

1 STATE OF NEW YORK

2 COUNTY OF BROOME

3 - - - - -

4 In the Matter of a Public Hearing

5 on

6 Eligibility for Assigned Counsel

7 - - - - -

8 A Public Hearing held at 65 Hawley Street,
9 Binghamton, New York, on the 20th day of August, 2015,
10 commencing at 10:59 AM.

11
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15 KEVIN CALLAHAN
16 Shorthand Reporter
17 Notary Public
18 Binghamton - (607) 723-5820
19 (800) 633-9149

20 B E F O R E:

21 JOSEPH MAREANE, NYS Office of
22 Indigent Legal Services.

23 WILLIAM LEAHY, NYS Office of
24 Indigent Legal Services.

PATRCIA WARTH, NYS Office of
Indigent Legal Services.

JOANNE MACRI, NYS Office of
Indigent Legal Services.

Angela BURTON, NYS Office of
Indigent Legal Services.

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1 MR. MAREANE: Good morning,
2 everyone. Welcome. My name is Joe Mareane.
3 I'm the Tompkins County Administrator. I'm
4 also, I think, one of the charter members of
5 the Indigent Defense Board for New York
6 State. I think I'm also the only
7 non-attorney on the board of OILS.

8 So, I come to this with a slightly
9 different perspective, perhaps, than others
10 but certainly have enjoyed the experience
11 with the board and, frankly, I'm amazed at
12 the amount of accomplishments that have
13 occurred since the board was created and the
14 office was created just a few years ago.

15 I'll spend a few minutes this
16 morning just reading a preface, introducing
17 your panel members. I will also apologize
18 in advance for having to leave a little bit
19 early. It's nothing you said. It's just
20 that I have to be back in Ithaca for another
21 meeting at about 1:00 this morning. So,
22 I'll be leaving around noon.

23 We thank everyone for joining us
24 here today to discuss the eligibility for

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1 assignment of counsel. Over 50 years ago
2 the Supreme Court announced in Gideon v
3 Wainwright that any person who is too poor
4 to hire a lawyer must be provided with
5 counsel during a criminal court proceeding.
6 Moreover, New York State was a pioneer among
7 the states in providing a statutory right to
8 counsel for litigants in a range of Family
9 Court proceedings.

10 As early as 1975 the New York State
11 Legislature noted that because of the
12 possible infringements of fundamental rights
13 and interests including the loss of a
14 child's society and the possibility of
15 criminal charges, litigants have a
16 constitutional right to counsel in certain
17 Family Court proceedings.

18 Despite the acknowledge of these
19 principles, New York State, as well as many
20 other states, continues to struggle with the
21 obligation of providing adequate support to
22 ensure access to the courts for those unable
23 to afford to pay for an attorney on an equal
24 basis with those who can afford private

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1 is to solicit your views, your opinions and
2 comments on criteria that should be used and
3 the process or method that should be
4 implemented in determining eligibility.

5 We're also interested in hearing
6 about any expected advantages and/or
7 disadvantages that you see in developing
8 uniform and comprehensive guidelines, as
9 well as any recommendations you have
10 concerning the review and/or appeal of the
11 eligibility determinations.

12 We also welcome any information you
13 wish to share with us regarding the related
14 social and/or economic impact you see these
15 standards may have in your communities.

16 Before we begin, we wish to extend
17 our thanks to our distinguished panel
18 members and our guests for taking time out
19 of your busy schedules today to meet with us
20 to share your expertise, your insights and
21 your recommendations. We'd also like to
22 extend a special thanks to the Office of
23 Court Administration and would like to offer
24 special thanks to the District Executive for

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1 the 6th Judicial District, Mr. Gregory
2 Gates, as well as Lisa Daniels Smith,
3 Special Counsel for the Administrative
4 Judge, and Karen Stephens, Chief Clerk of
5 the Broome County Supreme and County Courts,
6 as well as all of the OCA staff here in
7 Binghamton, New York, for allowing us the
8 unique opportunity to access this courtroom
9 and its facilities.

10 We welcome each of you and would
11 like to introduce you to each of our
12 distinguished members of the panel. I'll
13 exclude myself and the distinguished
14 gentleman. My name is Joe Mareane, and I'm
15 the Tompkins County Administrator. I've
16 come to that position after serving a
17 variety of roles in local government and
18 otherwise now a very long public-sector
19 career.

20 To my right is William Leahy. He's
21 the director of the New York State Office of
22 Indigent Legal Services. Many of you have
23 come to know Bill. He's a graduate of the
24 University of Notre Dame and Harvard Law

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1 School. After practicing for 10 years as a
2 trial and appellate public defender for the
3 Massachusetts Defenders Committee, he was
4 chosen as the first deputy chief counsel for
5 the public defender division of the
6 Massachusetts Committee for Public Counsel
7 Services back in 1984. In 1991 he became
8 the second chief counsel of CPCS leading
9 that statewide public defender and assigned
10 counsel agency until his so-called
11 retirement back in 2010. He was lead
12 counsel in the right to counsel case
13 Lavallee v Justices of the Hampden Superior
14 Court in 2004 in Massachusetts.

15 In February 2011 Mr. Leahy ended
16 his retirement and began his tenure as the
17 director of the State Office of Indigent
18 Legal Services where he has undertaken the
19 responsibility of improving the quality of
20 representation for poor people in the
21 criminal and family courts without the
22 state.

23 And I will add editorially he has
24 done a tremendous job in that function and

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1 in also his relationships with all of the
2 stakeholders including the counties and all
3 you in this room.

4 Patricia Warth is the chief
5 Hurrell-Harring implementation attorney.
6 Patricia has recently joined the State
7 Indigent Legal Services office as chief
8 attorney for the Hurrell-Harring settlement
9 implementation unit.

10 Prior to joining and since 2008 she
11 was director of justice strategies at the
12 Center for Community Alternatives where she
13 oversaw the organization's client specific
14 planning unit, which provides defense-based
15 sentencing advocacy and the organization's
16 reentry clinic, which assists people who
17 have had past convictions overcome the
18 barriers to employment, housing and higher
19 education.

20 Upon graduating from Cornell Law
21 School, she joined the New York State
22 Capital Defense Office until its closure in
23 2005. She also spent a semester at Syracuse
24 Law School's Office of Clinical Legal

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1 Education as a practitioner-in-residence and
2 then two years as managing attorney of the
3 Buffalo, New York, Office of Prisoner's
4 Legal Services of New York.

5 Joanne Macri is also joining us.

6 Joanne is the director of Regional
7 Initiatives of the New York State Office of
8 Indigent Legal Services where she's
9 currently overseeing the implementation of a
10 statewide network of six regional
11 immigration assistance centers on behalf of
12 the New York State Office of Indigent Legal
13 Services.

14 Prior to joining ILS she served as
15 the director of Criminal Defense Immigration
16 Project and the Immigrant Defense Project of
17 the New York State Public Defenders
18 Association and has taught for several years
19 as an adjunct professor of Immigration Law
20 at SUNY Buffalo Law School.

21 To my far right is Angela Olivia
22 Burton. Angela is the director of Quality
23 Enhancement for Parent Representation at the
24 New York State Office of Indigent Legal

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1 Services. Ms. Burton is a graduate of
2 Cornell, two Cornell graduates, as a
3 resident, I'm happy to see that, and the
4 New York University School of Law.

5 She began representing children in
6 the New York City Family Court as a student
7 attorney in the NYU Law School's Juvenile
8 Rights Clinic. Upon graduation, she clerked
9 at the New York State Court of Appeals with
10 the Honorable Fritz W. Alexander and then
11 joined the Law Firm of -- which I can't
12 pronounce.

13 MS. BURTON: Debevoise.

14 MR. MAREANE: -- Debevoise &
15 Plimpton as an associate before becoming an
16 instructor of law at New York University Law
17 School in 1995.

18 She subsequently joined the faculty
19 at the Syracuse University College of Law as
20 the director of the Children's Rights and
21 Family Law Clinic and then became an
22 assistant professor at the State University
23 of New York School of Law before joining
24 ILS.

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1 She currently serves as a
2 commissioner on the New York State Permanent
3 Judicial Commission on Justice for Children
4 and is a member of the National Association
5 of Counsel for Children.

6 We also wish to acknowledge Lisa
7 Robertson who is here with us today and will
8 be joining ILS in the fall to work on
9 eligibility -- she's in the back. I'm
10 looking. She's in the back. Welcome.
11 She'll be joining ILS this fall to work on
12 eligibility standards within the context of
13 the Hurrell-Harring settlement agreement.

14 With that, we would like to open it
15 up -- Bill, do you have any words for us
16 before we get started?

17 MR. LEAHY: No. Just ready to
18 spring right into the testimony, I think,
19 Mr. Chairman.

20 Jay Wilbur.

21 MR. WILBUR: Is there anyone that
22 needs to be anywhere that needs to go before
23 me?

24 Thank you for this opportunity.

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1 Good morning. I didn't prepare any written
2 testimony. I thought I'd have a dialogue.
3 There's some things that I do want to tell
4 you.

5 My comments are limited to the
6 criminal matters. I am the Broome County
7 Public Defender. I've been in the office
8 since 1989 and I've been the head public
9 defender since 2001.

10 The process I'm going to talk about
11 is in Broome County. Obviously, I believe
12 and I don't know what you've been hearing
13 around the state you have the unenviable
14 task of trying to come up with eligibility.
15 I've talked to my colleagues in the New York
16 State Defenders Association, New York
17 Association of Criminal Defense Lawyers and
18 the chief defenders of New York, and
19 eligibility has been the most divisive issue
20 whether it's from the institutional provider
21 or if the Court's going to do it.

22 I believe the Court needs to do it.
23 I'm there to assist the Court. I've always
24 maintained that. I don't think the Court

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1 presently has the resources to do this. My
2 office -- my county has done that. I have
3 investigators. I have intake specialists
4 that assist to get the information from the
5 clients relative to their finances. Whether
6 it's if they can afford bail, that has no
7 determination. We go to the jail every
8 single day to see clients. There's no form
9 that they have to fill out.

10 Presently, very few of the local
11 courts are doing the eligibility. I don't
12 know if that's just the way practice has
13 been. I'm sure you've heard stories around
14 the state as to whether that's good or bad.

15 The one thing that I do want to
16 emphasize is confidentiality. Too many
17 times I've seen the Court with the defendant
18 up there, raise your right hand, swear to
19 this. I think client confidentiality has to
20 be assured so much so that through NYSDA's
21 work, New York State Defenders Association,
22 there was a case brought to our attention
23 where a particular client in another county,
24 their financial information was subpoenaed.

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1 Due to that I no longer have a sworn
2 statement. I just take a financial
3 statement. Some counties actually shred
4 that. I don't go that far, but I will not
5 release that and I'll fight any subpoena for
6 that.

7 I think the basis that I would
8 suggest to you whether it's through each
9 judicial district or each department,
10 there -- I understand there has to be
11 different standards over the state. What it
12 costs here to retain an attorney is going to
13 be much different than if it's in Manhattan,
14 and I will salute that.

15 I've looked at the self-sufficiency
16 guidelines and to credit you and your
17 efforts I have not, probably negligently,
18 looked at those standards in a number of
19 years. So, I intend to raise my standards,
20 federal poverty standards. Currently we use
21 150 percent. I don't know if I can go full
22 to the 240, but I am probably going to raise
23 it to at least 200 depending what your
24 suggestions are because I think there needs

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1 to be some consistency both for criminal
2 representation, Family Court, not only in
3 Broome County, certainly, but throughout the
4 district and the state.

5 What we do particularly, we do take
6 liabilities, assets. What I do not do is --
7 I do take income from those to their family
8 if they're under 21 pursuant to the Family
9 Court Act. We don't take any into
10 consideration if the charge is against their
11 parents. The same thing with the spouse.

12 But I think the 150 guideline is --
13 whether the Court does it or whether there's
14 an institutional provider, some have
15 suggested a third party. I don't think
16 that's workable. I would suggest to you
17 that may not be the way to go.

18 The appeal process. Obviously, the
19 Court can order me to reevaluate somebody.
20 I've had clients come to me for
21 reevaluations. While their case is pending
22 they've lost their job. Absolutely we look
23 at that. We use 722-d a lot if they have
24 some partial payments depending on their

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1 case and their charge because, obviously,
2 resources for a very serious offense are
3 going to be needed more than if it's for a
4 minor offense, and that's taking into
5 consideration their eligibility.

6 See, we're lucky enough because I
7 have three intake specialists that go to the
8 jail along with investigators for the
9 serious side. If you come up with some type
10 of plan, I certainly don't want Broome
11 County to be penalized since my county has
12 taken the efforts to provide us with the
13 staff needed to determine eligibility.

14 I'm open for any questions that you
15 may have relative to how -- Angela.

16 MS. BURTON: I just wondered. You
17 had mentioned the use of 722-d a lot. I
18 just have a couple of questions. One is at
19 what point in time is the 722-d order
20 typically issued? Is it at the beginning of
21 a case? Is it somewhere down the line?

22 MR. WILBUR: That's a great
23 question. We inform the Court that we're
24 going to apply at the end of the case, we're

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1 going to present to the Court a 722-d order.

2 Now, it's not my place to tell the
3 Court what that is, and in other cases
4 they've given us the assigned counsel rates
5 and in other cases they've given us greater
6 than that, but we inform the client at the
7 beginning that an order will be put forth to
8 the judge. The judge, hopefully, will sign
9 it.

10 Just so you all are aware, that
11 money does not go into the public defender's
12 budget. That goes into the general budget
13 of the county.

14 And there are a number of cases.
15 If somebody is a few dollars over the
16 guideline, you know, \$200 over, of course,
17 we're going to try and help that individual
18 to take the case, especially if they've gone
19 out and tried to secure an attorney and they
20 were unable to do so.

21 MS. WARTH: Can you describe more
22 fully the circumstances in which you would
23 pursue a 722-d order.

24 MR. WILBUR: Okay. If someone has

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1 property like a house and they don't have
2 much of a mortgage on it, they have a lot of
3 equity on it, I feel it's my duty to inform
4 the Court that, yes, they do have some
5 resources to do that. That's after we've
6 gone through their liabilities, credit
7 cards, student loan payments, things like
8 that. And I would inform them that they may
9 have the ability to provide something
10 towards their defense.

11 MS. WARTH: So, the advantage of
12 doing it that way is to assure that there's
13 continuity in their representation and that
14 representation is quick?

15 MR. WILBUR: Correct.

16 MS. WARTH: All right. But
17 that -- to your knowledge, you know, for a
18 situation like that, for example, is the
19 expectation, then, that the person would
20 have to sell it? I mean, what --

21 MR. WILBUR: No.

22 MS. WARTH: How does that work,
23 then?

24 MR. WILBUR: We don't want anybody

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1 selling their houses. And, in fact, if
2 they've tried that, just to secure --
3 whether it's a loan, a home equity or
4 something else, and it absolutely cannot
5 help, I, absolutely, will either take the
6 case ourself or tell the judge they have a
7 problem doing that. I can't tell you how
8 many times that I've had 722-d orders where
9 the person is incarcerated. I just rip them
10 up. I don't even submit those.

11 MS. WARTH: Right.

12 MR. WILBUR: Okay. They have
13 enough problems with the resources that
14 they're going to need while they're
15 incarcerated. I certainly don't want to
16 saddle them with debt or anything else
17 because they're probably going to have
18 fines, surcharges based on their
19 incarceration. I do not want to add that to
20 their problems.

21 MS. WARTH: So, just one brief --
22 in the way you described your process, it
23 sounded like you respect the fact that the
24 judge makes the ultimate decision about the

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1 know, if you're going on vacation,
2 hopefully, it's not done if your caseload is
3 heavy. I like having somebody else with
4 eyes to look at that. Caseloads, everything
5 else, that's a whole other discussion on
6 another day, but that's really my
7 determination. You just -- do they meet to
8 criteria? Yes. Okay.

9 And, in fact, sometimes the intake
10 specialists come up, you know, this person
11 is just a little bit above the guidelines,
12 just take it, or I think this is one we need
13 to inform the Court, maybe 722-d, and the
14 courts sometimes say, you know what, just
15 take the case, Jim. I have no problems.

16 MR. LEAHY: In your intake
17 process, do you use the 150 percent of
18 federal poverty guideline as the measure or
19 do you go into the question of assets and
20 liabilities in an attempt to determine
21 whether the person can afford to retain
22 counsel?

23 MR. WILBUR: We do both. I would
24 say that 150 is probably the floor, and the

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1 reason is that because I know that I can
2 take that case and I can go talk to the
3 judge and say, Judge, you know, we're just a
4 little bit over based on the federal poverty
5 guidelines.

6 To be quite honest with you, after
7 reviewing it, I think 150 percent is low.
8 So, I am definitely going to be moving
9 those. I don't know -- as an institutional
10 provider, if you keep moving those
11 guidelines up, then more people are going to
12 be eligible and then we're going to run into
13 a problem with caseloads, resources on the
14 back end.

15 MR. LEAHY: But you must run into
16 a fair number of people whose incomes are
17 significantly above 150 percent but whose
18 responsibilities for keeping their family
19 unit functioning make it impossible for them
20 to retain counsel. So, do what you do in
21 those situations?

22 MR. WILBUR: Simply take the case.
23 If I'm going to err, I would rather err on
24 taking the case than not taking the case.

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1 If I'm called to task on that, I think I can
2 explain that.

3 I don't know what the local bar's
4 per hour charge is, but I know that it's
5 more than the 65 or \$75.

6 MR. LEAHY: Do you have a
7 percentage or estimate of how many people
8 are deemed to be eligible and how many are
9 not?

10 MR. WILBUR: Well, I can tell you
11 that last year we did about 8,700 cases, and
12 I know that there were, roughly, I think,
13 900 to 1,000 that were deemed ineligible. I
14 don't know if any of those were then
15 re-interviewed to see if they would meet
16 eligibility requirements.

17 MR. LEAHY: Were all of those
18 people requesting the assignment of counsel,
19 or were they just interviewed in kind of the
20 normal course?

21 MR. WILBUR: Usually in the normal
22 course probably at the jail.

23 MR. LEAHY: Yeah. And the last
24 question, do you have a count as to the

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1 amount of 722-d income that was produced for
2 the county in, say, 2014?

3 MR. WILBUR: Under \$3,000.

4 MR. LEAHY: Thank you.

5 MS. BURTON: I have a question
6 about the timeliness of -- the timeliness of
7 the process of determining whether or not a
8 person is eligible or not and how soon
9 they're able to actually be assigned counsel
10 and have access to counsel.

11 MR. WILBUR: Okay. Obviously, in
12 jail we'll see them. Usually we're either
13 assigned at the arraignment or provisionally
14 assigned. I believe if I'm provisionally
15 assigned, I'm assigned, and we see them.

16 The process gets a little bogged
17 down if they're released on their own
18 recognizance. Then they have to make an
19 appointment with our office. So, there is a
20 time lag. I don't want to say that there
21 isn't. It may be two weeks, three weeks
22 depending upon for them to get in and
23 schedule an appointment, keep the
24 appointment, which we have a problem with

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1 sometimes with our clients, and then to go
2 through that process. But for all intents
3 and purposes, I believe once I'm assigned
4 whether provisionally or assigned under
5 that, I'm their attorney.

6 MS. BURTON: And do you see any
7 issues with when you described that it may
8 be two or three weeks, sometimes there may
9 be some issues with the client getting to
10 the office to make the application and that
11 sort of thing? I guess I'm just wondering,
12 do you see any issues with that delay as far
13 as the impact that it might have on the
14 ability of the lawyer once they are
15 assigned, assuming that there is an
16 assignment, to actually like, you know,
17 properly defend the case in a timely manner?

18 MR. WILBUR: There always could
19 be. Presently it usually takes that time,
20 if not longer, to get the police reports or
21 anything else. If anything comes up, it
22 goes across my desk.

23 Additionally, we have other jails
24 that, unfortunately, sometimes they have to

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1 be shipped out to other jails. We have a
2 process so that they can call us and do a
3 phone intake.

4 So, if somebody is moved out of the
5 state and they have to answer the charge, we
6 will do the phone intake for them and see if
7 it's possible to do an authorization and
8 waiver if we can do that if that's what they
9 want to do.

10 MR. LEAHY: Okay.

11 MS. MACRI: Can I ask a question.
12 So, just a couple of things. That
13 provisional appointment at arraignment that
14 you're referencing, so the concept here is
15 that someone is arrested, in custody. The
16 PD's office is provisionally assigned. At
17 that point you're not in any way responsible
18 or able to maybe -- to actually do an
19 eligibility determination, right?

20 MR. WILBUR: Usually that's
21 correct. If the Court has not done that
22 themselves, then we will definitely meet
23 with them 99 percent at the jail in a
24 confidential room and talk to them and then

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1 notify the Court immediately usually that
2 day.

3 Unfortunately, the worst day it
4 would probably be is a Thursday, Friday
5 morning because then you're not on the jail
6 list until probably Monday morning. So,
7 there could be that delay of four days
8 before you're actually seeing someone to see
9 if you qualify.

10 MS. MACRI: But before that you've
11 been able to represent them at the
12 arraignment?

13 MR. WILBUR: Yes.

14 MS. MACRI: And not have any
15 problem with that but then do the
16 eligibility subsequent to that or appearance
17 that you make at arraignment?

18 MR. WILBUR: That would be
19 correct.

20 MS. MACRI: And can I ask about
21 the financial form that you're referring to.

22 MR. WILBUR: Mm-mm.

23 MS. MACRI: Do you collect or do
24 you require or does -- do the judges require

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1 that documentation be either collected or
2 reviewed by your office to verify the
3 information that's being recorded by the
4 individual?

5 MR. WILBUR: I've never been
6 requested by a judge to do it. There have
7 been circumstances where I've suspected that
8 the client may have many more resources than
9 they're telling us. There are cases where I
10 want to see some documentation, bank
11 statements, tax returns for those that file
12 tax returns, just to make sure that they
13 qualify.

14 MS. MACRI: So, in those
15 instances, have you had situations where --
16 does the Court, generally speaking, rely
17 upon your determination or your
18 investigation, or is it often that the Court
19 wants to look at more details? I mean, what
20 are you generally seeing with this kind of
21 process?

22 MR. WILBUR: I'd say 90 to
23 95 percent they rely on our office. There
24 are those in that 10 percent of the cases

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1 guideline level that you have chosen, is it
2 some something that you sit down and
3 negotiate with county or is this something
4 that the county sort of entrusted you to
5 say, you do the investigation and come to us
6 and let us know what your determination is?
7 How does that --

8 MR. WILBUR: The second one.
9 Basically, I take the federal poverty
10 guidelines as they're published in January,
11 February or March of the year, sit down, 100
12 percent, add 50 percent to it. Now I may go
13 200 percent because I think that may be more
14 fair. I think on the low end it may be
15 marginally more. I've looked at the last
16 six, seven years, and it hasn't changed that
17 much. So, I think it's time to actually
18 raise those guidelines.

19 MS. MACRI: I know, one more.
20 When you do a denial, there's a denial of
21 eligibility, do you provide them with any
22 written notice of that denial?

23 MR. WILBUR: Yes. We do that by
24 letter. I've had many clients call and I've

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1 actually reconsidered the matter. What did
2 you not tell us that I need to know? And
3 there are times where for whatever reason
4 they feel hesitant to talk to the intake
5 specialist. So, they'll talk to me, and
6 then I'll make that determination.

7 MS. MACRI: I'm done now. Thank
8 you.

9 MR. LEAHY: Okay. A two-part
10 question, but I'm not promising the last
11 one.

12 One, the approximate cost to their
13 county of hiring, housing, fringing these
14 three interview employee specialists and,
15 secondly, whether there might not be savings
16 to the county if we were to publish a
17 presumptive eligibility at a certain
18 percentage, let's take the 200 that you're
19 considering implementing in your office, as
20 presumptively eligible for services without
21 any further investigation.

22 MR. WILBUR: Without specifically
23 to the dollar, I know that the intake
24 specialists have a salary in the \$30,000

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1 range, in the 30s, with benefits. So, I
2 think benefits are 40?

3 MS. WARTH: 26?

4 MR. WILBUR: I think they're more
5 than that. Depending if they have,
6 obviously, a family health plan and stuff
7 like that. Yeah. There could be some
8 savings.

9 MS. WARTH: I have one last
10 question.

11 MR. WILBUR: This is like the
12 Appellate Court.

13 MS. WARTH: Well, just so you
14 know, you're in the hot seat because it's
15 very helpful.

16 I am curious. You said early on
17 that you didn't think it was a good idea to
18 have a third party do that, do what your
19 office has been doing, the investigation and
20 the recommendation to the Court. Can you
21 tell me why that is.

22 MR. WILBUR: Well, what I've been
23 hearing throughout the state, others may
24 have proposed it, whether it be the

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1 probation department or somebody else, you
2 know, maybe I'll back off of that if you can
3 collectively come up with an adequate third
4 party that can assure me client
5 confidentiality that they wouldn't be giving
6 the documents to the DA or anybody else.

7 So, I'll back step on that one, but
8 I certainly don't think it should be
9 anything with law enforcement. It's a tough
10 enough job having the clients trust us as it
11 is, and I think that would just add to the
12 problem, in the short response.

13 MR. MAREANE: Anyone else?

14 MR. WILBUR: Thank you very much.

15 MR. MAREANE: Thank you very much.

16 MS. WARTH: Thank you.

17 MR. MAREANE: Our next speaker is
18 my colleague Julia Hughes, who is the
19 defense counsel coordinator.

20 And, Julia, I don't know if you
21 were here when I said it, if I leave during
22 your presentation, it's not because of
23 anything you said. I just have to get back.

24 MS. HUGHES: You don't know how

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1 much I love these things. You know, I'm
2 here because you forced me. No.

3 Good morning, all of you. Nice to
4 see you again. I'm Julia Hughes from the
5 Tompkins County Assigned Counsel Program.
6 I've worked there for about 17 years.
7 Before that I was a town justice in the
8 County of Tompkins and then I was a court
9 clerk. So, I've worked in the county for
10 about 32 years. I started when I was about
11 three.

12 MS. WARTH: And that's for the
13 record.

14 MS. HUGHES: Yes. Yes. Please,
15 put that in the notes.

16 Okay. Our guidelines are based on
17 125 percent of the federal poverty
18 guidelines. We also take into consideration
19 numbers of dependents, assets and severity
20 of the crime. If someone is denied assigned
21 counsel based upon income and assets, there
22 is an appeal process through which our
23 supervising attorney is notified. It then
24 goes to him. He then reviews it. If he

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1 decides that the person is then not
2 eligible, it then goes on to the judge.

3 There may be extenuating
4 circumstances which the client did not
5 include in our application, which is three
6 pages, and it's very in-depth. It asks for
7 assets, liabilities, structured settlements,
8 inheritance and is a sworn-to statement.

9 We then can check with the
10 Department of Social Socials to see if
11 they're receiving benefits and we have that
12 on our form, and they know that we're going
13 to do that. All of these things have
14 bearing on our decision.

15 If the supervising attorney then
16 determines that the client is eligible, I
17 assign accordingly, and this is done very
18 quickly within 24 to 48 hours. But if he
19 still feels that the client is outside the
20 guidelines, the client then has the
21 opportunity to appeal it to the Court.

22 The judge will then call our office
23 and ask for a copy of the client's
24 application and supporting documentation.

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1 Like Broome County it's different. Our
2 judges want to see the documentation. They
3 want to see the application. We do provide
4 it to them ex parte.

5 The judge will then call our office
6 and tell us whether or not we should assign
7 or not. Once the judge makes a decision,
8 it's final. If he says the person is
9 entitled, we do it right away. If not,
10 that's what -- the client is notified of
11 that.

12 One of the things that's a problem
13 with not having guidelines that are uniform
14 is the consistency from county to county. I
15 have cases where the client may be on
16 probation and, say, he has another crime in
17 Onondaga or Broome or whatever. The
18 guidelines are different. My client may be
19 represented in Tompkins and go to the next
20 county and is not represented. That is a
21 problem. What happens in that case
22 sometimes, and I've had it happen many
23 times, is my attorney will appear pro bono
24 and take care of that case so that he can

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1 come back to Tompkins County and take care
2 of the case there.

3 Or we have a client with a Family
4 Court matter that is transferring in to
5 Tompkins County out of another county. When
6 they get to Tompkins County, they're not
7 eligible, and that happens. And then you
8 don't -- you have someone dealing with their
9 children -- with the children issues that
10 doesn't have representation. And we go
11 through the process, and they're still not
12 eligible.

13 I realize the difficulty of these
14 situations to make it uniform and I realize
15 different economies in each county, but I
16 think that there has to be some sort of
17 baseline so we can all bring this together
18 and make sure each one of our clients has
19 due process.

20 MS. BURTON: Could you -- say, for
21 instance, if there were some sort of formula
22 that included consideration of the cost to
23 actually hire an attorney.

24 MS. HUGHES: Mm-mm.

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1 MS. BURTON: Do you have a
2 suggestion, and given, you know, as Jay
3 talked about, the cost might be different in
4 County X or County Y, do you have any
5 thoughts about how we might integrate that
6 aspect of the ability to afford counsel in
7 our recommendations? For instance, in each
8 county how would we know what it costs
9 like --

10 MS. HUGHES: Yeah. The average
11 cost for an attorney in Tompkins County is,
12 approximately, \$250 an hour.

13 MS. BURTON: So, you know that --

14 MS. HUGHES: I know that.

15 MS. BURTON: -- in your county?

16 MS. HUGHES: Yes.

17 MS. BURTON: And how did you come
18 to know that, what --

19 MS. HUGHES: We've taken a survey
20 of the bigger firms and some of the sole
21 practitioners, and it ranges anywhere from
22 175 to \$400.

23 MS. BURTON: And that would be
24 dependent upon the type of case?

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1 MS. HUGHES: Absolutely.

2 MS. BURTON: The complexity of the
3 charges involved?

4 MS. HUGHES: Mm-mm.

5 MS. BURTON: Whether it's a Family
6 Court case or a criminal court case, and
7 you've done that research already?

8 MS. HUGHES: Yes. Yes. And that
9 does play a part.

10 I'm not sure how you would do that,
11 but whether it be by judicial district or by
12 region, which we all know that we're very
13 much in favor of regionalization.

14 MS. MACRI: Thank you, Julia.

15 MS. HUGHES: You're welcome.

16 And that somehow it could be done
17 that way. I'm not sure how much an attorney
18 in our county differs from an attorney in
19 Onondaga or Broome when they're retained.

20 MS. BURTON: But there's a way to
21 figure that out?

22 MS. HUGHES: Yes. Yes.

23 MS. BURTON: Thank you.

24 MS. MACRI: Following along that

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1 same line, this concept of, perhaps, looking
2 at a regional sort of way of looking at --
3 let me just say, if we had regional
4 districts where we look at the eligibility
5 standards, how would you respond to creating
6 sort of a presumption that in that region if
7 has someone has been deemed eligible in one
8 county that there should be a presumption
9 that they be deemed eligible in another
10 unless there's evidence to show otherwise?
11 Do you think that would be --

12 MS. HUGHES: Yes. Yes, I do.

13 MR. LEAHY: So, good. I was
14 thinking about the reverse of the last
15 question.

16 MS. MACRI: It took me a while to
17 get that out.

18 MR. LEAHY: But that's just my
19 complicated mind. So, let me put my simple
20 mind to work and ask this question: Do you
21 have a sense of the percentage of people who
22 apply for counsel to your program who are
23 approved at the administrator level, at the
24 supervising attorney level and overall?

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1 MS. HUGHES: I assign,
2 approximately, 3,000 cases a year. Last
3 year 279 people were denied based upon it
4 wasn't something we represented them,
5 something we assigned, their finances,
6 things like that.

7 I will tell you in my county that
8 if someone is denied, most likely they're
9 going to get approved by the judge.

10 MR. LEAHY: Okay.

11 MS. HUGHES: Very few people are
12 denied based upon their finances in our
13 county.

14 MR. LEAHY: As few as 1 percent
15 or -- and I don't want to put words in your
16 mouth. You tell me.

17 MS. HUGHES: I would say -- I
18 would say 3 percent, 4 percent. Not very
19 many people are denied. Our judges feel
20 that there should be representation. And we
21 also have countywide counsel at first
22 appearance in our county.

23 MR. LEAHY: I've heard that.

24 MS. HUGHES: I've heard that. I

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1 know you have.

2 And wherever you go into court,
3 there is going to be an attorney there with
4 you, and you are presumed to be eligible at
5 that point. No one is turned away. If they
6 say, yeah, I have a retained attorney or
7 whatever, our attorney always shows up and
8 is there.

9 Once that arraignment is over with,
10 then they come to us and apply, and we see
11 whether or not they're eligible, but at the
12 inception such as the arraignment, they are
13 all eligible, and the attorney does stand
14 there with them at arraignment.

15 MS. WARTH: Julia, you touched
16 upon something that, you know, I think all
17 of us are struggling with, and that is the
18 need for uniformity but also the need to
19 honor the differences amongst the different
20 regions and differences in cost of living
21 and differences in cost of retained counsel,
22 and that is something that we're struggling
23 with, but one of the things we're also
24 struggling with is how to make this as

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1 simple as possible because if we make it
2 overly complex, it won't work.

3 It occurred to me one of the things
4 that might be helpful is to have
5 presumptions of eligibility. For example,
6 if somebody is on public benefits or food
7 stamps, across the board it would seem that
8 that person everywhere would have a hard
9 time -- would be unable to retain counsel
10 and, hence, should be eligible for assigned
11 counsel.

12 So, that leads to a two-part
13 question. One, do you use presumptions of
14 eligibility? And if not, what would be your
15 thoughts about guidelines that established
16 presumptions of eligibility?

17 MS. HUGHES: I think each case is
18 different. I mean, we have some cases -- we
19 have a lot of cases right now in Family
20 Court where the grandparents are -- have
21 custody of the child or whatever and they're
22 receiving food stamps or benefits for the
23 child, but they do not. So, each case is
24 different.

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1 I think presumption of eligibility,
2 just each case is so different. I think
3 that you really have to look at each one
4 individually. I think that something that
5 does help with that and I really stress this
6 across the state to everyone and is
7 something I believe in is that you have to
8 have a central clearinghouse, okay.

9 Everything has to come to one
10 place, and there has to be one certain area
11 for which your clients go to. Some clients
12 are going to court. The judge is assigning
13 them. They don't know what's going on. No
14 one is notified. I think if you have
15 everything in one area, which is what my
16 office is, the central clearinghouse for
17 Tompkins County, I think that helps
18 tremendously. They're dealing with me.
19 They're not dealing with an attorney.
20 They're not dealing with the judge. You
21 know, it's an office. It's very
22 confidential. You know, it's a dialogue,
23 and I think that they feel some sort of
24 trust that we're there to help them.

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1 retain. I'm still looking at that based
2 upon the fact that maybe, you know, when
3 some people say they're going to retain and
4 they go out and try to hire an attorney and
5 they hear that they have a \$5,000 retainer
6 they want up front, then sometimes they come
7 back to me and say, no, I can't. I can't
8 retain. So, we still spend time looking at
9 the application, I do, and it is taking a
10 tremendous amount of time.

11 MS. MACRI: Can I ask about -- you
12 touched upon criteria earlier, and I think
13 you discussed it, but just refresh my memory
14 on this. In terms of looking at parental
15 income or spousal income in determining
16 eligibility, is that something that your
17 county takes into consideration when, let's
18 say, an individual between the ages of 17
19 and 21 is arrested? Would you be inquiring
20 about their parental income in that instance
21 or --

22 MS. HUGHES: Yes, we do. And you
23 touched on something that's a bit sensitive
24 in our economy because we have two very big

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1 colleges, and we have a lot of college
2 students -- not a lot, but I would say
3 college students who come to us. They have
4 a DWI. They have something and they haven't
5 told their parents, okay. We don't do that.
6 I mean, if they -- you know, I've had them,
7 you know, literally crying in my office. At
8 some point I say to them, at some point
9 you're going to have to tell them, you know,
10 but we do take it into consideration, but we
11 never, ever force an issue if they are not
12 going to inform their parents.

13 The other problem with the 722-d is
14 you can't do it outside New York State. So,
15 a lot of our students are from
16 Massachusetts, Connecticut, New Jersey. So,
17 really 722-d is -- is not feasible. You
18 can't do it.

19 MS. MACRI: Do you still have them
20 issued, though, despite the fact that
21 somebody is out of state or --

22 MS. HUGHES: Yes, we do. We'll
23 have them -- we still have them apply.
24 Also, spousal income is taken into

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1 consideration. All household income is
2 taken into consideration.

3 MR. LEAHY: What about a household
4 that consists of two unmarried adults?

5 MS. HUGHES: If they're considered
6 a family unit such as they have children
7 together, things like that, then we do
8 consider them a family unit.

9 MR. LEAHY: And if no children?

10 MS. HUGHES: No. We take only --
11 that person is only considered one
12 dependent, and we take that person's income.

13 MS. MACRI: And can I ask about
14 the 722 orders, D orders. Does it get
15 enforced? I mean, do you see that funds are
16 being --

17 MS. HUGHES: Very little. I mean,
18 last year we collected \$5,000, but I haven't
19 seen any 722-ds on a large case, you know, a
20 large -- such as, I mean, a high-level
21 felony. Approximately \$5,000 was taken in
22 last year. I do not enforce them. That's
23 not my -- that's the county attorney's
24 office who handles that.

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1 MS. WARTH: I have a last
2 question. You've been incredibly helpful.
3 Thank you.

4 At one point you mentioned that
5 people feel very comfortable talking to you
6 about this issue because they feel a sense
7 of you're helping them?

8 MS. HUGHES: Right.

9 MS. WARTH: Do you think that
10 would be lost if the investigation and
11 recommendation process were turned over to a
12 third party as opposed to the provider, you,
13 doing it?

14 MS. HUGHES: It depends on who the
15 third party is. I mean, sometimes the
16 clients are very intimidated. They're not
17 very trusting. They're very traumatized at
18 some point. It depends.

19 If you have someone going in the
20 jail, and we have an organization called AR
21 Opportunities, Alternatives Resources, that
22 goes to the jail every day. They help all
23 the inmates. They seem to be very receptive
24 to that. It depends on who the third party

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1 is, and I think that makes a big difference.

2 We are -- our office is located in
3 a very remote area. We're by no one. We
4 were next to the FBI and we made them move.
5 So, you know, no one sees anyone coming in
6 or out. No one knows who's in our office,
7 and, I mean, that's a big deal, too, because
8 sometimes you have clients who are coming in
9 who are wanted. There's a warrant out for
10 their arrest and they aren't going to come
11 in. They don't want to come to wherever
12 that office is to the courthouse to
13 wherever.

14 So, I think that where we are, who
15 we are, how small we are, I think, helps
16 with the client relationship.

17 MR. MAREANE: Anything?

18 Julia, thank you very much.

19 MS. MACRI: Thank you very much.

20 MR. MAREANE: See you back in
21 Ithaca.

22 Our next speaker, and I'm going to
23 take my leave now, is Jim Murphy, who is
24 affiliated with the Legal Services of

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1 Central New York.

2 MR. MURPHY: I will make the point
3 now that I'm not appearing on behalf of
4 Legal Services of Central New York.

5 MS. MACRI: Thank you for being
6 here.

7 MR. MURPHY: Pardon me?

8 MS. MACRI: Thank you for being
9 here.

10 MR. MURPHY: You're welcome.

11 First of all, thank you, for the
12 opportunity to be here. The issues that
13 you're addressing are critical ones across
14 the state.

15 I've been practicing in the Sixth
16 Judicial District now since April of 1978
17 and throughout that period of time through
18 the present these are recurring issues,
19 issues that come up time and again. We
20 think they're cured, and with the next
21 public defender, the next county
22 administrator, we end up with the same
23 problems all over again.

24 I was admitted to the bar in

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1 New York in the Third Department in February
2 of 1977. That very same month Richard
3 Kaminski, who was then the director of
4 administration for the Third Department,
5 issued a memo that was distributed
6 throughout the Third Department. It set
7 forth eligibility guidelines and criteria.
8 I've attached a copy of that memo to my
9 written submission.

10 It came very close to getting
11 almost everything. They -- where they erred
12 a bit, I guess, was when they advised us all
13 including all the courts that the Office of
14 Court Administration would be taking over
15 establishing statewide standards and that
16 would replace it. We've been waiting now
17 for 38-and-a-half years for those new
18 instructions to come in. They haven't.

19 The instructions were wonderful in
20 a number of respects. First of all, we
21 talked about eligibility guidelines this
22 morning and percentages of poverty. No one
23 has said whether they're looking at net
24 income or gross income in those

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1 calculations. The Third Department got it
2 right in '78 it ought to be net.

3 There are a couple of other things
4 that have been touched on this morning that
5 I'd like to address, too, before I go into
6 what I've prepared. Obviously, counsel at
7 first appearance is critical on the criminal
8 side. I don't know. I've spoken with Jay
9 in the past, but my understanding in Broome
10 County, for example, is if you're arraigned
11 in city court, bail is never established
12 with regard to felony charges. You're
13 automatically committed to the jail, and
14 bail is considered by a County or Supreme
15 Court judge. I would suggest to you that
16 eligibility determinations ought to be
17 happening before we have folks sitting in
18 jail and folks sitting in jail who aren't
19 represented.

20 There was also a question with
21 regard to establishing some automatic
22 eligibility criteria, and Tom is the one
23 that suggested it that that might not work
24 because children could be receiving

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1 benefits. Well, the children aren't the
2 ones seeking counsel. So, of course, the
3 fact that the child is receiving food stamp
4 benefits, which, of course, they're
5 precluded from doing if they're living in a
6 household with an adult, but, for example,
7 if they were receiving SSI benefits, those
8 are the benefits of the child. We're
9 talking about eligibility for the person or
10 eligibility for need-based programs for the
11 person seeking counsel, the parent.

12 If the parent or the grandparent or
13 whoever is involved is receiving public
14 assistance benefits, either tenant payment
15 benefits or safety net benefits or if
16 they're receiving SSI, supplemental security
17 income or if they're receiving food stamps
18 or Medicaid, they ought to be eligible for
19 assigned counsel. If they can't afford food
20 for themselves and their children to eat, if
21 they can't afford their utilities without
22 receiving assistance, clearly, they're not
23 in a position to retain an attorney for
24 representation no matter what the charge.

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1 I would also hope that as we talk
2 about these percentages it's recognized, as
3 the Third Department recognized in their
4 memo, that that should just be a floor.
5 Whatever we come up with as a guideline
6 should be a standard below which everyone is
7 eligible, but then as the nature of the
8 proceeding increases in severity, there
9 should an ability to go beyond that
10 percentage.

11 MR. LEAHY: Can I step in there
12 and ask a question?

13 MR. MURPHY: Sure.

14 MR. LEAHY: And it's a little bit
15 of a nuance and maybe a nitpick, but you
16 used the term automatic eligibility and I
17 think when I posed the question along those
18 lines to a previous speaker, I referred to
19 presumptive eligibility.

20 MR. MURPHY: Yes.

21 MR. LEAHY: Is there a distinction
22 or a difference between those two terms?

23 MR. MURPHY: Not in the way I was
24 using it so --

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1 New York State Defenders Office have
2 presided or presented that book to you, and
3 I would support all the issues that they've
4 addressed.

5 So, I changed what I wanted to do
6 and I wanted to put some faces on some of
7 the clients that are impacted in this and to
8 show you how prevalent some of these issues
9 are.

10 I'd like to talk to you about two
11 cases that came through my office in the
12 last two weeks. One of them was on Tuesday
13 of this week. A woman was charged with
14 harassment second. She receives SSI
15 benefits for herself. She receives food
16 stamps benefits for herself and her child
17 and Medicaid benefits for herself and her
18 child. She does live with a boyfriend and
19 she shares shelter expenses with that
20 individual, but otherwise their income is
21 separate. The Department of Social Services
22 recognizes that they are separate households
23 for the public assistance program, for SSI
24 and for the safety net or, excuse me, for

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1 SNAP benefits.

2 She applied -- after appearing in
3 court, she was referred to the public
4 defender's office to apply, which she did
5 the very next morning. She then checked in
6 in the morning of her scheduled --
7 next-scheduled court appearance, which was
8 Tuesday of this week, and was advised that
9 she had been denied based on income. That
10 income, again, doesn't reference whether
11 we're dealing with gross income or net
12 income, but what it did do was take into
13 consideration the income of the boyfriend, a
14 boyfriend who's not the father of the child,
15 a boyfriend who has no legal responsibility
16 for this woman Dorothy or her son.

17 To make matters a bit worse, the
18 evening before this there was -- before her
19 second court appearance she was in a dispute
20 with that boyfriend. The police were
21 called. She was transported to the regional
22 medical center and spent the night there in
23 that center.

24 To suggest that she could rely on

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1 that boyfriend for assigned counsel payment
2 is beyond me. I assume it would be a very
3 simple fix. I'd simply pick up the phone,
4 call the public defender's office and be
5 advised, you're right, we need to look at
6 what we're doing in terms of household
7 definitions, and this should be someone who
8 is eligible.

9 It was on -- at the last minute,
10 but I was advised when I first spoke to the
11 receptionist that there was no possibility
12 of reviewing, that any option would be with
13 the judge. When I spoke with the public
14 defender himself, he advised me that he
15 would take a look at it, but he viewed it as
16 an open question in New York as to whether
17 or not that income could be addressed.

18 I hope you can address that in your
19 standards.

20 MR. LEAHY: If I could ask a
21 question right there at that point. If we
22 do address it and I think we probably need
23 to address it, I'm intrigued by your
24 reference to the definition of household

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1 established with respect to, I think you
2 said, SSI and SNAP benefits, perhaps.

3 MR. MURPHY: (Nods head)

4 MR. LEAHY: Where such a
5 determination has been made, and it has been
6 made, and, again, we have this two sides of
7 the coin because it can be made that it's a
8 separate household or it can be made that it's
9 one household, but where it's made a
10 separate household, is that something that
11 we should factor into the consideration of
12 our own definition?

13 MR. MURPHY: Absolutely. You
14 should be looking, I believe, at legal
15 responsibility. In New York State legal
16 responsibility for a child ends at age 21
17 under Section 413. There is spousal
18 responsibility in New York, but there's no
19 boyfriend or girlfriend responsibility.
20 It's not something that in any way could be
21 enforced.

22 In addition to which it creates all
23 sorts of issues in terms of who the client
24 is and who the client answers to if the

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1 boyfriend or girlfriend is the one retaining
2 that attorney and paying for them. So, to
3 me, it's a very simple answer. You can't do
4 it.

5 Recognizing that the public
6 defender's office didn't have enough time to
7 fully look at it at that point, we went to
8 the court appearance with the client at 4:00
9 that afternoon. We explained these issues
10 to the judge, who advised us he'd like to
11 rely on the public defender's office to make
12 these determinations.

13 When we pointed out to him that
14 ultimately the responsibility for making
15 those determinations falls on the judge, he
16 acknowledged that was true but said he'd
17 like to lean on the public defender's
18 eligibility guidelines, so that's what he
19 would probably do, and he hopes that I could
20 resolve it with the public defender's
21 office.

22 Incidentally, part of that woman's
23 treatment the night before was psychiatric
24 treatment. None of this is doing anything

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1 to help her situation.

2 The second case came in the week
3 before. This was a 25-year-old who is now
4 confined to a wheelchair. In June she gave
5 birth to a child at the local regional
6 center. Because of her various disabilities
7 and medications she takes for them, there
8 were special issues involving the child, and
9 the child was kept in the NICU unit at the
10 hospital.

11 When the child was ready to be
12 returned home, the Department of Social
13 Services at the end of July stepped in and
14 took custody of the child. When the woman
15 had left the hospital, and she's 25 years
16 old, she went and was staying with her
17 mother, who does have substantial income.
18 When she applied for representation through
19 the public defender's office in that
20 Article 10 proceeding, she was required to
21 list her mother and parents' income, which
22 she did.

23 The other part of what was
24 happening through this was that the

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1 grandmother of the child, her mother, was
2 also looking at seeking custody and filing
3 an Article 6 proceeding and actually had
4 retained an attorney from an adjoining
5 county to represent her. So, she was
6 actually an adverse party, but she was
7 denied representation. And when she then
8 appeared in Family Court and pointed out
9 that she had been denied representation, the
10 Court still did not appointment any for her.

11 After she contacted our office, we
12 had her obtain a letter. The grandmother
13 was willing to sign the letter explaining
14 that she would not pay legal expenses for
15 her adult daughter, who was 25 years old,
16 and following that the public defender's
17 office did provide representation.

18 By the way, the 25-year-old woman
19 had no source of income. She has an SSI
20 application that's pending and a Medicaid
21 application. She was carried under her
22 mother's medical insurance because of the
23 obligation to provide that coverage through
24 age 26. That's in two weeks in one rural

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1 county.

2 I've listed for you in my written
3 testimony a number of other issues. First a
4 grouping of issues that have arisen in the
5 past couple months. Those issues included a
6 county, a very large county, in fact, one of
7 the -- one of the Hurrell-Harring counties,
8 which was counting food stamp or SNAP
9 benefits as income, that despite the fact
10 that consideration of SNAP benefits as
11 income for any program operated by a state
12 is illegal both under federal statute and
13 under New York statute. That county is not
14 alone. Five years ago we addressed that
15 same issue in an adjoining county.

16 That's another thing that we see if
17 we are addressing these issues across the
18 state. If using one method reduces costs in
19 one county, it will show up again in an
20 adjoining county or 10 years later when
21 someone remembers that they used to do it
22 that way.

23 One of the recurring issues is
24 ownership of a home. That is also a

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1 traditional Onondaga County issue, which
2 spread from Onondaga County to a number of
3 other counties. There's case law from the
4 Second Department in New York that says mere
5 ownership doesn't do it, but we've
6 represented folks in Onondaga County who
7 have been denied representation even with
8 regard to a Habitat for Humanity home where
9 there was no equity in the property other
10 than their sweat equity that goes into it
11 under the Habitat for Humanity program. In
12 addition, the home was owned by the mother
13 of the 19-year-old individual who was
14 seeking representation.

15 We've represented folks in Madison
16 County who were respondents in Article 10
17 proceedings. They owned a mobile home on,
18 approximately, an acre of land. They had no
19 equity in the property. They had actually
20 applied for loans against the property to
21 seek representation. They were each
22 entitled to separate representation because
23 of issues in the Article 10 proceeding, but
24 that property had been used as a basis for

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1 denying representation in the Article 10
2 proceeding. It's still a recurring problem
3 in New York, and this is the financial
4 eligibility issue, but we're still running
5 into courts that don't recognize the
6 obligation under Criminal Procedure Law
7 170.10 to provide representation in cases
8 involving violations even in this county and
9 in Herkimer County within the past couple
10 months.

11 We have counties that count child
12 support income received by households as
13 available income, but there's no
14 corresponding deduction for child support
15 benefits that they are required and, in
16 fact, are paying out to other households.

17 In Delaware County there's special
18 attention which is given to income tax
19 refunds and earned income credits. Those
20 funds are exempt and prohibited from being
21 considered and temporary assistance cases in
22 New York, that is, safety net and 10-f
23 cases, food stamps and Medicaid.

24 Also, attached to my testimony is a

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1 copy of the directive from OTDA that
2 specifically address that, but it shouldn't
3 be necessary to go there because when you're
4 talking about counties that are looking at
5 gross income, when you're counting a tax
6 refund, you're double counting that money,
7 but it continues.

8 There are also issues with the
9 notices that are provided to folks who are
10 denied representation. It would only make
11 sense that those notices should identify
12 both the standards for eligibility and the
13 income and resources as calculated by
14 whoever is making those determinations. I
15 don't think that there's any question that
16 as we talked about creating some set
17 presumptive standards that we have to be
18 looking at the second level at some point to
19 address some of these other issues.

20 We've had a county deny
21 representation because the litigant was not
22 a county resident despite the fact that the
23 proceeding was pending in the county.

24 We've had 722-d orders taken with

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1 regard to folks receiving SSI benefits.
2 Those benefits, of course, are exempt from
3 execution under both federal law and state
4 law, but those orders were routinely being
5 taken simply by an application by the
6 defender's office.

7 We've had folks who received SSI
8 who received retro benefits. Their
9 resources are well below the resource
10 standards for SSI, but -- and this, again,
11 an Onondaga County situation -- they were
12 denied on the basis of those resources which
13 were well within the SSI levels, but the
14 attorney who was provisionally assigned
15 initially agreed to represent while charging
16 a fee. Of course, you know, there are
17 ethical opinions prohibiting that sort of
18 conduct.

19 We'll dealt with situations where
20 parents have been denied assigned counsel
21 despite the pendency of PINS proceedings
22 initiated by third parties, their school,
23 the Department of Social Services, whoever.
24 Again these issues seem to recur over and

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1 over again.

2 So, we are hopeful that as you
3 establish these standards that, one, there
4 is significant training that's provided to
5 all offices that are making eligibility
6 determinations and for the courts and
7 particularly for the lay justice courts in
8 the state where there is not an appreciation
9 for some of these issues.

10 Again, the 1977 memo is a great
11 starting point, I think, following the
12 recommendation from the New York State
13 Defenders Association.

14 I thank you for undertaking this.
15 I hope I don't have another 38 years to
16 wait. I'm quite confident I won't be
17 waiting for that time frame. Both
18 Mr. Kaminski and the then administrative
19 judge for the Third Department has long
20 since passed. It would be wonderful to
21 adopt some standards in their name.

22 Thank you.

23 MS. MACRI: Before you go, we have
24 some questions, just a few questions.

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1 MS. WARTH: Thank you so much for
2 your testimony in both oral and also giving
3 us a lot to think about in writing, too.
4 It's incredibly helpful and I think that
5 it's helpful to hear that -- the stories
6 that you're telling us about anonymous
7 situations that you tend to see over and
8 over and I think that's important to know.

9 I do want to follow up on the
10 inquiry that Bill had asked you earlier
11 about presumptive and/or automatic
12 eligibility and, you know, I think you made
13 it clear that if we see those safety net
14 benefits and that kind of thing that would
15 be something that would -- you would endorse
16 as an automatic eligibility.

17 Are there any other things that
18 come to mind that we should think about in
19 terms of automatic and/or presumptive?

20 MR. MURPHY: Well, I think there's
21 no question with regard to tenant and safety
22 net. I think there's no question with
23 regard to SSI benefits.

24 I would point out that just in

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1 October of last year New York State changed
2 its payment methods under the SSI program,
3 and so now there are actually SSI payments
4 that are made by the Social Security
5 Administration in state supplemental
6 program, payments that are paid out by OTDA.

7 So, while those folks are actually
8 not receiving the federal SSI benefit, they
9 are receiving a supplement to that. So,
10 those are folks, anyone receiving SSE in
11 addition to SSI, should be included, I would
12 think.

13 MS. WARTH: Right.

14 MR. MURPHY: I would certainly
15 think that anybody receiving SNAP benefits.
16 If they can't afford food, they can't afford
17 an attorney. And the same with regard to
18 Medicaid. If we -- if households can't
19 address those needs, they certainly are not
20 going to be able to retain an attorney.

21 MS. WARTH: What about a
22 situation, for example, if somebody is in
23 custody and unable to make bail? Would that
24 qualify?

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1 MR. MURPHY: I would certainly
2 think that's -- that's another perfect
3 example of a situation which makes -- which
4 in the long run, quite frankly, can save the
5 county money, you know. We're -- in Broome
6 County now, we have a -- the county jail was
7 built 15 years ago, in that area. At that
8 time I think the population of the City of
9 Binghamton was 78,000. I think it's now
10 something like 48,000. And that jail is
11 full, and people are routinely being shipped
12 out to other places. I think it's -- if
13 some of these things were in place, if bail
14 was being set when someone appeared in City
15 Court on a felony charge, that jail might be
16 so full, and Broome County might be saving
17 some money for what they're contracting out
18 with Chemung County and other counties to
19 place prisoners in.

20 MS. WARTH: I think you also do an
21 excellent job. You eloquently state that we
22 should think about considering net income
23 and not just gross income, and that would
24 require that we take into account

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1 liabilities. Do you have thoughts about the
2 liabilities that should be considered?

3 MR. MURPHY: Well, I mean, I think
4 whether or not those obligations are there
5 and are going to be there, one huge issue is
6 childcare expenses. It's not at all unusual
7 for childcare expenses to dwarf any other
8 public benefits that folks are receiving.
9 And if they're paying those childcare
10 benefits, to garner the income they're
11 receiving, there sure ought to be coverage
12 of those.

13 Anything where there are
14 garnishments, of course, that can't be
15 lifted, those have certainly got to come
16 out, and moneys that are being paid in taxes
17 aren't currently available, either. So, I
18 mean, all those things need to be considered
19 because what you're looking at is how much
20 money there is in the pocket at the end of
21 the month after those very basic issues have
22 been met.

23 MS. WARTH: What are your thoughts
24 on things like general household expenses,

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1 mortgage payments, rent, educational
2 payments?

3 MR. MURPHY: Obviously, the
4 mortgage payments can't be escaped, or
5 they're going to be without that home that
6 some counties are relying on them to use for
7 the standard.

8 I mean, I think, obviously, there
9 could be situations in which one would be
10 concerned about that. You know, obviously,
11 someone who has a \$5,000-a-month mortgage
12 that's probably not reasonable in terms of
13 these standards, but I think that generally
14 you have to look at those expenses, as well,
15 because those expenses, the person seeking
16 the assigned counsel isn't always the
17 individual who's bringing in the wages. And
18 that person has a responsibility to their
19 children in the home and other people that
20 they may be legally responsible for. So,
21 I'm not sure that that's an appropriate
22 diversion.

23 MS. BURTON: Jim, I want to first
24 thank you for putting a face to some of

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1 these issues by sharing with us the stories
2 of the actual people who've been impacted by
3 some of these issues that you've brought up.

4 And I had a chance to just skim
5 through the memo that you provided to us
6 from the Third Judicial Department in
7 February 15, 1977, and just listening to the
8 conversation that you've been having, one of
9 the paragraphs struck me as sort of
10 encapsulating everything that you've been
11 saying and I just want to see if that is
12 what you've been saying. It says, a person
13 charged with a crime or before the County
14 Court and otherwise entitled to assigned
15 counsel is eligible for assigned counsel
16 when the value of his present net assets and
17 his current net income are insufficient to
18 enable him promptly to retain a qualified
19 attorney, obtain a lease or a bond and pay
20 other expenses necessary to an adequate
21 defense while furnishing himself and his
22 dependents with the necessities of life.

23 MR. MURPHY: I think that says it.
24 It addresses -- you know, there was some

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1 suggestion about looking at 722-d orders and
2 asking folks to apply for financing. How
3 long do you think that those applications
4 for financing are going to take? And if
5 that's, you know -- in the Family Court
6 side, if that's -- if that's not seeing your
7 child, your child is a month old and you
8 ought to be doing a lot of bonding, those
9 just aren't acceptable time frames.

10 MS. BURTON: Thank you.

11 MS. MACRI: I have a question. I
12 think this has been very compelling to,
13 again, lead us to really understand some of
14 the plights of the individuals that you've
15 seen affected by these eligibility issues.

16 I do want to ask you. I know we've
17 been talking throughout the morning about
18 who should be responsible. I mean, we know
19 that the judges have statutory authority,
20 but who should be responsible for gathering
21 this information or conducting this
22 assessment? Do you have any opinion on that
23 that you would wish to share with us?

24 MR. MURPHY: Well, in my county,

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1 Cortland County, as you may be aware, we've
2 recently obtained approval finally for an
3 assigned counsel. I think that the
4 administrator for that plan is a great
5 choice because they're not providing the
6 representation, unlike the public defender's
7 office, so that in those counties where
8 there is an assigned counsel plan, I think
9 that they should always be the first choice.

10 It also permits them with
11 software -- again, New York State Defenders
12 Association has what I'm told is great
13 software in terms of criminal defense work.
14 It permits cross-checking for conflicts and
15 avoids all of those problems, and you remove
16 the sense that, well, of course, I got
17 denied assigned counsel, my boyfriend is
18 already represented by them. It makes for a
19 much fairer system and a more transparent
20 system.

21 MS. MACRI: We have had folks in
22 prior hearings talk about some Social
23 Services entities, for example, are expected
24 to make the determination and once they do

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1 so that that determination is binding. So,
2 the Social Services attorney takes on a
3 housing matter. Because Social Services did
4 the determination, the Court knows that this
5 person is deemed to be someone who is
6 deserving of counsel without having to pay
7 for it.

8 MR. MURPHY: I think there you're
9 dealing with a somewhat different scenario.
10 What you're talking about is an adverse
11 party challenging a determination made by a
12 legal services program, and there's some
13 ethical opinions over time that have
14 addressed that. And the Legal Services
15 Corporation also addressed that saying that
16 those are not issues for consideration by
17 the Court. If folks have issues with how
18 those eligibility determinations are made,
19 that's done through a complaint to the Legal
20 Services Corporation. So, I think we're
21 kind of apples and oranges on that.

22 MS. MACRI: Okay.

23 MR. MURPHY: Thank you.

24 MR. LEAHY: Thank you very much.

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1 MS. MACRI: I think at this time
2 if there's -- we'd like to open up to any
3 other speakers or anyone who wishes to
4 address the panel before we adjourn. If
5 anyone would like to address us on any
6 issues that we've talked about today or any
7 of the issues in the settlement, we invite
8 you to come forward.

9 MS. WARTH: And if you don't mind,
10 we do have a court stenographer, if you
11 could identify yourself and spell your name,
12 that would be terrific.

13 MS. BECKWITH: I actually brought
14 my business card.

15 MS. WARTH: Thank you.

16 MS. BECKWITH: Thank you. And I
17 did bring copies of the application that our
18 county uses to determine eligibility.

19 MS. WARTH: Thank you.

20 MS. BECKWITH: Good morning. My
21 name is Karri Beckwith. I'm the assigned
22 counsel administrator for Chenango County,
23 which is about 32 miles north of where we
24 are right now. I have been in my position

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1 since 2004. At that time I was hired to be
2 the assigned counsel administrator and I was
3 the only full-time employee in our office.
4 We have one part-time public defender, four
5 assistant public defenders.

6 At this time and back in 2004 I
7 make all eligibility determinations as asked
8 about the judges in our county, and there is
9 an application process that I did provide to
10 you this morning. We do take into account
11 many things. We do use the gross income
12 number. We use 125 percent eligibility
13 guidelines.

14 In Chenango we receive applications
15 in many ways from the Court by mail or fax,
16 by appearance right in our office. We're
17 very easily found in the Eaton Center right
18 in the City of Norwich. We also receive
19 applications by fax or mail from our local
20 jail. Sometimes applications provided to us
21 from the courts are accompanied by TV-1 or
22 TV-2 forms, and I hope that you're all
23 familiar with those terms. If not, they are
24 orders by the local court ordering my office

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1 to make the assignment. And it makes it
2 actually pretty easy for me, but if an
3 application is accompanied by a TV-1 form
4 and the person is still incarcerated at the
5 time that I review the application, they are
6 automatically given an attorney by order of
7 the judge. Those forms do come from the
8 local courts.

9 If clients are incarcerated, they
10 do receive immediate representation, and we
11 try to get an attorney to see them that day
12 or within 24 to 48 hours as soon as
13 possible, but our county does not currently
14 participate in counsel at first appearance.

15 If a client is deemed eligible, I
16 send a letter notifying them of the
17 attorney's contact information. And if
18 during the pendency of the representation
19 they are released from a correctional
20 facility, many times their representation is
21 reevaluated to determine if they're still
22 eligible. If they're released from jail and
23 they go back to work, we certainly take a
24 look at that.

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1 Lots of times if I make a
2 determination that the person should no
3 longer be represented, I just notify the
4 Court, and then the judge makes that
5 decision whether or not to relieve counsel.

6 If they are determined to be
7 ineligible and the income is borderline, I
8 contact the Court and encourage them to take
9 a look at the application and I usually
10 accompany it with a 722-d order, but even
11 within our own county it really depends on
12 the Court whether they even consider a 722-d
13 order. Our City Court, which is in Norwich,
14 is very busy, and they do about one a week.
15 However, local courts that are in the
16 outlying areas, the judges have never heard
17 the term, to be quite honest, and we've
18 tried to speak to them about it, and they
19 honestly feel that the determination should
20 be made by me in my position and either
21 they're eligible or they're not. And
22 there's -- actually, there's a variety of
23 opinions on that matter, as well, I believe,
24 from many different agencies.

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1 household. The only time that doesn't come
2 into play really is in a case where the
3 potential client may have a victim in the
4 household. For example, if they had
5 assaulted a parent, we generally don't take
6 the parental income into play there because
7 potentially that would be an issue.

8 PINS proceedings we do it on a
9 case-by-case basis. If the parent or
10 guardian may be in trouble in the future
11 based on their action or nonaction in the
12 PINS proceeding, then we generally do
13 assigned counsel to the parent.

14 I was actually a little bit shocked
15 this morning as to how different our
16 counties do use the guidelines. In Chenango
17 when I took the position in 2004, I was told
18 to use the guidelines and kind look at the
19 application, and if nothing really stood out
20 to me, just, basically, use their gross
21 income, and that was the end of it. And
22 over the years, you know, pretty much that
23 has been how we do things.

24 Something that I feel is slightly

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1 unfair in Family Court proceedings are if
2 one parent is the parent that has placement
3 and receives the child support payments and
4 the other parent who is working and paying
5 support, we don't take the payments to the
6 one parent into account because that's not
7 part of their income. We use the payments
8 on the other side, unfortunately, that one
9 parent may not qualify based on his payments
10 because that's really considered his gross
11 income. I don't know if I said that
12 correctly, but you understand what I'm
13 trying to say.

14 Right now we're having an issue in
15 our county, and this is kind of based on the
16 assignments, but we went to committee
17 yesterday because our 18-b line, we're
18 depleted for the entire year this year, and
19 our committee bases our performance as an
20 office on how low we can keep the 18-b line,
21 which is just a horrible thing. It doesn't
22 take into account our representation of
23 these clients who just desperately need our
24 help. All that they care about is how much

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1 the county part is going to be at the end of
2 the year, and we work very hard to try to
3 keep that line low.

4 We try to use local attorneys to
5 the courts that they are providing services
6 at. We really scrutinize bills when we
7 receive them making sure that no attorneys
8 overuse the money that's available to them.
9 Very seldom do they actually go over the
10 statutory limit. However, I believe even in
11 our county there's probably abuse of the
12 system, and it's unfortunate that my job
13 performance and the job performance of those
14 in my office, unfortunately, the county
15 considers it to be a bad thing if the
16 assigned counsel line, which we have
17 absolutely no control over, exceeds our
18 budget for the year.

19 In many counties over the years I'm
20 sure that they've done what they've had to
21 do to provide representation to the clients,
22 and as the years have gone when I first
23 started, I was assigned counsel
24 administrator and then in 2013 with the help

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1 of the Indigent Legal Services Fund we
2 actually expanded. Now we have one
3 full-time public defender, two full-time
4 assistants. We have one secretary that does
5 the legal paperwork for the assistant public
6 defenders and then one part-time clerk.

7 And as need be over the years my
8 job evolved from assigned counsel
9 administrator to then I received the felony
10 case files in the office and then I started
11 to work on felony case management in the
12 office and then I took over the grant
13 writing and the grant management and the
14 budget proceedings.

15 And so, I think that if anything
16 comes out of Chenango County, I think it
17 would be a great benefit that someone were
18 to tell our county that someone should be in
19 charge of assigned counsel representation
20 and nothing else because all these factors
21 play into decisions that are made out of our
22 office, and it shouldn't be. It should be
23 one person looking at some form that
24 New York State comes up with to determine

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1 whether or not someone is eligibility for
2 assigned counsel. It should be statutory,
3 you know, and it should be something that if
4 somebody comes into Chenango County, they'll
5 fill out an application, I can fax it to
6 Ulster County, and they're using the same
7 guidelines that I am so that that person
8 doesn't have to say to me, as they did in
9 another county, why did I get one in
10 Chenango, but I don't get one in Ulster? I
11 don't understand.

12 So, I'm sorry. I didn't mean to
13 rant, but it's a very passionate thing that
14 we're all trying to deal with here and we're
15 all trying to work for the better good of
16 the indigent clients in New York State and I
17 hope that at some point you're all able to
18 come up with some kind of better way to do
19 this so we're all not trying to reinvent the
20 wheel in our counties.

21 MS. WARTH: And you didn't rant.
22 I think you highlighted some very important
23 issues including the outside pressures that
24 are put on decision-makers in making these

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1 decisions and the real need for good
2 guidelines and good standards that can be
3 used across the board in an effective way,
4 but also the need to ensure that everybody
5 is on board with what this really means in
6 terms of ensuring the constitutional right
7 to counsel. So, thank you.

8 MS. BECKWITH: Yes. You're
9 welcome.

10 MR. LEAHY: Thanks, Karri. Let me
11 just add that you've touched upon a very big
12 issue that goes beyond the eligibility
13 guidelines, and, indeed, it's possible that
14 eligibility guidelines which are uniform and
15 which do honor and preserve and protect the
16 right to counsel could have the long-term
17 effect of exacerbating the funding crisis,
18 and that wouldn't be their intent. Their
19 intent would be to honor the right to
20 counsel. And that's all part of, you know,
21 a much bigger issue that is -- you know,
22 we're very involved in both with the
23 implementation of the historic settlement in
24 Hurrell-Harring.

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1 right. I didn't figure out the percentages,
2 but I did prepare them.

3 MS. WARTH: Thank you.

4 MS. BECKWITH: Yes.

5 MS. BURTON: I did have a question
6 just in terms of the application process.
7 And as you mentioned, I noticed on the
8 application form that there's no -- there
9 are no questions about liabilities or
10 expenses --

11 MS. BECKWITH: That's correct.

12 MS. BURTON: -- only about income.
13 And I lost my thought.

14 MR. LEAHY: I noticed something,
15 Angela, so let me just cover it for you.

16 MS. BURTON: Thank you.

17 MR. LEAHY: I see something that
18 looks like it's been highlighted on the
19 original. Across from financial information
20 it says, supporting documentation is now
21 required.

22 MS. BURTON: That was the
23 question.

24 MR. LEAHY: Is that it?

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1 MS. MACRI: You picked up on mine,
2 but you can ask the same thing.

3 MS. BURTON: Well, it was part of
4 the question, but my question that this
5 prompted me to wonder whether there are
6 people who are denied eligibility for
7 failure to provide the supporting
8 documentation?

9 MS. BECKWITH: Daily, yes. That
10 is a really big realization that the
11 potential clients are having in Chenango
12 County, is it that for the first six or
13 seven years that I was in the position, the
14 chief public defender not -- we did not have
15 the manpower to be able to review all the
16 financial documents that were really
17 required to determine eligibility. So, I
18 took their word for it.

19 And over the years when the 18-b
20 line became so excessive and caseloads
21 become so unmanageable, we came to the
22 determination that we really needed to start
23 requiring financial documentation. As our
24 office expanded, we had more people to be

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1 able to help do that. So, as time went on,
2 yes, that was a change that we made.

3 But something that I didn't
4 mention, if someone comes in and they're
5 able to provide us with a public assistance
6 number, Medicaid, a food stamp number, they
7 are someone that as long as they have that
8 card number on the application, that is an
9 automatic. I know that we talked a lot
10 about automatics.

11 One other issue that I just
12 happened to remember to mention, in the
13 spring we had a small issue with -- we were
14 subpoenaed to provide a copy of the
15 application in a matrimonial proceeding.
16 The gentleman had filled out an application
17 for a custody visitation issue, and then the
18 wife brought a question in matrimonial, and
19 we were subpoenaed and had to provide the
20 Court with a copy of the financial
21 disclosure for the assigned counsel program.
22 And the judge kept -- I don't believe he
23 released it to the parties, but he did keep
24 it. He said he was going to give us a

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1 determination as to whether or not he was
2 going to take it in on a case.

3 And I don't -- I'm not sure if
4 there's any case law regarding that, but I
5 would be interested to know that because we
6 researched it and were not able to find any.

7 MS. MACRI: Was this, the judge,
8 the same judge on the earlier proceeding
9 that --

10 MS. BECKWITH: No.

11 MS. MACRI: Okay.

12 MR. LEAHY: Thank you.

13 MS. BECKWITH: Thank you so much.

14 MS. MACRI: Thank you.

15 MR. LEAHY: Keith.

16 MR. DAYTON: Good afternoon. My
17 name is Keith Dayton. I'm the chief public
18 defender of Cortland County and I come
19 really before you in a good moment for
20 Cortland County in that as a result of a lot
21 of hard effort and assistance from people
22 like the New York State Office of Indigent
23 Legal Services, New York State Defenders
24 Association, our Cortland Bar Association

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1 and our committee like Jim Murphy and
2 Patrick Perfetti, who is here, the County
3 Legislature, we are now in a position to
4 actually have implemented and budgeted for
5 and space provided for an independent office
6 for an assigned counsel administrator with
7 staff built in. And we're in the process
8 that -- that's being posted now, and
9 hopefully we can fill that and that will
10 bring tremendous improvement. And to be at
11 this point after so many years of battling
12 and everything and fights, it is really a
13 great moment.

14 And I guess -- so, that individual
15 that is going to be the first assigned
16 counsel administrator will be in the unique
17 position to develop a lot of policies and
18 implement a whole lot of policies regarding
19 eligibility and vouchers and relationships
20 with judges and the county. And so, I don't
21 know how soon we're going to have some
22 information out, but certainly I would
23 expect that our assigned counsel
24 administrator would be eager to adopt some

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1 guidelines to start this.

2 But in the meantime, our current
3 policy is one in which, essentially, by
4 default the public defender's office ends up
5 processing the applications. And things to
6 think about, from my point of view, and that
7 is that we've talked about whether the
8 provider processes the application, an
9 independent party. I strongly urge it to be
10 an independent party.

11 For example, the last speaker
12 talked about, you know, being in possession
13 of an application from an adverse party in a
14 matrimonial action, but some of the things
15 to think about that puts, say, my public
16 defender's office in an awkward position, I
17 would get applications from both parents or
18 codefendants, which means that there are
19 certain confidential information that is
20 available to me representing a defendant
21 that, you know, it makes it very awkward
22 whether, you know -- and certainly certain
23 parts of that application could contain
24 information that may be used to an advantage

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1 of one party. So, that's one reason why an
2 independent party processing applications is
3 a good idea.

4 The second is that in the event
5 that we process an application and deny the
6 application at the outset, and I'll talk
7 about our process momentarily, but in the
8 event that we deny the application and the
9 appeals process works and it goes to the
10 judge and the judge overrules us and assigns
11 us, it does make it a little bit of an
12 awkward moment to begin with that this
13 individual is walking back into our office.
14 Now, we're professionals. We do that, but
15 from a client's point of view, they walk in
16 and now they've just had us deny them and
17 now -- you know, what's their comfort level
18 on that immediate hope for a trust level of
19 the representation over, you know, important
20 things like custody and their liberties? We
21 can get by that, but it's a challenge.

22 And the third type of issue is that
23 in the event that when we process the
24 application, and I'll use a Family Court

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1 matter as an example, a mother will come in
2 and apply. We will process the application.
3 She'll be eligible. We will immediately get
4 a notice of appearance out of the Court and
5 represent the mother. The father comes in
6 secondarily. You know, it could be even the
7 same day. We process the application. We
8 identify eligibility. We identify the
9 obvious conflict with our office. We set
10 the wheels in motion to get assigned counsel
11 for that party.

12 But let's say that while that
13 process is going on there's a court
14 appearance, and that court appearance could
15 involve like orders of protection and things
16 of that. And now the mother has an
17 attorney, and the father doesn't have an
18 attorney and the father is saying, wait a
19 minute, you know, there could be something
20 going on. You know, I meet an attorney in
21 that office and I saw him in there when I
22 handed the application in. And it puts us
23 in an awkward position of trying to say that
24 we didn't do anything wrong, that's just how

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1 the system goes.

2 And so, those are sort of just
3 three types of examples of reasons why the
4 independent processor, I think, is the way
5 to go.

6 And then just briefly on how I
7 process the applications now in our county.
8 We have an application process. We require
9 documentation. The general idea behind the
10 applications is that I have a legislature
11 that I may be called upon to defend my
12 numbers, my process, my applications. So,
13 there is documentation that we require.

14 But when we get the application
15 with the documentation, our first insight is
16 is this person presumptively eligible
17 pursuant to the federal guidelines, and we
18 use that second column. I think it's 125,
19 is on our chart. And if they are eligible,
20 then immediately they would get an attorney.

21 If they're not, if they're over the
22 guidelines, then we start to at that point
23 look a little deeper and we look a little
24 deeper and we say, well, are they close, is

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1 it a significant type of case, was there
2 prior representation, are they represented
3 currently by a public defender. Those
4 things are taken into account really with
5 the mindset that if I have to defend to the
6 legislature, I can say, this is why I did
7 that.

8 In fact, on our application we do
9 have a box at the end of the application
10 that indicates any other factors that we
11 should take into consideration, please, fill
12 in, and then we scrutinize those and we --
13 with the idea being we are trying to get
14 representation, but we also need to be able
15 to defend it if called in by the county
16 attorney or the County Legislature.

17 In the event that the applicant is
18 denied, the appeals process would be to go
19 to the Court and plead your case, and that
20 happens regularly. And I know you've asked
21 other people like what type of percentages
22 are we talking about and I didn't bring my
23 exact numbers today, but I would say we
24 probably accept about 70 percent of the

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1 applications that are handed in, and then of
2 those 30 percent probably half of those are
3 overruled and assigned to us by the
4 particular judges so that that process is in
5 place, and judges routinely will follow
6 through on that.

7 I'm not so sure that they follow
8 through on that in -- from their point of
9 view that they are -- that they really are
10 convinced of their inability to hire
11 counsel. Perhaps, it's more that they want
12 an attorney there, and so, you know,
13 that's -- this is the most expeditious way
14 to get this person represented for the case
15 flow and the Court, but in any event, those
16 are, roughly, the numbers.

17 We also provide the opportunity
18 that in the event that the applicant is
19 denied, if they feel that there's some
20 factor that would render them eligible but
21 it's not obtained in the application, I
22 forgot to put it if or I didn't realize that
23 that was eligible, we allow applicants to
24 resubmit applications over and over again.

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1 And, in fact, if the application
2 comes back in and it's like a brand new
3 application, we go with the new application.
4 It's not our position to judge and to
5 battle, hey, wait a minute, what happened to
6 this. We accept the new application because
7 they're signing it. So, that's really the
8 process that we go through for
9 representation.

10 And before I take any questions you
11 might have, I would also suggest that any
12 type of guidelines or procedures that you
13 put out there, from our point of view, two
14 things that you might not consider as
15 relevant, but I think they definitely are,
16 the first is defining a case because I think
17 ultimately ILS and others, we're going to
18 look at statistics across the state, and
19 there's a wide variety in terms of the
20 number of cases and caseload standards and
21 stuff. So, a definition of what a case is
22 for the long-run effects on some other
23 things that could come down in the future I
24 would suggest along with caseload standards

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1 because this is part of our issue that if we
2 expand our scope of representation, you
3 know, without caseload standards to be able
4 to go to the legislature and say, well, wait
5 a minute, we've now accepted this, now we're
6 over-standard, we need more staff, we'll
7 always be in that battle where our resources
8 are going to be challenged. And without
9 some backing to say, well, this is --
10 establishes we need more staff. I see them
11 going together, the guidelines and the
12 standards are joined.

13 MS. MACRI: Thank you so much for
14 taking the time out to be here and sharing a
15 little bit of information about the process
16 in your county.

17 I was kind of curious. The rate of
18 denials that I understand as being
19 estimated, but if we were to propose higher
20 federal poverty guideline levels, for
21 example, let's say we used over 150 percent,
22 just as a hypothetical, the denials that you
23 see in your county, would you see your
24 caseload be significantly increased, or

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1 these are cases that are way above that
2 125 percent guideline? I don't know if I'm
3 stating it properly. Do you think you would
4 see a significant readjustment of the number
5 of cases that would be assigned?

6 MR. DAYTON: Not on the face of it
7 because we kind of look for opportunities to
8 go up to, let's say, 150 percent. However,
9 if then the guidelines are 150 percent, then
10 we start looking for opportunities to go up
11 to 200. So, essentially, a ratchet effect,
12 there could be higher numbers.

13 MS. MACRI: Can I ask one more
14 question. Does your county -- you may have
15 already addressed this. 722-d orders, do
16 you -- does your county issue a number of
17 722-d orders in these kinds of cases where
18 they're borderline?

19 MR. DAYTON: Yeah. That's --
20 that's a challenge, and I think it's a
21 challenge for everyone, but like I made
22 reference to earlier that there are a lot of
23 cases now in particularly our most busiest
24 court in which the judge has gotten to the

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1 position where the inquiry says, look, if
2 you want an attorney, regardless of income,
3 if you want an attorney, I'll assign the
4 public defender's office, and you will have
5 to pay -- you might have to pay the county
6 back. And we at this point because -- for
7 lack of better standards, we use a fixed-fee
8 basis depending on the level of the case.
9 And what is happening in Cortland, let's
10 say, about the last year, year and a half,
11 is that we have a good reputation of
12 attorneys in the public defender's office.
13 And even those that would be denied outright
14 are saying, yeah, that's a bargain. I'll
15 take that.

16 And so, we are -- we're seeing a
17 dramatic increase in the 722 orders that are
18 issued, issued, not necessarily collected
19 because that's the other awkward position
20 that we're in. We're not in a position to
21 be able to collect on them because we
22 envision this -- the public defender's
23 office, that is, we envision the situation
24 where if we send a collection letter of any

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1 level out, then in a way that could create a
2 conflict of interest if there's a future
3 case. You know, let's say the case goes,
4 and then they reapply and they say, wait a
5 minute, how can they represent me when, you
6 know, they're trying to collect from me?
7 And then it turns out then there's a
8 conflict, and that case gets assigned out,
9 and then the county has to pay the 18-b.
10 And we stress or I stress we're not going to
11 do that, and then the county attorney would
12 be the natural backup. But if they don't
13 have the resources for that, it would fall
14 on them.

15 So, there's a significant amount
16 but not a lot of collection.

17 MR. LEAHY: Do you have data on
18 the collections?

19 MR. DAYTON: Like 5 percent.
20 And really --

21 MR. LEAHY: And that's per a
22 calendar year?

23 MR. DAYTON: Less than 1,000. And
24 those -- maybe way less, maybe less than

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1 200, but it happens to be that those that
2 end up paying, you know, come in, and they
3 give us a check for \$20. In a way I feel
4 the worst for them because you can tell
5 they're actually budgeting and trying to do
6 that. And, all right, here's your receipt.

7 MR. LEAHY: I wanted to engage in
8 a little bit more of a conversation with you
9 about the public defender or assigned
10 counsel administrator as the determiner of
11 eligibility. We've certainly heard a lot of
12 testimony from many of your colleagues from
13 around the state that the public defender is
14 sometimes mentioned or sometimes the primary
15 provider in the county of mandated
16 representation ought to be the primary
17 determiner at least in terms of recommending
18 to the Court of eligibility, and the
19 reasoning seems to go you know more about
20 the client, you care more about the client,
21 you make a more informed prorate to counsel
22 judgments than an independent entity is
23 likely to do or, indeed, that the Court
24 might on its own devices do. And you have

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1 pointed out in your testimony some serious
2 concerns about the public defender in that
3 role.

4 My question isn't really to resolve
5 that issue so much as whether if you assign
6 the responsibility to the assigned counsel
7 administrator who does not herself do the
8 representation, does that really mitigate
9 the problem where you have the same problems
10 of confidential information coming through
11 the assigned counsel administrator or
12 clients who are going to become public
13 defender clients and clients who are denied
14 eligibility and then are going into an 18-b
15 office, lawyer's office, with the judge
16 having overruled? So, do you really get
17 away from those conflict problems and client
18 relationship problems by -- is there a
19 significant difference between the public
20 defender providing and the assigned counsel
21 administrator?

22 MR. DAYTON: There still may be
23 some administrative types of conflicts, but
24 in terms of just strictly representing a

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1 particular client, I think it solves almost
2 all of those, from our point of view,
3 because we're not in a position -- we get
4 our cases and we now can zealously represent
5 our clients without concern of verifying
6 their income, of having information of a
7 codefendant or we have our own intake sheets
8 and we develop our own trust.

9 And another example is if a --
10 there could be a scenario in which an
11 applicant lists no income, is determined
12 eligible and then when we have our intake,
13 of course, we're trying to develop equities
14 to say to the judge and the District
15 Attorney don't put this person in jail, you
16 know, he or she is working, and that's an
17 awkward position to be in. Whereas, if we
18 are assigned to represent someone and,
19 basically, they say, you know, here's your
20 case, go to it, we can then focus entirely
21 on that without outside conflict and
22 influences.

23 MR. LEAHY: Impressive example.

24 Thank you.

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1 MS. BURTON: I just have two
2 questions that are about different things.

3 So, one is in terms of the
4 application process and the kinds of
5 questions that you ask about or that are
6 asked about financial information, does that
7 include information about liabilities or no?

8 MR. DAYTON: Yes. We have -- we
9 ask that assets be listed, but that's not
10 included in our analysis in a declining type
11 of way. In other words, it's just too --
12 it's felt too difficult to try to say
13 someone has an asset; therefore, we're not
14 going to represent them with the expectation
15 they're selling it. It's awkward. However,
16 if you list an asset and it's in foreclosure
17 or something like that, that's one of those
18 factors we would consider to be inclusive.

19 We will from the gross income
20 subtract out extraordinary expenses because
21 from my point -- well, the federal poverty
22 guidelines are designed to include things
23 like basic housing, basic food and basic
24 necessities. So, that -- so, from that

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1 point of view, we don't subtract that from
2 the income. However, if there are
3 extraordinary medical expenses, student loan
4 payments, child support payments, things of
5 that sort, while we don't look at net
6 necessarily, we will subtract those types of
7 expenses that are not incorporated into
8 figuring out the federal poverty guidelines.

9 MS. BURTON: Thank you. And then
10 the other question is you mentioned that
11 there is an appeals process that happens
12 regularly that people who have been denied
13 can go to. Is that in writing anywhere?

14 MR. DAYTON: Well, I don't have
15 our denial letter in front of me. At one
16 point it was on our denial letter, and then
17 I had a period of time where I wasn't the
18 public defender and now I'm back and I don't
19 know if I've seen it. It was on it
20 previously, but I'm not going to confirm a
21 paragraph at the bottom saying, you know, if
22 you don't follow up, but we do orally tell
23 people because they will come in, hey, why
24 am I denied, or call, why am I denied, and

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1 we will tell them the two possibilities,
2 appeal to the judge or reapply with
3 additional factors.

4 MS. BURTON: Thank you.

5 MS. WARTH: Do you consider
6 parental income?

7 MR. DAYTON: Yes. If they are --
8 if the parents include them as dependents,
9 yes.

10 MS. WARTH: What about spousal
11 income?

12 MR. DAYTON: Yes.

13 MS. WARTH: Do you see any
14 disadvantages or have you experienced any
15 disadvantages in doing that?

16 MR. DAYTON: Well, in the event
17 that there is an issue, for example, if an
18 18-year-old who lives at home, you know, now
19 gets charged with something, is in trouble,
20 and the parent just says, he's or she's got
21 to deal with it herself, our response of
22 that is if the parent, essentially, puts
23 that in writing, which they regularly or
24 readily will do, then I can put that in the

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1 file and then take that into consideration.
2 Something like that is an example.

3 Or another example is that if there
4 is a household made up of entities that
5 aren't -- don't consider themselves a joint
6 household but just there, then they can
7 designate really one way or the other for
8 our analysis. They can say, well, consider
9 me as an individual, but then we would look
10 up a single person on the guidelines. But
11 if they want to take advantage of, say, the
12 dependents that are there to be on a
13 different part of the guideline, well, then
14 that income is included. So, it's kind of
15 one way or the other. That's some of the
16 analysis.

17 But the trouble, of course, is and
18 you're going to have this difficulty coming
19 up with guidelines, is that everything truly
20 is a case-by-case basis. I mean, humans
21 have so many different factors and variables
22 that it would be virtually impossible for
23 you to try to include them all.

24 Oh, I'll put this -- I'll point

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1 this out. Presumptively our only automatics
2 are -- involve those people that are in jail
3 or that have had their children taken.
4 Other than that, we process it straight up.

5 MR. LEAHY: Can you avoid the
6 whole process in those cases, the
7 application process?

8 MR. DAYTON: We get them
9 represented. And then at the arraignment
10 with counsel we will indicate here is our
11 application. They still have to follow
12 through the application process,
13 particularly if they get released or make
14 bail, then go through the normal process,
15 but for the period of time when, you know,
16 the children are -- have been removed or
17 they're incarcerated, it would be a
18 no-questions-asked type of deal.

19 MR. LEAHY: For representation
20 pending later determining eligibility?

21 MR. DAYTON: (Nods head)

22 MS. MACRI: Can I ask something in
23 terms of having to collect documents for the
24 assessment process. Have you ever had to

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1 deny somebody because the documents are not
2 available?

3 MR. DAYTON: Yeah.

4 MS. MACRI: Okay.

5 MR. DAYTON: We consider it
6 incomplete and we would still encourage
7 them, you know, at their next court
8 appearance. And often the judges will take
9 their own initiative, as well, that even in
10 the case where they may have submitted an
11 application the next court appearance and
12 they're not represented, the judge could
13 very well say, I will take oral testimony
14 and assign the public defender's office.
15 And then when we get that assignment, we
16 open it up, which, from our point of view,
17 you know, great because what I want to be
18 able to do is say to really to the
19 legislature we were assigned.

20 MS. MACRI: Keeping that kind of
21 instance when you said that a judge would
22 take oral testimony, would that testimony be
23 taken in the courtroom with the DA present
24 or --

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1 MR. DAYTON: It very well could
2 be.

3 MS. MACRI: That happens?

4 MR. DAYTON: It very well could
5 have happened.

6 MS. MACRI: Okay.

7 MR. DAYTON: Thank you.

8 MR. LEAHY: Thank you.

9 MS. MACRI: Thank you.

10 MR. LEAHY: So, if there are no
11 other speakers -- actually, there's another
12 hand up.

13 MR. BECKER: Hi. My name is
14 Jonathan Becker. I'm speaking in my own
15 private capacity and not in my capacity as
16 an attorney for the Legal Aid Society.

17 I used to be a prosecutor in the
18 North Country up in St. Lawrence County. I
19 was an Assistant District Attorney for four
20 years where I did welfare fraud prosecution.
21 I came down to Otego County and was an 18-b
22 attorney for a year. I've been doing
23 assistant conflict defender work,
24 essentially, for the last year for Legal Aid

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1 and I'm about to leave that job to become
2 another yet bucket attorney job. I'm going
3 to be an attorney, full-time attorney, for
4 child.

5 Two -- a couple things that I just
6 want to address with the panel. One of the
7 biggest ones, in every place where I worked,
8 every judge -- in St. Lawrence County
9 there's 32 justice courts, literally. Otsego
10 County I worked with a bunch of justice
11 court judges, worked in the Delaware County
12 and Otsego County Family Courts.

13 I have never seen a consistent form
14 for the application for assigned counsel.
15 I've had the Appellate Division tell me,
16 hey, here's your form that we want you to
17 have your client fill out. I'm like, this
18 doesn't like look anything like what they
19 filled out before. So, the first thing
20 could actually be denied on appeal that was
21 granted at the trial level. It just makes
22 no sense.

23 So, all I'm really asking for
24 really is one consistent easy-to-use form

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1 that even a hairdresser, which a lot of
2 judges are hairdressers, can figure out.
3 They can do basic math and assess, okay,
4 this person is eligible for assigned
5 counsel. That would be number one request.

6 Number two request, I fully agree
7 with the public defenders and everyone else
8 who say this person should be completely
9 independent of the attorney who's handling
10 the client. Here's my major reason why.
11 Clients lie a lot. As a welfare fraud
12 prosecutor, I can tell you they'll lie to
13 DSS if they -- if their shoes aren't tied,
14 they'll tell them their shoes are tied.

15 We prosecuted a person who walked
16 in at one point before -- not realizing
17 there's fingerprint analysis now at the DSS
18 level, she walked in, gave a whole crazy
19 identity. They fingerprinted her, found out
20 she was an Onondaga person and immediately
21 arrested her for offering a false instrument
22 for filing. It didn't take them five
23 minutes to charge her. Putting an attorney
24 in the middle of that so that having the

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1 attorney go, yeah, here, why don't we fill
2 out -- figure out whether your assigned
3 counsel application is correct I feel is a
4 really bad thing because it puts us in a
5 horrible position. I know when I was an
6 18-b attorney, I'd be like, okay, you've got
7 to tell me every time your income changes.
8 You've got to tell me. Any time it changes,
9 you've got to tell me. If it changes a
10 little, I've got to tell the judge and the
11 judge whatever.

12 Take us out of it. Have this
13 administrator person be the person that's
14 like the same way in support magistrates or
15 support court any time your income changes,
16 you tell the support magistrate. You have
17 to. There's no touching by the attorney at
18 all. Even if it's a support violation,
19 there -- the person is whatever. All you
20 have to do is say, don't forget to tell the
21 truth, and you're out of it and you're not
22 in any way complicit to any weird
23 shenanigans of the defendant or respondent
24 based on the circumstances they're involved

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1 in. So, those are the major things, but
2 that's one of the things.

3 We -- as a prosecutor, I personally
4 went looking for those assigned counsel
5 applications. So, I would prosecute drug
6 dealers and cigarette smugglers and
7 everybody else, and they'd be like, I don't
8 have any money. And I'm like, then where
9 the hell did you get 15 pounds of pot?
10 Where the heck did you get 13 million
11 cigarettes? Like this didn't magically
12 appear in your pocket. And then they'd be
13 like, I don't know.

14 The other problem is that then they
15 have a PSI, and we had a problem where a kid
16 showed up, went into the PSI and said, yeah,
17 I made \$50,000 dealing drugs. He had an
18 assigned counsel attorney. His attorney is
19 like, oh, crap, please, shut up, and we had
20 a whole issue.

21 MS. BURTON: I'm sorry. What's a
22 PSI?

23 MR. BECKER: Oh, I'm sorry.
24 Presentence investigation report.

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1 MS. BURTON: Thank you. I'm in
2 the Family Court world.

3 MR. BECKER: Yeah. Okay. So, in
4 a presentence investigation report they're
5 telling probation a bunch of stuff. So, the
6 attorney is then put in this horrible
7 situation where he's like, oh, crap. The
8 judge is like, this is a lot worse case than
9 I thought it was, you know, and then you
10 have this whole issue where the ethics issue
11 of the attorney is like, I have to withdraw
12 because I want to give them competent
13 representation, but I may be accused of
14 committing a crime myself. I don't want to
15 be involved in this.

16 So, those are just my things, very
17 simple form that everybody can follow. Keep
18 the attorneys out of it. And, sadly, and I
19 have to say, and presume that the client is
20 lying.

21 MS. MACRI: Can I ask a quick
22 question?

23 MR. BECKER: Sure.

24 MS. MACRI: So, we've heard talk

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1 about confidentiality issues.

2 MR. BECKER: Yeah.

3 MS. MACRI: What's your position
4 with regard to the fact that if an attorney
5 is conducting the eligibility determination
6 and this information is shared with -- you
7 know, the client shares that information
8 with the attorney, do you think that that
9 should be protected by a confidential
10 relationship?

11 MR. BECKER: Okay. So, let's take
12 the horrible hypothetical. The client
13 applies for counsel, fills out the little
14 form, and the judge grants him the
15 application. The attorney then has a
16 conversation with him. The client says,
17 yeah, I have been dealing drugs and I've
18 been making \$15,000 a year more than I told
19 the judge. The attorney has one of two
20 options. A, he has to move to withdraw
21 immediately from the case or, B -- I don't
22 think there's a B because he's stuck in a
23 quandary. As an officer of the court, he
24 has a duty to report the income.

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1 MR. LEAHY: Well, B, he could
2 follow the state bar standards that say that
3 he or she may or may not disclose the
4 information to the Court.

5 MR. BECKER: I think if you're B,
6 what you're saying, if the client is getting
7 free legal services from the county, let's
8 say it's an 18-b attorney, that's qualified
9 at \$4,400, right, but it's not clearly 4,400
10 because the 4,400 hasn't been earned yet.
11 So, it's a continuing and ongoing larceny.
12 You're automatically then complicit as an
13 accomplice, a knowing accomplice, in a
14 larceny of funds from the state.

15 MR. LEAHY: I hear your position.
16 So, let me ask you the tough question.

17 MR. BECKER: Sure.

18 MR. LEAHY: We need to keep the
19 lawyers out of it. The judges, whether or
20 not they're hairdressers, need to have it
21 kept very, very simple, and I assume you
22 mean out of their direct hands, as well?

23 MR. BECKER: No.

24 MR. LEAHY: No. So, each and

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1 every one of the 2,200 town or village
2 courts should be doing these eligibility
3 determinations?

4 MR. BECKER: The application
5 should be submitted to a judge, but, I mean,
6 my understanding that's how the process is
7 supposed to work, is that the judges are all
8 supposed to be making approvals. That's the
9 way the law is written.

10 MR. LEAHY: Well, most are not.

11 MR. BECKER: In every justice
12 court that I've been in the judge are the
13 ones, they'll either delegate -- in
14 St. Lawrence County they delegate out. If
15 the assigned counsel panel thing says it's
16 okay, they send it over with the
17 recommendation of, yes, you should approve
18 counsel. They did that at the County Court
19 level. I remember dealing with that because
20 I was in Family Court way too often, and the
21 judge would be like, yep, I've got it here,
22 assigned counsel, and approved and he signs
23 something.

24 MR. LEAHY: All right. In any

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1 event, your position is each judge should do
2 that him or herself and we'll have
3 uniformity under that?

4 MR. BECKER: Yes. And that way no
5 matter what. And then if you have
6 everything like you have -- some judge has
7 decided it, especially if the County Court
8 judge or Family Court judge in Otsego County
9 has granted somebody counsel, then it would
10 make -- kind of silly. If there's been no
11 change in finances in the last month that
12 that couldn't just be in a state central
13 registry that they automatically are
14 assigned counsel in whatever other state
15 they're picked up for or, I'm sorry,
16 whichever county. That's all.

17 MR. LEAHY: Thank you.

18 MR. BECKER: All right.

19 MS. MACRI: Thank you.

20 MR. BRENNAN: I, too, will be
21 brief. My name is John Brennan. I'm from
22 Chemung County and I run the Chenango County
23 Public Advocate's Office, which is our
24 conflicts office.

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1 In Chemung County all the
2 eligibility requirements are determined by
3 the judges, not the public defender's office
4 or my office, and we don't have an assigned
5 counsel administrator. So, basically, once
6 the case is assigned to our office, a judge
7 has already determined that this person is
8 eligible.

9 We're not really sure what
10 guidelines, if any, these judges are using.
11 I think it varies from court to court. It
12 may even vary from judge to judge within
13 each court. I know there are some justice
14 courts who do use some sort of a financial
15 affidavit, so to speak, although I don't
16 necessarily know what questions are on it.
17 Some judges conduct some sort of a back and
18 forth on the record with the defendant at
19 the arraignment just asking questions to
20 determine if the judge thinks that they
21 qualify for an assigned counsel.

22 In Family Court there's a little
23 bit more structure. For all Article
24 10 cases the Court automatically assigns an

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1 attorney prior to the first appearance on
2 that Article 10 position and then conducts
3 an inquiry later to determine if that
4 attorney should remain on the case or if the
5 person should either proceed pro se or hire
6 their own attorney.

7 For all other Family Court cases,
8 each litigant has the option to go to the
9 Family Court Clerk to fill out the financial
10 affidavit assignment of counsel request.
11 That gets reviewed by the Court, and the
12 assignment is either made or denied,
13 although I think throughout all of Chemung
14 County and all of the judges I think they
15 err on the side of assigning counsel.

16 Some of those Family Court -- if
17 somebody hasn't filled out that application
18 but they show up for their first appearance
19 in family court and they say, Judge, I want
20 a lawyer, sometimes the judge will just say,
21 all right, we'll -- you can have the public
22 defender. Other judges will require them to
23 fill out the financial affidavit before
24 assigning counsel. So, in Chemung County it

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1 just varies from court to court and from
2 judge to judge.

3 MS. BURTON: Thank you, John. Can
4 you -- so, you mentioned that in
5 Article 10 cases the judge automatically
6 will assign and they inquire later on. In
7 your experience has any -- in any of those
8 cases have the attorneys been withdrawn
9 after that further inquiry or is it most
10 often or always the case that --

11 MR. BRENNAN: I can't think of a
12 time when the person didn't qualify. I
13 mean, especially for an Article 10 case in
14 Chemung, anyway, if they are indigent,
15 that's just the way it goes.

16 MS. BURTON: Thank you.

17 MS. MACRI: And, John, he raced
18 over from court. Thank you very much for
19 being here with us --

20 MR. BRENNAN: Sure.

21 MS. MACRI: -- and offering some
22 information for us to consider. In terms of
23 the concept here of having the judges
24 involved in taking care of the process, have

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1 you, and you don't have to tell us
2 specifics, have you ever seen situations
3 where you may know a particular family or
4 client who really is deserving but the judge
5 is not going to grant, do you have an
6 opportunity to step in and advocate for that
7 individual? If someone is denied, what
8 happens if the judge denies it?

9 MR. BRENNAN: Those cases are few
10 and far between anyway, but I think if
11 myself or the public defender went to the
12 judge and said, hey, we know the particular
13 circumstances of this client or this family,
14 we think that they do qualify that they have
15 assigned counsel, I think the judge would
16 grant that request.

17 MS. MACRI: Okay.

18 MS. WARTH: You probably don't
19 know the answer to this, but do you have any
20 sense of how many people who ask for
21 assigned counsel tend to be granted assigned
22 counsel versus the number or percentage of
23 those who don't, or is that are too hard
24 to --

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1 MR. BRENNAN: The number that are
2 granted far exceed the ones that don't.

3 MR. LEAHY: So, in Chemung
4 County -- and how long have you now been in
5 your position?

6 MR. BRENNAN: Eighteen months.

7 MR. LEAHY: So, the question of
8 this all judge determination in the county,
9 how would you say it's working out in terms
10 of being faithful to kind of the core of
11 Gideon progeny in that people who can't
12 afford counsel have an entitlement? Is that
13 being honored in this situation?

14 MR. BRENNAN: It's definitely
15 being honored and I think it may be
16 exceeded. I think there may be some people
17 who are hearing other stories from other
18 public defender's wouldn't qualify in those
19 other counties, but they're given assigned
20 counsel in Chemung County.

21 So, like I said, I think the judges
22 err on the side of caution. They feel as
23 though it's better to make sure that there's
24 an attorney there. The person might be on

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1 the edge of eligibility, whatever
2 eligibility might be. It's to just make
3 sure that attorney is there.

4 And I also think that, and I've
5 heard this from other people's testimony,
6 that we have judges who tend to like
7 attorneys there. It's a lot easier to move
8 the case then to deal with a pro se
9 litigant. So, I think that's another reason
10 why they tend to err on the side of
11 assigning counsel.

12 MR. LEAHY: And your assessment
13 applies across the judicial spectrum
14 including the town and village?

15 MR. BRENNAN: I would say so.

16 MR. LEAHY: Thank you.

17 MS. MACRI: Thank you so much. Is
18 there anyone else who would like to speak?

19 MR. LEAHY: I think there no
20 formal speakers. I'd just like to say,
21 beyond thanks again to everyone, a few
22 things. One, that we have one more public
23 hearing next Wednesday, August 26th, in
24 Elizabethtown. August 26th is also the

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1 deadline for us to receive written
2 submissions, which can be done
3 electronically or by mail if it's postmarked
4 by the 26.

5 MS. MACRI: We take anything.

6 MR. LEAHY: Remember snail mail?
7 We'll take those, as well.

8 And I want to thank our court
9 reporter who has been really proficient and
10 patient and stalwart.

11 MS. MACRI: Thank you.

12 MR. LEAHY: Thank you all very
13 much.

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1 STATE OF NEW YORK :

2 COUNTY OF BROOME :

3
4 I, KEVIN CALLAHAN, Shorthand Reporter, do
5 certify that the foregoing is a true and accurate
6 transcript of the proceedings in the matter of a public
7 hearing on the Eligibility for Assigned Counsel, held
8 in Binghamton, New York, on August 20, 2015.

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11 -----
12 KEVIN CALLAHAN

13 Shorthand Reporter

14 Notary Public

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