



STATEMENT
of
PAULETTE BROWN
President of the
AMERICAN BAR ASSOCIATION
submitted to the
NEW YORK STATE
OFFICE OF INDIGENT LEGAL SERVICES
on
“ELIGIBILITY FOR ASSIGNMENT OF
COUNSEL”

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1050 Connecticut Ave. NW, Suite 400 • Washington, DC 20036
www.americanbar.org

Governmental Affairs
Office

Members of the New York State Office of Indigent Legal Services:

On behalf of the American Bar Association, I want to thank the members of the New York State Office of Indigent Legal Services for the opportunity to share the ABA's views on several important issues for your consideration regarding eligibility for assignment of counsel for mandated representation.

My name is Paulette Brown and I currently serve as President of the American Bar Association. The ABA is the voice of the legal profession in the United States. With nearly 400,000 members, it is one of the world's largest voluntary professional organizations. The ABA has, for decades, promulgated public defense standards and policies. Today, I focus on those standards and policies related to the eligibility for assignment of counsel.

At the outset, I would like to commend the New York State Office of Indigent Legal Services (ILS) for conducting these hearings. ILS's development of eligibility standards is critical not only to implementation of the settlement agreement in *Hurrell-Harring et al. v. State of New York*, but also to the improvement of public defense in New York and across the United States.

Hurrell-Harring laid bare deficiencies in New York public defense: underfunding, excessive workloads, and a lack of uniform standards. Yet New York has also been a public defense innovator. Holistic defense, digital forensics, and early provision of counsel originated in this state and have been adopted in many parts of the United States. The eligibility standards ILS develops today will undoubtedly influence the provision of public defense for years to come. I commend you for taking on this weighty responsibility.

Importance of Eligibility Standards

In 1963, the United States Supreme Court in *Gideon v. Wainwright* found that it is an "obvious truth" that, "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." "[L]awyers in criminal courts," the Supreme Court observed in this decision, "are necessities, not luxuries." More than half a century later, the eligibility standards that ILS develops will determine who, in New York, is "too poor to hire a lawyer."

Accurately identifying "defendants unable to employ counsel" is imperative, observed the Court in *Gideon*, if we are to uphold the Sixth Amendment. Too often, eligibility standards have fallen prey to political whim or financial concerns, depriving our citizens of the right to counsel. In 2004, the ABA released *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (Report). This Report recognized that jurisdictions "sometimes employ cost-cutting measures—including . . . undue restrictions on eligibility for services, and the imposition of fees and fines for services—that interfere with the exercise of the right to counsel and the provision of constitutionally adequate representation." (Report at 38, *available at*:

http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf).

The report also discussed New York public defense. In particular, it recounted testimony by long-time public defense reformer Jonathan Gradess that, in New York, “eligibility for defense services often is restricted unconstitutionally . . . for the sole purpose of containing the costs of local systems.” *Id.* Mr. Gradess noted that the state’s nearly 100 public defense plans applied different eligibility standards. (Report at 22.)

Based on these findings, the Report recommended that states establish a public defense oversight agency that can adopt and enforce rules, including eligibility standards. (Report at 42-43.) The creation of ILS in 2010 and ILS’s current program of standards development meet that need.

Relevant ABA Policies and Standards

The ABA has developed substantial policy regarding eligibility for assignment of counsel, much of which is contained in the *ABA Ten Principles of a Public Defense Delivery System* (“Ten Principles”) and *ABA Standards for Criminal Justice: Providing Defense Services* (3d ed.) (“PDS”). ABA policy begins with the broad requirement that “Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention or request for counsel.” (Principle 3, Ten Principles, *available at*: http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.)

Eligibility determinations should be made by attorneys, a neutral screening agency, or the court. (Standard 5-7.3, PDS. *available at*: http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_toc.html.) When the determination is made by an entity other than the court, confidentiality should be maintained, and defendants denied counsel should be afforded the right to a court’s review of the eligibility determination.

Under the PDS standards, eligibility should not be determined ad hoc. Rather, states should employ a questionnaire to determine the “nature and extent of the financial resources available for obtaining representation.” Eligibility may also change during the course of the proceedings. Thus, eligibility should be redetermined if new information becomes available.

Eligibility should not require destitution. Rather, “[c]ounsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship.” (Standard 5-7.1, PDS.) Further, a jurisdiction should not deny a defendant the right to counsel because (1) she has the “ability to pay part of the cost of representation”; (2) “friends or relatives have resources to retain counsel”; or (3) “bond has been or can be posted.” Once counsel is assigned, defendants should not be required to reimburse a jurisdiction for the cost of representation, unless the defendant’s eligibility was based on fraud. (Standard 5-7.2, PDS.)

Finally, where jurisdictions contract for defense services, those contracts should include “the basis and method for determining eligibility of persons served by the contract, consistent with standard 5-7.1.” (Standard 5-3.3(b)(iii).)

Conclusion

The ABA applauds New York’s development of eligibility standards. These standards will determine the assignment of counsel—and, in turn, the direction of many criminal proceedings—in New York and beyond. I sincerely hope ABA standards and policies will assist and help guide your work in this area. I encourage you to contact the ABA if we can be of assistance as you develop New York’s standards.