



Legal Aid Society
of Northeastern
New York, Inc.

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Good morning. My name is Peter Racette. I am Deputy Director at the Legal Aid Society of Northeastern New York (LASNNY). Thank you for the opportunity to testify here today on these issues of vital importance to low income New Yorkers.

LASNNY is a not-for-profit organization which provides free legal services to low income people in civil cases. We provide legal services in all 11 counties in the Fourth Judicial District and in 5 counties in the Third Judicial District. We receive grants from more than 35 federal, state, local and private sources. Two-thirds of our budget comes from three sources—the federal Legal Services Corporation (LSC); the New York State Interest on Lawyer Account Fund (IOLA); and the New York State Office of Court Administration Judicial Civil Legal Services fund (JCLS). Each of these funders have different financial eligibility requirements.

I am here today on behalf of LASNNY for two reasons. First and foremost, the financial eligibility criteria formulated by the Office of Indigent Legal Services will have a profound impact on the low income people served by LASNNY. LASNNY considers low income people needing legal representation to be our client community. We want to ensure that the constitutional and statutory rights to mandated representation in certain cases are provided in a fair and even-handed way and are effective in implementing the right to counsel.

Second, LASNNY has many years of experience in determining whether people requesting our services are financially eligible to be served. LASNNY's three main funders—LSC, IOLA, and JCLS—require that we comply with federal or state regulations in doing so. LASNNY is subject to an LSC annual compliance audit on whether we are correctly making these determinations as well as periodic reviews by funder compliance staff. I want to share with you LASNNY's experiences on what works and what does not work when formulating financial eligibility standards and making financial eligibility determinations.

I will discuss each of these issues in more detail, but as a general matter, LASNNY believes that there should be uniform and comprehensive criteria for



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determining eligibility for mandated representation with room for local discretion to address issues such as the cost of living and, in particular, the up-front cost of retaining counsel in the locality. LASNNY also believes that the floor for eligibility should be no lower than 200% of the federal poverty level for household size with discretion to increase the income eligibility level to account for factors such as actual availability of income, cost of retaining counsel, necessary family or household expenses, and the cost of living in particular localities. LASNNY also believes that those receiving needs-based benefits such as Public Assistance, Supplemental Security Income (SSI), Supplemental Nutrition Assistance (Food Stamps); and Medicaid should be presumptively eligible. Further, financial verification requirements for applicants who do not receive needs-based benefits should be reasonable and not so onerous as to result in denial of services due to difficulty verifying financial information. LASNNY also believes that asset eligibility criteria must emphasize the actual and expeditious availability of the asset to retain counsel. Finally, LASNNY believes that there should be an expeditious opportunity for an applicant to have a determination of ineligibility reviewed to make certain the determination is correct.

Eligibility criteria for mandated representation should be uniform throughout the state. LASNNY has heard from clients who have been denied assigned counsel or public defender services based on criteria unique to that county or even by the presiding judge, including items such as ownership of an automobile, ownership of a home, income exceeding the public assistance standard of need in the county, and even receipt of an earned income tax credit. Eligibility for assigned counsel should be based on standard criteria, uniformly applied, not dependent on local and variable customs.

LASNNY's three major funders—LSC, IOLA and JCLS—have somewhat different basic income eligibility criteria. LSC requires that a person's income be at or below 125% of the federal poverty level to be eligible for services or that a person be at or below 200% of the federal poverty level with household expenses such as unreimbursed medical costs; fixed debt and obligations; job-related expenses such as dependent care, transportation, clothing or equipment; non-medical expenses associated with age or disability; and current taxes or other significant factors that affect the ability to afford legal representation. IOLA's eligibility criteria are similar except IOLA does not impose a 200% cap on consideration of expenses and IOLA specifically provides that the cost of retaining private counsel with respect to the particular matter in which assistance is sought should be a factor. Income eligibility criteria for JCLS is 200% of poverty. I have attached copies of the relevant LSC and IOLA regulations. The LSC regulation—45 C.F.R. Part 1611--contains an Appendix with a table showing 2015 amounts for 125% and 200% of federal poverty levels by household size.

LASNNY believes income eligibility should be no lower than 200% of poverty and that the expenses specified in the LSC and IOLA regulations should be considered even if the person's income is above 200% of poverty. LASNNY's experience is that the cost of housing and unreimbursed medical expenses alone render those at or under 200% of poverty eligible for services. It is inefficient to document those expenses for persons at or below 200% of poverty—such people are inevitably eligible.

The real issue with respect to income eligibility is whether routine household expenses for those over 200% of poverty preclude the ability to afford counsel. For many, housing expenses alone are 40% or more of gross income. Expenses ought to be considered for those over 200% of poverty and those under 200% should be presumptively eligible. And, the standard retainer amount required by a private attorney in the type of case at issue in the application should be a consideration. Retainers in felony cases or custody disputes are often many thousands of dollars and cannot be realistically afforded by many people even if their income is over 200% of poverty given routine household expenses. In formulating eligibility criteria, OILS should survey standard private counsel retainer requirements in different regions of the state and incorporate the findings into eligibility criteria.

Those persons who receive needs-based public benefits such as SSI, Food Stamps, public assistance and Medicaid should also be presumptively eligible for mandated representation. Such individuals have had their financial resources evaluated by the agency administering the benefit and are subject to rigorous verification and disclosure requirements, as well as robust anti-fraud checks such as computer interfaces reflecting payroll withholding. Few individuals on these programs have income over 200% of poverty. It is a waste of time and money to enquire and document financial resources in qualifying such individuals for service: financial eligibility should be presumed.

Furthermore, financial verification requirements should be reserved for those cases in which there is reason to doubt the accuracy of financial information given by the applicant. LSC, IOLA and JCLS all recognize the importance of developing a relationship of trust between attorney and client and that onerous verification requirements at the outset of the relationship interfere with the attorney-client relationship. LASNNY has some grants which do require that all applicant financial information be verified and our experience is this is not a simple task for a person to quickly fulfill. It often takes days or weeks to assemble the necessary information, during which time no legal services can be provided. Our experience is that such verification requirements are not necessary to ensure accurate

eligibility determinations and often delay the start of legal services. If it subsequently develops that the financial information given by an applicant is not accurate, LASNNY is required to withdraw from representation if discontinuation of services is not inconsistent with our professional responsibility.

It is also important that eligibility criteria ensure that only income or assets actually available to an applicant are considered. LSC regulations specifically provide that if an applicant is a victim of domestic violence, the income and assets of the perpetrator or assets jointly held by the victim and the perpetrator not be considered available to the victim in determining eligibility. Any criteria established for mandated representation should so provide as well. As well, in situations where the applicant is a minor parent residing with his or her own parents, the financial resources of the parent/grandparent should not be used in determining eligibility for mandated representation. The parent/grandparent's duty to support the minor parent does not include a duty to provide legal representation.

In considering asset availability, the liquidity of the asset should be considered as well as the actual availability of the asset. If an asset is not liquid, it is not available. For example, a person may have equity in their home, but such equity is not readily available to a person. It may take months for a person to obtain a home equity loan even when a lender is willing to make a loan on the equity. The same is true for vehicles. With respect to retirement accounts, only the portion of the account actually available to a person should be considered in determining financial eligibility. Often, any share of the retirement account contributed by an employer is not available and any share contributed by the applicant is available subject to penalties and income-tax withholding. And, if an asset is determined to be liquid, only the equity value, not the fair market value, should be considered in determining availability of the asset.

Finally, the Office of Indigent Legal Services should ensure that there is an expedited review process if an applicant objects to a determination that they are not eligible for mandated representation. LASNNY's major funders require that we have a grievance process for denials of assistance. The process is fairly simple—a person with supervisory responsibility must review all pertinent information and speak with the applicant either in person or by telephone and determine if the denial of eligibility was correct. Such a simplified process helps assure uniform and fair decisions and avoids simple, unintended mistakes.

Thank you for the opportunity to testify on these important matters.