCLAS no longer required the completion of the assigned counsel application form once a determination of presumption was made.
- *SCLAS did not consider bail as a reason for denying eligibility:* As it did before implementation, SCLAS did not consider the defendant's ability to post bail as a reason to deny eligibility.
- *Third-party resources were no longer considered.* SCLAS no longer considered the income and resources of third parties, including parents and spouses, in their eligibility

assessments, unless the third party expressed a willingness to pay, the applicant consented to the arraignment, and the arrangement did not jeopardize the attorney-client relationship.

- *Non-liquid assets were generally not considered:* Consistent with the ILS Eligibility Standards, SCLAS did not consider vehicles used for basic life necessities, nor a defendant's primary residence, unless it had significant value and equity and was readily marketable. Additionally, SCLAS did not consider other non-liquid assets without first assessing the asset's value and equity.
- *Child support and public assistance receipts were not considered in the eligibility assessment:* SCLAS' assigned counsel application did not ask about child support received by the defendant. For purpose of determining presumptive eligibility, it asked whether the defendant received public assistance, but did not ask about the amount of assistance received.
- *The application contained a more comprehensive list of debts and liabilities that were considered:* Although SCLAS previously considered an array of debts and liabilities in assessing whether a defendant had the resources to retain private counsel, it did not consider such household expenses as food and transportation. Having adopted the ILS Sample application for its own use, by April 2017, SCLAS considered a more extensive list of liabilities, thereby obtaining a more realistic assessment of the defendant's financial circumstances.
- *SCLAS asked for verification, but only in certain circumstances:* SCLAS typically did not ask for verifying documentation, except in certain circumstances, such as: 1) in close calls; 2) where the applicant appeared to have sufficient income to retain counsel, but reported having a significant amount of debts and liabilities; and 3) where an applicant was requesting reconsideration of an ineligibility decision.
- *SCLAS no longer requested truth attestations:* Prior to implementation, SCLAS generally did not require applicants to swear or affirm to the truthfulness of the information they provided, unless the screening staff thought that the applicant was not being forthcoming, in which case they asked the applicant to affirm as a means of conveying the seriousness of the situation and the need for correct information. By April 2017, truth attestations were no longer requested, though SCLAS still impresses upon applicants the need to be accurate and forthcoming.
- *Applicants deemed ineligible were given only verbal notifications of the decision and of their right to appeal to the judge:* As it had always done, for all defendants it deemed ineligible for counsel, SCLAS did not provide written notification of the ineligibility decision or of the defendants' right to seek reconsideration or appeal. Instead, it notified the defendants verbally, and told them of their right to appeal to the judge, but not that they also had the option of seeking SCLAS' reconsideration of the determination.



- *SCLAS was instituting a policy to conduct eligibility assessments for persons who seek an assignment of counsel even though no charges have yet been filed:* As noted in the 2017 Report, SCLAS was revising its office protocols to ensure that they screen those individuals who contact the office seeking counsel because they received an appearance ticket or because they learned that they are being investigated by law enforcement, even though no charges have been filed.

### **C. Assessment of compliance with the Eligibility Criteria and Procedures since the 2017 Eligibility Report**

The following assessment of the County’s compliance with the Eligibility Standards over the past year is based on the information we gleaned from the numerous court observations we conducted in 2017 and 2018; the conversations we held with court personnel, staff members of the SCLAS and the ACDP; and our review of the data we received:

#### *1. D-11*

- As previously stated, in D-11, Probation screens only for presumptive eligibility of those defendants who are detained pre-arraignment and, in so doing, uses the presumptive factors set forth in the Eligibility Standards.
- Since October 3, 2016, Probation has consistently collected, maintained, and reported to ILS on a monthly basis, data representing the number of eligibility screenings it conducted in D-11, and, of those, the number of applicants it deemed presumptively eligible for assigned counsel. The data reveals that in 2017, 13,345 defendants were screened, of which 10,310 (or 77.25%), were presumed eligible – slightly lower than the average percentage (81%) deemed eligible during the last three months of 2016.
- As for those defendants who are not assigned counsel at arraignment and released pre-trial, it is ILS’ understanding that some judges send them to the 4<sup>th</sup> floor SAP Screening Office to be screened while other judges give them a notice listing the documents they must bring to their next court appearance to be assessed for eligibility then.

#### *2. SAP*

- *Criteria I (core eligibility standard):* The SAP screener has consistently used the Eligibility Standards in assessing who is eligible for an assigned counsel, and, in doing so, ensures that counsel is assigned to defendants who cannot afford to retain private counsel.
- *Criteria II (presumptions of eligibility):* The SAP screener uses the four delineated presumptions of eligibility. He estimates that approximately 95% of the applications are decided based on one of the eligibility presumptions.

- *Criteria III (ability to post bond):* The SAP screener does not consider a defendant's ability to post bond or pay cash bail in his assessments.
- *Criteria IV (third-party resources):* The SAP screener does not consider the financial resources of third parties as being available to the defendant, except, as he has been trained to do, when there is a third-party expressing an intention to pay for counsel and the applicant is fully informed of that arrangement and agrees to it.
- *Criteria V (non-liquid assets):* The SAP screener asks applicants who are not presumptively eligible for assignment of counsel to identify real estate they own (as well as any rental income from such real estate) and any vehicles not necessary for basic life necessities, and to estimate the current market value of the listed asset. This information is used to determine, in accordance with the Eligibility Standards, if the defendant has non-liquid assets that can be readily converted to a liquid asset to pay for counsel.
- *Criteria VI (child support and public assistance):* The SAP screener does not consider child support received by the defendant, but will consider, as a liability, any child support amounts that the defendant pays to another person. Similarly, receipts of need-based public assistance is not considered as income in the assessment process, but to determine whether the applicant is presumptively eligible for assigned counsel.
- *Criteria VII (financial obligations):* In his attempt to make a comprehensive assessment of whether the defendant can afford to retain an attorney, the screener obtains and considers information about the defendant's debts and liabilities using an expansive, non-exclusive list of financial obligations.
- *Criteria VIII (cost of retaining counsel):* The screener is aware of the Eligibility Standards' requirement to consider, in assessing financial eligibility, the cost of retaining an attorney for the particular crime with which the applicant is charged. Although he has not yet had to make this assessment on any application, the screener is instructed that, should it become necessary to do so, or in close calls, he should first consult with the ACDP Administrator before making an eligibility determination.
- *Procedure X (delegation of screening responsibility):* As stated earlier, according to the ACDP, there are two judges who, when they are in the SAP rotation, do not send defendants to the 4<sup>th</sup> floor Screening Office to be screened. One instructs defendants to come to their next court appearance with a retained attorney, or if they cannot retain, to apply for counsel at their next court appearance. The other asks defendants questions about their ability to retain counsel, generally assigning counsel because most defendants lack the resources to pay for an attorney. When initiated, the ACDP screening program was intended for defendants referred from the Street Appearance Part. However, according to the ACDP, more and more judges are recognizing the benefits of this screening program and thus are sending unrepresented defendants to the Screening Office even when they are presiding over a District Court part other than SAP.

- *Procedure XI (confidentiality)*: The SAP screening program has the benefit of ensuring confidentiality. To maintain the confidentiality of the defendants' information, the ACDP immediately scans each application form and retains the originals in an organized fashion inside its offices. Verifying documentation are not photocopied, and are immediately returned to the applicants after being reviewed. Additionally, all defendants are screened in the confidential setting of the 4<sup>th</sup> floor Screening Office. Of the two judges who do not use the SAP screening program, one tends to err on the side of assigning counsel after a brief inquiry on the record; the other instructs the defendant to appear at the next court date with counsel.<sup>8</sup>
- *Procedure XII (timeliness of decision)*: Most applications are decided immediately, while the applicant is still meeting with Andrew. Occasionally, applicants cannot be screened the same day they are arraigned because the line of defendants waiting to be screened after leaving SAP is too long and Andrew is forced to ask some of the defendants to return on their adjourned court date to be screened. The applicants who return for screening on their adjourn date are screened prior to their court appearance so they can inform the judge of the eligibility recommendation. The ACDP reports that there are times when defendants from a non-SAP Part of the District Court call the ACDP office and request an attorney. When that happens, the Administrator summons the screener to the ACDP office to meet with and screen the defendant, or, alternatively, sends the defendant to the 4<sup>th</sup> floor office to be screened.
- *Procedure XIII (burden of application process)*: Although he has never had reason to request verifying documentation, the SAP screener knows that he can request documentation if, for instance, he has reason to believe that the defendant gave inaccurate or misleading information. In close calls, he errs towards deciding eligibility in the defendant's favor.
- *Procedure XIV (written notice of ineligibility)*: The ACDP has not deemed many applicants ineligible for counsel, and over the past year, none of those deemed ineligible requested reconsideration or appealed. For those deemed ineligible, the screener immediately provides them with written notice of the ineligibility decision and of the right to request reconsideration or appeal, or both. He instructs the applicants that, if they wish to appeal, they should first call the ACDP office and request that their application be reconsidered.
- *Procedure XV (use of partial payment orders at the time of assignment of counsel)*: Since implementation of the ACDP's screening program, the ACDP has not requested that judges issue partial payment orders at the time of assigning counsel, and, reportedly, the District Court judges do not generally do so.

Regarding Procedure XVI's data collection requirements, to date, ILS has received data from the ACDP covering the period May 30, 2017 (the start of the program) to December 21, 2017 (the

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<sup>8</sup> Because the next court date will be in a different District Court part presided over by another judge, other judges must deal with the defendants who appear without counsel. It is not clear what happens in these instances, though the ACDP states that some judges send these defendants to the SAP Screening Room.

last day of the year that the Suffolk courts were open for business before the start of the new year). The data reveals that, for this period, 724 defendants were screened by the SAP screener, and 3 defendants were deemed ineligible for assigned counsel.

Unfortunately, there is no data from the courts to indicate how many of the 721 defendants deemed eligible for assigned counsel were actually assigned counsel by the judge. However, there is reason to believe that judges are generally following ACDP's eligibility recommendation and that the SAP screening program has been beneficial to the District Court. As previously stated, an increasing number of judges are using the program even when they are not presiding over the Street Appearance Part. ILS' observations also highlight the program's success. During our court observation of District Court Part D-43, ILS spoke briefly with one of the defendants about how she was assigned counsel. The defendant told us that, during her arraignment in the Street Appearance Part, the judge told her to get an attorney for her next court date, and adjourned the case to D-43. But she lacked the resources to retain an attorney, and appeared on her adjourned date without counsel. She told the D-43 judge she could not afford to pay for an attorney, and the judge told her she could apply for assigned counsel, and instructed her to go to the SAP Screening Office. She did so, and was screened and determined eligible for assigned counsel. That same day, she returned to D-43 bearing her eligibility notice which the screener had given her, and she was assigned an attorney. The woman told ILS that, in previous District Court cases, no one told her that she could apply for assigned counsel. She added: "It is better now."

### 3. *East End Town and Village Courts*

SCLAS implemented the Eligibility Standards by September 1, 2016. As a staff member recently stated, implementation "did not mean a drastic change" for SCLAS because, by the time of implementation, they had already been using criteria and procedures that were mostly consistent with the Eligibility Standards. The following is a brief assessment of SCLAS' compliance with the Standards over the past year:

- *Criteria I (core eligibility standard):* SCLAS continues to use criteria and procedures designed to ensure that counsel is assigned to defendants who cannot afford to retain private counsel. SCLAS staff report that the assessment standards have become less rigid and the application process has been seamless.
- *Criteria II (presumptions of eligibility):* SCLAS uses the four delineated presumptions of eligibility. Screening staff estimate that, as in the previous year, in 2017, approximately 70%-80% of applicants were deemed eligible based on one of the four presumptions.
- *Criteria III (ability to post bond):* As reported in the April 2017 Eligibility Report, SCLAS has maintained its long-standing policy of not automatically denying assigned counsel eligibility to defendants who can post bond or pay cash bail.
- *Criteria IV (third-party resources):* SCLAS generally does not consider third-party resources as available to the defendant. SCLAS will consider third-party resources when a third party expresses a willingness to pay, the defendant agrees to that payment

arrangement, and the arrangement does not jeopardize the attorney-client relationship. But when that happens, defendants do not go to SCLAS to apply for assigned counsel.

- *Criteria V (non-liquid assets):* SCLAS does not consider any vehicles used for basic life necessities, and does not consider an applicant's primary residence except in circumstances set forth in this Criteria. For any non-liquid assets that are potentially considered, SCLAS obtains information about the value of the asset and any equity the applicant has in it.
- *Criteria VI (child support and public assistance):* SCLAS neither obtains information about, nor considers, child support received as income available to the applicant, and while it continues to obtain information about need-based public assistance, it does so only to assess the applicant's presumptive eligibility for assignment of counsel.
- *Criteria VII (financial obligations):* SCLAS' application includes a comprehensive list of financial obligations for defendants to identify. This allows the screening staff to obtain a thorough picture of the defendant's financial situation in assessing whether the defendant has sufficient resources to pay for private counsel.
- *Criteria VIII (cost of retaining counsel):* Although the assigned counsel application does not prompt the screening staff to assess the costs of retaining counsel, SCLAS considers the costs of paying for a defense, estimating retainers based on what they know about East End practice and considering the complexity of the case.
- *Procedure X (delegation of screening responsibility):* According to SCLAS, East End magistrates generally follow SCLAS' eligibility recommendations. Staff note that it is "extremely rare" that a judge does not follow the recommendation.
- *Procedure XI (confidentiality):* Because SCLAS screens for assigned counsel eligibility, courts generally do not ask defendants detailed questions about their financial ability to retain counsel in open court and on the record. The questions, when asked, are usually limited to, "do you work?" and "can you afford an attorney?" SCLAS also takes steps to ensure the confidentiality of the information obtained. For instance, although SCLAS has never received a judicial request to turn over an assigned counsel application, if it were to happen, SCLAS has instituted a policy designed to protect the defendant's confidentiality. Additionally, all screening interviews are conducted in a confidential setting inside the SCLAS offices.
- *Procedure XII (timeliness of decision):* SCLAS screeners decide applications for assigned counsel with great immediacy. When defendants apply to SCLAS prior to their next court appearance, they are interviewed by a staff member, and at the completion of the interview, they are told if they are deemed eligible for counsel. One staffer recently described the process as follows:

*If they are deemed eligible, we inform them verbally, but we tell them that they will learn the identity of the assigned attorney at their next court*

*appearance. However, if the case requires some immediate action, we will assign an attorney that same day that the application is decided. If the attorney assigned to the court in which the case is scheduled is available, we will have the defendant meet with that attorney immediately. We never tell a defendant that he has to wait if he has a question, concern or ask to speak with an attorney.*

Over the past year, SCLAS revised its office protocols so that individuals who contact the office seeking counsel because of an appearance ticket or because they are being investigated by law enforcement can be assessed for assigned counsel eligibility. Staff report that an attorney is assigned provisionally until an eligibility screening can be conducted.

- *Procedure XIII (burden of application process):* SCLAS staff are careful to avoid requirements that create barriers to applying for assigned counsel. To that end, SCLAS does not require applicants to affirm or attest to the accuracy of the information they provide. In terms of verification of the financial information applicants provide, SCLAS requests verifying documentation from applicants in close calls, where the defendant seems to have enough income to pay for counsel, but has significant financial debt or liabilities, or where the defendant's financial situation is unclear (which happens most often for self-employed defendants). And, in the rare case where an applicant has been deemed ineligible and is requesting reconsideration (though this did not occur over the past year), SCLAS will ask for documentation. If the defendant is having difficulty producing it, SCLAS will work with the defendant on alternative ways of obtaining the necessary financial information. Many defendants who apply for counsel must travel for hours by bus to get to the SCLAS office in Riverhead, so staff is careful before requesting documents if it means that the defendant must make a second trip to Riverhead to deliver them.
- *Procedure XIV (written notice of ineligibility):* During the past year, SCLAS developed a protocol that ensures that applicants it deems ineligible are notified in writing of the right to request reconsideration by SCLAS, to appeal to the judge, or both. SCLAS is currently working on a written notice of the reasons for an ineligibility determination.
- *Procedure XV (use of partial payment orders at the time of assignment of counsel):* As we noted in the last report, judges on the East End have traditionally not ordered partial payment orders at the time of assigning counsel, and it is not the practice of SCLAS to ask them to do so.

Pursuant to the requirements of Procedure XVI regarding data, SCLAS has been collecting and reporting to ILS eligibility data since September 1, 2016. For calendar year 2017, ILS has received data for the first three quarters. According to the data reported, during that period, SCLAS screened 506 applicants on the East End, and, of those, 1 applicant was deemed financially ineligible. This applicant did not appeal or request reconsideration of the denial. Staff also report that implementation of the Eligibility Standards has streamlined the application

and screening process, and has not had any significant impact on attorney caseloads. “We have not seen any huge increases in the number of applications and people we deem eligible,” a staffer noted.

#### **D. Barriers to implementation and ongoing challenges**

The one identifiable barrier to full implementation of the Eligibility Criteria and Procedures in Suffolk County results from the fact that there is no single entity in District Court that currently conducts screening for all the courts in the County. As previously discussed, in Part D-11, Probation screens in-custody defendants and makes a recommendation of whether they are presumptively eligible for assigned counsel. Probation’s ability to obtain financial information is limited, and they are not able to get a full financial picture of defendants who apply for assigned counsel. Perhaps because of this, judges are known to reject Probation’s eligibility recommendations and conduct their own screening, using unspecified and unwritten criteria. For those defendants who appear in SAP, the ACDP is able to conduct a more thorough screening for financial eligibility of counsel so they can be assigned counsel on their next court date. Although this program has been successful in promoting implementation of the Eligibility Standards, there are still a couple of judges who do not use this screening program. Moreover, it is not available to defendants who are arraigned in D-11.

As we noted in the April 2017 Report, it is the experience of the other *Hurrell-Harring* counties that having a single screening entity has made implementation of the Eligibility Standards more manageable, and has resulted in uniform, consistent, and transparent processes and decisions. In Suffolk County, ILS will continue to work with the County and Court administrators to achieve the goal of full implementation of the Eligibility Standards in District Court, particularly in D-11.

### Washington County

Although the Washington County Public Defender Office is the primary provider of mandated representation in Washington County, it is the Assigned Counsel Program (“ACP”) which has the responsibility for screening and making recommendations for assigned counsel eligibility in the County Court and the 24 Town and Village Courts (“justice courts”). Tom Cioffi is the ACP’s Supervising Attorney and Marie DeCarlo-Drost is the Administrator.

#### **A. Current process for deciding assigned counsel eligibility**

Implementation of the Eligibility Criteria and Procedures in Washington County meant, in no small way, the dismantling of barriers to applying for assigned counsel. Prior to implementation, applications were accepted at the ACP office in Ford Edward, the county seat, during specific hours of the week only, and only if the applicant, and not some other person, physically delivered the application to the ACP office in person. This created a problem for applicants who could not reach the ACP office during the prescribed hours, or because of transportation issues. Ford Edward is situated in the lower eastern half of the County, and for most of the County’s residents, is reachable only by private vehicular transportation. There is no public transportation system that services the entire County.

Under the leadership of Mr. Cioffi, the ACP expanded the ways in which persons can apply for assigned counsel: today, applications are accepted by personal delivery, as well as by fax, mail, and by ACP staffers positioned once weekly at two outreach court locations in the northernmost (Whitehall Town and Village Court) and southernmost (White Creek Town Court) locations of the county.

With the implementation of the counsel at arraignment program in 2016, the Public Defender Office now provides arraignment coverage for every defendant in the county. At arraignment, staff attorneys from the Public Defender Office regularly inform non-custodial defendants (those who are released after arraignment) of their right to assigned counsel, no longer leaving that responsibility solely to the arraignment judge. The arraignment attorneys hand the defendants a packet containing the application form and a cover letter, on which an attorney's name is indicated as having represented a defendant at arraignment. The cover letter also informs the defendants of the ways that the application can be delivered to the ACP, and that, to assist the ACP in its determination of eligibility, the defendants are encouraged to provide the ACP with the charging documents and a form of identification.

If it is evident that the defendant cannot afford to pay for private counsel, such as where the defendant is homeless, unemployed, or a student, the arraignment attorney will ask the court to assign counsel; in some courts, the judge will, *sua sponte*, assign counsel. Defendants who are remanded to pre-trial detention are assigned counsel at arraignment. If they are subsequently released, they may be asked to complete an assigned counsel application.

Arraignment counsel no longer inform defendants that their appearance is for the limited purpose of arraignment only. Rather, unless a case is disposed of at arraignment, the arraignment attorneys remain on the case as provisionally assigned, until a determination of eligibility is made. This is so, unless the Public Defender Office identifies a conflict, in which case the ACP assumes responsibility for the case after arraignment.

Upon receipt of the completed application forms, ACP staff immediately review them and generally make a decision on eligibility within 24 hours, unless more information is needed from the applicant, or the case presents a problem that needs to be discussed with Mr. Cioffi. If the decision is that the applicant is eligible for counsel, the ACP notifies the Public Defender Office and, if there is a conflict, assigns an ACP panel attorney to the case, then sends a notice of the conflict assignment to the arraignment judge. An approval letter is also sent to the applicant, identifying the name and contact information of the assigned attorney. For applicants deemed ineligible for assigned counsel, the ACP notifies them in writing, explaining the reason for the denial and informing them of the right to request reconsideration or an appeal of the denial, or both.

The ACP deemed no applicant ineligible for counsel during calendar year 2017.



## **B. The status of implementation of the Criteria and Procedures at the time of the 2017 Eligibility Report.**

Not only did implementation of the Eligibility Standards bring about the dismantling of certain procedures in the ACP's eligibility determination process, as noted above, but it also effectuated the discontinuance of certain restrictive practices which dissuaded some people from applying or caused them not to complete the application process.

Following are the changes that had been made by the time of the 2017 Report:

- *Applicants were no longer required to produce onerous and unnecessary verifying documentation:* The ACP no longer required applicants, under a warning that applications would not be accepted, to submit unnecessary and sometimes hard-to-obtain documentation, such as proof of income of all members of the applicant's household; a notarized statement from another person describing the living situation, if the applicant was living in that person's home; and a "Government issued" identification card. Additionally, as of April 2017, the ACP accepted applications delivered to it by mail, fax or the personal delivery by someone other than the applicant.
- *Truth attestations were no longer required:* Applicants were no longer required to attest or affirm to the truthfulness of the information they provided.
- *Third-party income and resources were no longer considered in the eligibility assessment:* Except under those circumstances stated in the ILS Criteria and Procedures, the ACP no longer treated as income the financial resources of third parties, including the income of all "other members of the family," regardless of whether the family member had any financial responsibility towards the applicant.
- *Applicants deemed ineligible for assigned counsel were provided written notification of the ineligibility determination and notification of their right to appeal to the judge or request the ACP's reconsideration of its determination:* In addition to the written notification of ineligibility that the ACP had typically been sending to applicants it deemed ineligible for counsel, by April 2017, applicants were simultaneously notified, in writing, that they may request reconsideration of the eligibility denial, or request review by the judge, or that they may do both. The ACP no longer waited until applicants complained before notifying them only that they could appeal to the judge, as it did before.
- *The ACP increased the number of ways for determining presumptive eligibility for counsel:* Traditionally, the ACP had used only one presumption of eligibility, assigning counsel at arraignment if the defendant was remanded to custody, but instructing those defendants who were later released on bail or bond to apply for counsel upon their release. By April 2017, presumptive eligibility was found based on one of the four grounds set forth in the ILS Standards.

- *The ACP no longer considered need-based public benefits, unemployment and child support receipts as income:* Although the ACP did not treat public assistance benefits as income in its assessment, the application no longer elicited information about welfare and other need-based public benefits, such as SSI, and also no longer required the applicant to report unemployment benefits and child support received.
- *Non-liquid assets were now assessed only in accordance with the Eligibility Standards:* The ACP's old application asked defendants to list all real property and automobiles owned, but did not elicit sufficient information to allow the ACP to assess whether there was substantial equity in the assets. By April 2017, the application elicited not only the value of the assets, but also the amounts owed on them, allowing the ACP to include in its eligibility assessment only real estate that has substantial value and significant equity, as well as those vehicles, if marketable, that are not being used to provide basic life necessities.
- *The application's list of financial obligations now included those liabilities specifically highlighted in the ILS Eligibility Standards:* In eliciting information about the defendant's debts and financial obligations, the ACP's old application listed several possible expenses, but did not include unreimbursed medical expenses, education or job-related expenses, or minimum credit card payments, as identified by the Standards. These liabilities are now included on the application.
- *Ability to post bond or pay cash bail not considered:* As stated in the April 2017 Report, even prior to implementation of the Eligibility Standards, the ACP did not automatically deny assigned counsel to defendants who paid bail or posted bond.

**C. Assessment of compliance with the Eligibility Criteria and Procedures since the 2017 Eligibility Report**

The following assessment is based on court observations conducted by ILS staff, and conversations held over the past year with Mr. Cioffi, Ms. DeCarlo-Drost, and a justice court magistrate:

- *Criteria I (core eligibility standard):* The ACP continues to consider the applicants' total financial circumstances (income and debts) in determining assigned counsel eligibility, thereby ensuring that counsel is being assigned to defendants who cannot afford the costs of retaining a private attorney.
- *Criteria II (eligibility presumptions):* The ACP applies all four eligibility presumptions and has estimated that, over the past year, nearly all the applications received were decided based on a presumption.
- *Criteria III (ability to post bond or pay bail):* The ACP does not deny eligibility just because someone has posted bond or paid cash bail or has the ability to do so.

- *Criteria IV (third-party resources):* The ACP no longer considers the financial resources of other household members, including those of a spouse or a parent. The ACP is aware that such resources may be considered if there is a third-party willing to pay, the applicant consents to this arrangement, and the arrangement does not jeopardize the attorney-client relationship.
- *Criteria V (non-liquid assets):* The assigned counsel application asks defendants to list vehicles that are not used for basic life necessities and any real estate owned, and for each, to identify the fair market value and the amount owed, so that the ACP can ascertain whether there is significant equity in the asset that can be readily accessed. Reportedly, over the past year, the ACP did not encounter any situation in which the applicant had sufficient equity in a non-liquid asset to affect the outcome of the assigned counsel application.
- *Criteria VI (child support and public assistance):* The application no longer elicits information pertaining to an applicant's receipt of child support, and the ACP does not consider it as income available to the applicant. Similarly, although the application asks about the applicant's receipt of need-based public assistance, the ACP does not treat this as income, but as a factor in determining whether the applicant is presumptively eligible for counsel.
- *Criteria VII (financial obligations):* In assessing whether the applicant has the resources to retain private counsel, the ACP considers a non-exhaustive list of possible debts and obligations, including child support the applicant pays to another, medical expense reimbursements, employment-related expenses, and minimum credit card payments. Ms. De-Carlo Drost recently remarked that, since implementation, rarely has the ACP's assessment of an application progressed to the point of considering the defendant's debts and financial liabilities, because, as previously noted, most of the applications are decided based on an eligibility presumption.
- *Criteria VIII (cost of retaining counsel):* In the 2017 report, we noted that, traditionally, the ACP did not consider the cost of retaining an attorney in determining assigned counsel eligibility, and that, as a result, the ACP tended to deem defendants ineligible if there was any disposable income, even if this income was insufficient to pay the costs of a defense. Now, the ACP considers the cost of retaining counsel, though this issue has arisen infrequently, since nearly all defendants have lacked any disposable income or any other means of paying for counsel. According to Ms. DeCarlo-Drost, "[e]ven if we get past the presumption, the bank accounts and assets are so negligible that they hardly make a difference [in our assessment]."
- *Procedure X (delegation of screening responsibility):* As stated in the April 2017 report, Washington County magistrates have traditionally delegated to the ACP the role of screening and making a recommendation about assigned counsel eligibility. According to Mr. Cioffi, since implementation, the courts have consistently followed the ACP's recommendations.

- *Procedure XI (confidentiality)*: Besides asking defendants if they need to be assigned counsel, Washington County magistrates no longer elicit information about a defendant's financial circumstances on the record and in open court. Nor has a judge, over the past year, requested to see an assigned counsel application. Mr. Cioffi notes that, if a judge were to do so, he would take steps to respond to the judge in a manner that ensures the confidentiality of the information. And, in its own attempts to maintain the defendants' confidentiality, the ACP maintains all completed applications in a confidential manner and does not disclose them to anyone outside the office, except to the attorney to whom the case is assigned.
- *Procedure XII (timeliness of decision)*: The ACP screens and decides all eligibility applications within 24 hours of receiving them to guard against delays in the assignment of counsel. The ACP then assigns the cases to the Public Defender Office, except in the event of a conflict, in which case the matter is assigned to an ACP panel attorney.

The ACP also will assess eligibility and assign an attorney for applicants who contact the ACP or the Public Defender Office requesting counsel, upon learning that they are being investigated by law enforcement, or are otherwise facing criminal prosecution, even though no charges have yet been filed. Recently, Mr. Cioffi assigned counsel to a woman who was subpoenaed to testify against a loved one in a grand jury proceeding and sought advice on what she should do from the assistant Public Defender who represented her loved one. The assistant Public Defender recognized he could not advise her but that she needed the advice of counsel, so he referred her to Mr. Cioffi. Mr. Cioffi assessed the situation, recognized the potential for criminal liability if she elected not to comply with the subpoena, screened her for assigned counsel eligibility, and assigned counsel.

- *Procedure XIII (burden of application process)*: Under Mr. Cioffi's leadership, the ACP has made great strides in dismantling the barriers to applying for assigned counsel. It no longer automatically requests verifying documentation in every case, but will request verification where there are "red flags," such as where the defendant appears to have sufficient income, but the application lists financial liabilities that may make it impossible to pay for counsel. And, as we noted in the 2017 report, the ACP has also taken steps to ensure that the application process is far more accessible to applicants. To that end, it accepts applications by mail, fax, or by the delivery by someone other than the applicant. The ACP also has outreach program in the Whitehall Town and Village Court, where, once each month, applicants in the harder-to-reach northern part of the County can more conveniently go to apply for assigned counsel. The ACP has recently extended its outreach program to the White Creek Town Court in the southern region of the County.
- *Procedure XIV (written notice of ineligibility decision)*: Since implementation, the ACP has deemed one applicant ineligible for assigned counsel (this occurred in 2016). In the event of a denial, the ACP sends the applicant written notification of the ineligibility decision and the reason for it, along with notification of the applicant's

right to request reconsideration, or to appeal. The ACP has adopted ILS' sample notification forms.

- *Procedure XV (reconsiderations)*: The ACP does not request orders for partial payment at the time of assignment, and the judges have not *sua sponte* issued such orders.

Regarding the collection, maintenance and reporting of eligibility data required under Procedure XVI of the Standards, the ACP has consistently reported data to ILS on a quarterly basis. The data information received by ILS to date show that, in calendar year 2017, the ACP received 2,375 applications and determined that all were eligible for assigned counsel. Thus, there were no requests for reconsideration or appeals, or for partial payment orders pursuant to County Law § 722-d.

#### **D. Barriers to implementation and ongoing challenges**

In the 2017 Eligibility Report, we noted an ongoing challenge concerning the ACP office itself. The office is currently located in the basement of the county municipal building, in a relatively isolated location. The office does not include an interview room. To apply for counsel, applicants speak through a window in the basement hallway outside the ACP's office, which is not a confidential setting, although Ms. DeCarlo-Drost reports that the ACP staff take considerable care in ensuring that confidential information is not elicited within the hearing of anyone other than the applicant. Additionally, ACP Supervising Attorney Tom Cioffi notes that having to talk through a window is demeaning to applicants. Mr. Cioffi has addressed this issue with the County administration, and there is consensus that, for this reason and others, the ACP's current space is inadequate and new space is needed. Mr. Cioffi continues to work with the County on securing new space as soon as possible.

Otherwise, there are no significant barriers to implementing the Eligibility Standards.

### **III. CONCLUSION**

For the second year since the Settlement implementation deadline, all five *Hurrell-Harring* counties have screened for and determined assigned counsel eligibility in accordance with the ILS Criteria and Procedures: unnecessary strictures in the application process have remained eliminated and barriers to applying for counsel have remained dismantled, thereby allowing defendants' easier access and participation in the application process. By doing so, applicants who, prior to implementation, would have been denied assigned counsel, or would not have applied, are now being assisted by counsel assigned to represent them. Additionally, as every provider has indicated, implementation continues to result in greater administrative efficiency and the assignment of attorneys earlier in the cases.

As we committed to doing in the last annual report, ILS will continue to monitor implementation in all five counties to ensure that the goal of fairly distinguishing between those defendants who have the resources to retain competent counsel and those who do not is being achieved. In

Suffolk County, ILS intends to work with the programs and the judicial branch to streamline the process and mitigate or eliminate delays in the assignment of counsel in District Court.