



## Essex County Office of the Manager

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August 14, 2015

Ms. Tammeka Freeman, Executive Assistant  
New York State Office of Indigent Legal Services  
80 S. Swan St., 29<sup>th</sup> Floor  
Albany, NY 12210

Re: Written Testimony - Public Hearing - Eligibility for Assignment of Counsel

Dear Ms. Freeman:

Please accept this document as written testimony as it relates to your Public Hearings on Eligibility of Assignment of Counsel. As the Essex County Manager, I submit this testimony on behalf of the Essex County Board of Supervisors. The Board is aware that you will be conducting a public hearing on August 26, 2015 at 11:00 A.M. here at the Essex County Supreme Courthouse in Elizabethtown, therefore directed me to submit for your consideration the following comments.

First I would like to point out that the County understands its obligations as it relates to providing Counsel for those individuals charged with crimes who can't for whatever reasons afford to hire their own attorney to represent them. There seems to be the misconception that County's are automatically opposed to providing representation to these individuals. That is simply not the case, but rather like every service that we as a County are mandated by law to provide, we simply want to be assured that those individuals receiving the same are entitled to the benefit.

It is a constitutional right of criminal defendants who are financially unable to afford their own attorney to be appointed representation by the Courts, and the County has the obligation to cover the cost of such representation. In my view, some of the problems associated with providing this service can be broken down into the following areas;

- **Public Perception**  
The public perception is that individuals receiving the benefit of a court-appointed attorney must be Indigent. Even the name of your office includes Indigent within the title. The word Indigent conjures images of a homeless, vagrant, down and out, a pauper, barely surviving within society. The reality is nothing could be

further from the truth. As your office is aware, the constitutional right to appointed counsel is based upon financial inability to retain counsel. An individual could own property, have automobiles, has a good job but their liabilities for all of that could exceed their ability to retain private counsel, therefore would still qualify for an assigned attorney. When the public sees someone, who appears to be doing quite well, assigned an attorney then they assume the system has failed, when in fact it probably has not. The State needs to do a better job of explaining the nuances of the assignment of counsel to the general public.

- **Who determines eligibility?**

Ultimately this is the crux of the problem and must be changed at the state level in order to provide meaningful changes to what is now a broken system. It is without question that the constitutional and statutory obligation to determine eligibility for appointment of counsel, lies with the court and the presiding judge of that court. The majority of these judges, particularly in rural counties are part time with part time staff and very limited resources. Given their limited resources, they are going to delegate that determination process to someone else. In most cases that is the Public Defenders Office, or at least that is the case in Essex County.

In my view, the critical error in this process was perpetrated by the state legislature when the responsibility for making these determinations was forced upon the courts. In requiring the Judges to make these determinations the legislature forced the courts into doing the one thing a court *should never do*, and that is to become an *investigative unit*. In other words, if a judge accepts an application for assignment, lacking any other alternatives, the judge or his staff should begin a process of investigating the items contained within the application. Courts should not be in the business of conducting investigations. In truth no Judge is likely to undertake that process, therefore the reason for delegating to other parties.

That is not to suggest that a Judge should not be the individual making the decision, but rather the process now required of a Judge is flawed. The one thing Courts are good at and do on a routine basis is conducting judicial hearings. Hearings are conducted on a routine basis within the court system for a variety of legal questions. It seems the same process could be used by the Court system to determine eligibility for assignment of counsel. I would envision the process to be based upon the concept that if an individual request assignment of counsel that the court would grant that assignment until such time when a hearing could be held to determine final eligibility.

The Public Defenders Office could assist the defendant in gathering documents which would be presented to the court at the eligibility hearing. In 95% of the cases that is occurring anyway, but now the court is not actually reviewing those documents. Conducting a formal eligibility hearing within the Court system

would also indicate to the defendant the importance of being truthful in what they presented to the Court. Given issues related to confidentiality of those applying for assignment of counsel I would envision these to be closed hearings.

- **Lack of Standards**  
It would seem in order for an eligibility hearing process to occur it would require a change in the law at the state level. Although this is always problematic, it would provide an opportunity for the State to create a set of standards in terms of acceptable proof for eligibility. The distinction being that the State would not set eligibility itself, but rather would set the standard for documents require for the presiding judge to base his own ruling on. For example, that would avoid the problems associated with income limits established that truly vary all over the state in terms of what constitutes a living wage from one jurisdiction to another.
- **Case by Case basis**  
Attempting to determine eligibility for assignment of counsel based upon the current convoluted process does not easily lend itself to making eligibility determinations on a case by case basis. Adopting a judicial eligibility hearing process would assure each individual would be assured that his request would be individually reviewed by a judge.
- **Non-Liquid Assets**  
Although the general public does not understand, an individual is not required to liquidate their assets so that they can afford to pay an attorney. A judicial eligibility hearing would allow the court to sort out the true liquid assets from the non-liquid assets.
- **Considering the Seriousness of the Crime**  
Currently an application for assignment of counsel really does not lend itself to accounting for the seriousness of the crime which must be defended. Someone who has been charged with a simple violation or a low level misdemeanor could potential hire an attorney for very little money, and although they may meet the requirements for assignment of counsel they may have enough funds to cover their own defense.

However, someone with more income and assets who has been charged with a serious criminal charge, may not be able to even pay the retainer a private attorney would require just to take the case. A judicial eligibility hearing process would allow a judge on a case by case basis to consider the seriousness of the crime when determining eligibility.

- **Timely appointment of counsel**  
Judges are currently under a great deal of pressure to assure a defendant is represented by counsel as soon as practical. Given those concerns a Judge will often assign counsel without regard for the application process. Once that occurs

rarely does that assignment ever get reconsidered. A judicial eligibility hearing process would provide for that second look when the hearing actually takes place. If there is a concern on the time frame for appointment of counsel, then Legislature could include a provision within the law requiring a judicial eligibility hearing to occur within a defined amount of time. Currently all courts are required to conduct Felony Hearing within a defined time frame so this would not be much different, and could be based upon the same concepts.

- **Appeal for denial of appointment**

Under the current system there is really very little recourse for a defendant that has been turned down for assignment of counsel. If a judicial eligibility hearing process was implemented by law at the state level, then a standard for appeal could be established which would assure the rights of the defendant was safeguarded.

I am certain there are other aspects of a judicial eligibility hearing process which I may have missed, but often I think we try to find solutions to problems by over complicating the answer. Two things are certain in my mind, Courts should not be investigating anything, but Courts routinely conduct hearings. Why would a system not be developed that takes advantage of what Courts do well, and avoid what Courts should not be doing?

I hope these thoughts are helpful in this process, if you should have questions or concerns please let us know.

Sincerely yours,



Daniel L. Palmer  
Essex County Manager

cc: Essex County Board of Supervisors  
Judy Garrison, Clerk of the Board  
Daniel Manning, Essex County Attorney