

NYS Office of Indigent Legal Services
Public Hearing on Eligibility for Assignment of Counsel
July 30, 2015

Testimony of David C. Schopp, CEO of the Legal Aid Bureau of Buffalo, Inc.

The Legal Aid Bureau of Buffalo, Inc. ("LAB"), founded in 1912, is the largest institutional provider of legal services for the poor in Western New York. We handle over 20,000 cases each year, and approximately 13,000 of these cases are criminal matters originating in the City of Buffalo. Additionally, our Appeals and Post-Conviction Unit ("APCU") represents indigent criminal appellants in the Counties of Erie, Genesee, Orleans and Cattaraugus. This is half of the counties in the Eighth Judicial District.

The LAB fully supports the recommendations of other not-for-profit and defense organizations, in that we believe eligible individuals under 21 years of age should be automatically assigned counsel regardless of parental resource; that the threshold eligibility percentage should be increased to 250% of the federal poverty rate; that when in doubt, the provider should err on the side of assigning counsel; and that no single factor should be utilized in denying a litigant assigned counsel.

In addition to the above, I would like to address an issue concerning eligibility for assigned counsel. In order to assure that every convicted criminal defendant under our geographic mandate is not denied access to the appellate court system, the APCU responds to all written inquiries from inmates, whether or not the individual is presently a client of the LAB. Unfortunately, the APCU regularly receives correspondence from inmates in our geographic area, who are not assigned to our office, inquiring why their appeal has not yet been perfected.

The most common problem is that the notice of appeal was timely filed, but the motion for poor person status with the Appellate Division was not.

Although I believe most attorneys who regularly practice in the criminal courts in our area realize that a motion for poor person status is necessary to trigger the Appellate Division's assignment of counsel on appeal for the indigent litigant, attorneys are not required to do so by court rule. A close examination of 22 NYCRR 1022(a), (Rules of the Appellate Division Fourth Department) however, reveals that trial counsel, though required to advise clients in writing of time limits, the manner of instituting an appeal and the right to appeal as a poor person, is not actually required to *file* a motion for poor person status.

Instead, upon "ascertain[ing]" that a defendant wants to appeal, counsel need only file a notice of appeal (or an application for permission to do so). Here is the text of 22 NYCRR 1022(a):

Counsel assigned to or retained for the defendant in a criminal action or proceeding shall represent the defendant until the matter has been terminated in the trial court. Where there has been a conviction or an adverse decision on an application for a writ of habeas corpus, or on a motion under section 440.10 or 440.20 of the Criminal Procedure Law, immediately after the pronouncement of sentence or the service of a copy of the order disposing of such application or motion, counsel **shall advise** the defendant in writing of his right to appeal or to apply for permission to appeal, the time limitations involved, the manner of instituting an appeal or applying for permission and of obtaining a transcript of the testimony, and of the right of the person who is unable to pay the cost of an appeal to apply for leave to appeal as a poor person. Such counsel **shall also ascertain** whether defendant wishes to appeal or to apply for permission to appeal, and, if so, counsel **shall serve** the necessary notice of appeal or application for permission and shall file the necessary notice of appeal or application for permission with proof of service on or an admission of service by the opposing party. (bold emphasis added)

As can be seen here, the three acts required of counsel (advise, ascertain and serve) do not include the filing of a motion for poor person status.

The APCU has observed a significant number of unfortunate consequences of this regulatory gap, including the unnecessary expenditure of resources by our office in communicating with inmates the process of filing the application with the court and, most importantly, a delay in securing an assignment for the indigent litigant in question. In light of the simple motion procedure set in place by the Appellate Division to secure assignments, not affirmatively requiring trial counsel, by court rule, to file a motion for permission of poor person status on appeal is senseless.

The goals of the Bar in representing those who cannot afford counsel must include ensuring that every eligible litigant is assigned an attorney.. Amending 22 NYCRR 1022(a) is a start.

I will now address our office's current practice in for determining eligibility at the trial level, LAB's Criminal Defense Unit represents the vast majority of criminally charged indigent clients in the City of Buffalo. At arraignment, the sitting ("Intake") Judge conducts a brief inquiry of the defendant to ascertain his/her ability to procure counsel of their own devices. In the event they respond in the negative, our attorneys conduct an investigation as to those individual's resources. The clients are questioned as to their employment status and where said clients are unemployed or on public assistance, they are qualified by our office and accepted as clients pending further conflict checks and confirmation of their status. For those clients who indicate current employment, our attorneys now utilize 125% of the federal poverty guidelines as a rough measure of eligibility. However, other factors including the needs of the client to satisfy the basic necessities of life, the individual's level of debt, the complexity of the case, and any

other factors weighing on ability to pay are examined in making the determination as to eligibility. In borderline cases, we always err on the side of accepting as clients, individuals who assert that they cannot afford counsel. These brief inquiries into eligibility can last as little as 30 seconds, and once an individual is accepted, paperwork is served and the defense is begun at the arraignment proceeding. Thereafter, the information gleaned from the client at arraignment is confirmed during the initial post client interview .

We agree with other providers that promulgating a standard measure of eligibility, together with presumptions concerning eligibility among certain populations should be a goal of the indigent defense community. We also believe it is very important that the authority to make eligibility determinations be delegated to and performed by the primary provider of mandated representation in order to assure consistency and facilitate early representation. Finally, any increase in the number of clients eligible for assigned counsel as a result of these standards must be accompanied by additional funding to provided that representation.

We look forward with much anticipation to the promulgation of statewide eligibility standards.

Respectfully submitted,

Legal Aid Bureau of Buffalo, Inc.

Appeals and Post-Conviction and Criminal
Defense Unit(s)