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STATE OF NEW YORK
SEVENTH JUDICIAL DISTRICT

X - - - - - x

In Re:

NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES
PUBLIC HEARING ON ELIGIBILITY FOR ASSIGNMENT OF COUNSEL
(Hurrell-Harring et al v. State of New York)

X - - - - - x

Transcript of proceedings held in the
above-entitled matter at the Hall of Justice, Courtroom
303, 99 Exchange Boulevard, Rochester, New York on
Thursday, August 6, 2015 commencing at 11:10 a.m.

Reported by:
COMPUTER REPORTING SERVICE
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PANEL MEMBERS:

VINCENT E. DOYLE, III, Esq., Board Member NYS
Office of Indigent Legal Services

ANDREW DAVIES, Director of Research at NYS Office
of Indigent Legal Services

PATRICIA WARTH, Chief Hurrell-Harring
Implementation Attorney

JOANNE MACRI, Director of Regional Initiatives at
NYS Office of Indigent Legal Services

ANGELA BURTON, Director of Quality Enhancement for
Defense at NYS Office of Indigent Legal Services

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2 MR. DOYLE: Good morning, everyone. We
3 want to thank everyone for joining us here to discuss
4 the issues we're here to talk about.

5 My name is Vince Doyle. I'll be acting as
6 the Chair of the public hearing.

7 A few brief introductory remarks and then
8 I'll introduce our panelists and we'll get right to our
9 speakers and thank you for your patience.

10 Over 50 years ago the Supreme Court
11 announced in Gideon versus Wainwright that any person
12 who is too poor to hire a lawyer must be provided with
13 counsel during a criminal court proceeding. New York
14 was a pioneer among the states in providing a statutory
15 right to counsel for litigants in a range of family
16 court proceedings.

17 As early as 1975 the New York State
18 Legislature noted that because of the possible
19 infringements of fundamental interests and rights
20 including the loss of a child's society and the
21 possibility of criminal charges, litigants have a
22 constitutional right to counsel in certain family court
23 proceedings.

24 Despite the acknowledgement of these
25 principles, New York State, as well as many other

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2 states, continues to struggle with its obligation of
3 providing adequate support to ensure access to the
4 courts for those unable to afford to pay for an
5 attorney on an equal basis with those who can afford
6 private counsel.

7 We are pleased to report that measures,
8 which will be informed by your input here today, are
9 being taken to begin addressing many of these
10 unresolved issues.

11 As most of you know, a settlement
12 agreement was approved on March 11th of this year in
13 the Hurrell-Harring case in which the state
14 acknowledged responsibility for ensuring quality
15 mandated representation.

16 The New York State Office of Indigent
17 Legal Services has been vested with the authority to
18 fully implement the terms of this historic settlement
19 agreement. As part of that settlement agreement, ILS,
20 as we refer to ourselves, must develop and issue
21 recommendations that will be distributed statewide to
22 guide courts in counties located outside of New York
23 City in determining whether a person is unable to
24 afford counsel and therefore eligible for mandated
25 representation in criminal court proceedings.

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2 The purpose of this public hearing is to
3 solicit your views, opinions and comments on the
4 criteria that should be used and the process or method
5 that should be implemented in determining this crucial
6 eligibility question.

7 We are also interested in hearing about
8 any expected advantages and/or disadvantages that you
9 see in developing uniform and comprehensive guidelines
10 as well as any recommendations you have concerning the
11 review and/or appeal of these eligibility
12 determinations. We also welcome any information you
13 wish to share with us regarding the related social
14 and/or economic impact you foresee these standards may
15 have on your communities.

16 Before we begin, we wish to extend our
17 thanks to the distinguished panel members and our
18 guests for taking time out of your busy schedules to be
19 with us here today and to share your expertise, insight
20 and recommendations with us.

21 We also would like to extend a special
22 thanks to our host, the Office of Court Administration,
23 and specifically to the District Director for the 7th
24 District, Ronald Pawelczak, as well as the OCA staff
25 here in Rochester for allowing us the unique

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2 opportunity to access this beautiful courtroom and
3 these facilities.

4 I now want to introduce you briefly to
5 each of the panel members.

6 As I mentioned, my name is Vince Doyle.
7 The reason I'm here is I'm one of the board members of
8 ILS. ILS has an independent board that's appointed
9 with the input of different political figures in the
10 state and I am one of the board members. I'm also a
11 private practitioner with the law firm Connors &
12 Vilardo in Buffalo.

13 To my far right, Patricia Warth is the
14 chief Hurrell-Harring implementation attorney with ILS.
15 She recently joined the office. Prior to joining ILS
16 and since 2008 she was Director of Justice Strategies
17 at the Center for Community Alternatives where she
18 oversaw the organization's Client Specific Planning
19 unit. So we welcome Patricia to ILS and to the panel.

20 To my immediate right, Andrew Davies is
21 the Director of Research at ILS. He is primarily
22 responsible for gathering data on how mandated legal
23 services are delivered around the state and performing
24 research to drive their improvement.

25 To my far left, Angela Olivia Burton is

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2 the Director of Quality Enhancement for Parent
3 Representation at ILS. She is a graduate of Cornell
4 and New York University School of Law. She began
5 representing children in New York City Family Court as
6 a student attorney at NYU Law's Juvenile Rights Clinic.
7 Upon graduation she clerked at the New York State Court
8 of Appeals and then joined the law firm of Debevoise
9 before becoming an Instructor of Law at New York
10 University School of Law. She's had a number of
11 positions and is very knowledgeable in these matters.

12 To my immediate left, Joanne Macri who is
13 the Director of Regional Initiatives at the New York
14 State Office of Indigent Legal Services. She currently
15 oversees the implementation of a statewide network of
16 six Regional Immigration Assistance Centers on behalf
17 of ILS.

18 So we welcome our panelists and especially
19 we want to welcome all of our speakers, and our first
20 speaker -- and I'll remind you, to the speakers, our
21 proceedings are being transcribed. So just like court,
22 make sure you speak slowly, although I'm sure our court
23 reporter can keep up, and we will be keeping time so we
24 can get to everyone.

25 If time gets a little bit short, we are

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2 accepting written submissions if you want to submit
3 something to us afterwards in writing, that is
4 perfectly acceptable, and Joanne can give you that
5 information about how to submit that.

6 So our first speaker we welcome is John
7 Garvey, the Ontario County Administrator.

8 MR. GARVEY: Thank you, Mr. Doyle, and
9 members of the panel.

10 My name is John Garvey. I'm the County
11 Administrator of Ontario County which is located to the
12 southeast of Monroe County, about 30 miles away from
13 here where we sit. We are a county of 110,000 people
14 and we are happy to say we were the first county to
15 bring forth the settlement of a county in the
16 Hurrell-Harring case.

17 Over the last few years we have been very
18 active in supporting our public defender and
19 establishing an Office of Conflict Defender, two
20 offices historically we did not have. We had a panel
21 of assigned attorneys with the bar association for a
22 variety of reasons. The board came together and said
23 we really need to improve this service and this was
24 before the height of Hurrell-Harring case. So I'm
25 proud of the Board of Supervisors and I'm proud of our

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2 public defender, Leanne Lapp, and our conflict
3 defender, Andrea Schoeneman.

4 Last, we are doing a good business in some
5 ways, I must say. We've always been proud of our
6 prosecution, but we're equally committed to be proud of
7 our defense. We want the two best teams to argue
8 before the court and present the best interest of the
9 public and the defendant.

10 In 2014 - we've only been in business a
11 few years - our public defender had 2,961 cases. Our
12 conflict defender in the first six months, which was
13 created last year, had this year 234 criminal cases and
14 - part of her role was to assign the -- run the
15 Assigned Counsel Program - had 398 family court cases.

16 Sadly, family court seems to be outpacing
17 the criminal courts and I wish I had a scholarly answer
18 for you for that today, but I don't.

19 So we are on our way to creating a program
20 that we're very proud of, we think represents the
21 client's interest very well.

22 We have 16 town courts, two city courts
23 and I will say to you, we are weary of someone else
24 determining eligibility. We think it's working well
25 with our public defender and I have never once had a

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2 complaint come through my office or the Board of
3 Supervisors saying, "I was denied counsel," and you
4 know, we're working to expand our counsel and
5 arraignment.

6 We have lawyers in courts seven days a
7 week which for a more rural county is unheard of. I
8 mean, we're getting there. We're not where we need to
9 be, but we're on our way and we think, so far so good.

10 We are in touch frequently with the staff
11 of Indigent Legal Services. They provide good training
12 and support and funding, so we -- I will say we're
13 skeptical of another plan to assign eligibility because
14 we think it's working in Ontario County and we're happy
15 to share that with anybody who will listen.

16 So that will be my remarks for today. You
17 have a lot of speakers, but I wanted to welcome you to
18 the Finger Lakes Region. We're glad you're here and
19 certainly you're always welcome in our county seat,
20 Canandaigua, New York. So thank you for hearing me
21 today and if there's any questions or follow up, my
22 office is registered with your record. Thank you very
23 much.

24 MR. DOYLE: Questions from the panel?

25 MR. DAVIES: Mr. Garvey, thank you for

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2 coming here today and your reputation and the
3 reputation of your defenders proceeds you, certainly.

4 I just wondered for the purpose of perfect
5 clarity how exactly eligibility is determined.

6 MR. GARVEY: I'm sorry?

7 MR. DAVIES: You said that the public
8 defender presently is doing eligibility. Do I take
9 that to literally be true, that they are the ones who
10 take information and then --

11 MR. GARVEY: Yes.

12 MR. DAVIES: -- determine if they should
13 continue representation?

14 MR. GARVEY: Yes.

15 MR. DAVIES: I just wanted to be perfectly
16 clear on that.

17 MR. GARVEY: Right. Right.

18 MR. DOYLE: Has the county government had
19 any input with them about that or --

20 MR. GARVEY: We try not to. I mean, you
21 know, there's a sensitivity there. We try not to.

22 I count on the public defender to run the
23 office efficiently and if anyone raises an issue which
24 hasn't happened of this -- it's much more likely in our
25 county someone will question why a person is eligible

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2 because their perception is, this person is wealthy and
3 has a lot of money and the public shouldn't be paying
4 for defense, but I've never had the other case come
5 forward. I've never had a complaint the other way.

6 MR. DOYLE: How is your public defender
7 chosen?

8 MR. GARVEY: How is she chosen?

9 MR. DOYLE: Yes.

10 MR. GARVEY: A panel of the Board of
11 Supervisors, a committee, a select committee along with
12 a member of the bar, and I'm in on that panel, and a
13 staff member and we have open recruitment for public
14 defender, conflict defender and we accept -- we
15 generally have advertised through the state and the
16 local bar and Syracuse, Rochester to make sure the word
17 is out and we have had some good candidates and
18 ultimately Leanne Lapp and Andrea Schoeneman were the
19 two folks who rose to the top and I'm proud of both of
20 them.

21 MR. DOYLE: Terrific.

22 MR. GARVEY: And I want to add one thing,
23 that I'm very proud of the Board of Supervisors, you
24 know. Sometimes local boards are subject to scrutiny
25 that political affiliation would be considered. That

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2 doesn't happen in the Ontario County.

3 We're looking for the best public defender
4 or the best conflict defender and I don't know if
5 they're affiliated with some political party or not. I
6 have no idea. We don't ask and I think, it's a small
7 point, but I think you're sensitive to that, you know,
8 at your level.

9 MR. DOYLE: Absolutely.

10 MS. WARTH: It's clear that you're deeply
11 committed and have great faith in how your public
12 defender is doing the eligibility determinations.

13 Can you elaborate a little bit more on how
14 you feel and advances your county as a whole to have
15 that decision or those determinations made by the
16 public defender as opposed to some other entity?

17 MR. GARVEY: Well, as you know, having
18 counsel at arraignment and having counsel available
19 whenever they're needed is a problem and particularly
20 in a county where -- you know, we're a big county in
21 terms of geography with a number of courts and we feel
22 that our folks are out there. Our public defender who
23 we have faith in has established the rules and the
24 rules at a level of -- a guideline of 125 percent and
25 we think it happens.

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2 It's very important that these decisions
3 of eligibility be made quickly and our office is
4 responsive to them.

5 If a person needs an attorney and they're
6 not eligible, they need to know right away just as much
7 as a person who is eligible needs to know right away,
8 and our big thing is we don't want any bars to -- you
9 know, we're working diligently on counsel at
10 arraignment and that's been another learning curve
11 for -- you know, we have our town justices and many of
12 them are lay justices and, you know, these are things
13 that we're all learning a little bit.

14 So we think another outside agency or
15 someone else making those determinations -- we think
16 we've got it working pretty well and we're responsive
17 if we learn it isn't working well.

18 MS. WARTH: Just out of curiosity, the 125
19 percent of the federal guideline you're using right
20 now, eligibility standard, how is that decision made
21 that that would be the standard?

22 MR. GARVEY: Public defender makes it.
23 She tells me, but you know, I pretty much let her make
24 that decision and as long as she has the rationale for
25 it, it's fine with me.

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2 It's never been questioned that I -- it's
3 never been questioned by me. I mean, having been
4 through the lawsuit, I will say I am sensitive. We
5 always learn after you've been sued.

6 MS. WARTH: Right.

7 MR. GARVEY: But I think this is -- you
8 know, this whole system is new to us, but we're working
9 through it and we think it's working well.

10 Other questions?

11 MR. DOYLE: Anyone else?

12 Okay. Mr. Garvey, thank you very much and
13 it's wonderful to hear someone from county government
14 who is so supportive of their indigent defense system.
15 Thank you for that and thank you for coming here today
16 to share your perspective.

17 MR. GARVEY: My pleasure.

18 MR. DOYLE: So I think our next witness
19 who is available is Ed Nowak who needs no introduction
20 to the panel members. He's a former public defender of
21 Monroe County and longstanding, I believe, is it
22 president of --

23 MR. NOWAK: Yes.

24 MR. DOYLE: -- NYSDA? The New York State
25 Defenders Association.

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2 Welcome, Mr. Nowak.

3 MR. NOWAK: Thank you.

4 Well, I thought I would come today, not
5 only because I'm president of State Defenders
6 Association, but to talk about over 33 years as public
7 defender in Monroe County and some of our experiences
8 in how the eligibility determination really impacts the
9 quality of representation.

10 First, I was glad to hear Mr. Garvey's
11 comments that their defender makes the eligibility
12 determination because I believe that is the way it
13 should be and I am fully aware that is not the way it
14 usually is in most jurisdictions, and, in fact, in most
15 jurisdictions in the state the judges believe that
16 because it is a constitutional right of the defendant
17 it's their duty to protect that right and so that what
18 has to happen is the public defender might tell the
19 judge, you know, "We've interviewed this person, find
20 them to be eligible," or whatever agency does it in
21 whatever county, and then the judge is the official
22 appointee of counsel.

23 That to me is a really dangerous situation
24 because, in essence, what you're doing is delaying the
25 right to counsel, and as you would know, Mr. Doyle, if

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2 somebody walked into your office, a parent walked in
3 and said, "My son or daughter has just been arrested.
4 They've been driven away from my house. I want to
5 retain you. We talked about the fee. That's fine.
6 Just please help my son or daughter," you would be
7 there and the police wouldn't tell you to get out of
8 there and say you can't represent this youngster.
9 You'd say, "I'm the lawyer. I've been retained."
10 Simple as that.

11 Now you're poor. You go to the public
12 defender's office, "We'll try to represent you."

13 I talked to Tim Donaher before coming here
14 and I think Tim is on your agenda near the end. He has
15 a story that I was going to tell at our Defender Awards
16 Banquet about Roger Brazill who received the Wilfred
17 O'Connor Award, but I would prefer that since it's at
18 the end and it's a long story -- but Roger Brazill was
19 trying to intercede for a mom on behalf of her son who
20 was arrested and in police custody and they wouldn't
21 let him access the client because an eligibility
22 determination hadn't been made by a judge, and at the
23 end of this day, Mr. Brazill was threatened with arrest
24 for obstructing governmental administration and a
25 process was in place to have his case presented to a

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2 grand jury.

3 Tim has all the details because this
4 occurred under his tenure as public defender, not mine,
5 and to me that is absolutely absurd.

6 So law enforcement and the courts say, you
7 know, we're not letting a defender help a client when
8 the client is in custody. That is as critical a stage
9 as the arraignment. They're under arrest, could be
10 questioned and we were being denied access to that
11 client.

12 There is also a 4th Department case that
13 was litigated under my tenure as public defender where
14 one of my attorneys, Sid Farber, who was the head of
15 town court at the time, was trying to access a client
16 and the police sent him from point A to point B to
17 point C and all the time he was at point A, but they
18 just kept sending him around, and fortunately the 4th
19 Department reversed that conviction, but it shouldn't
20 be a situation where you have to go through the court.

21 The defender is, as is done in Ontario
22 County, perfectly capable and should be the one to make
23 that determine because it also leads to the question of
24 what happens to the information that is given, and if
25 it's given to another agency, is it privileged, is it

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2 confidential, what kind of protection is there? Can
3 the prosecutor access that.

4 I encountered a situation where a
5 prosecutor was thinking of charging a client with
6 perjury for signing an affidavit when they weren't
7 eligible, so now we're going to have felony perjury
8 charges brought, and it was my position that they could
9 not have that information under any circumstances. It
10 was gathered under the attorney/client privilege and
11 was not accessible to them.

12 Fortunately that case never did proceed
13 and cooler heads prevailed at the end of the day, but
14 it's issues like that that to me make this a situation
15 where the information needs to be gathered and kept
16 confidential and privileged by counsel for the
17 defendant, that the public defender can make that
18 determination.

19 If the client feels that they are eligible
20 and the public defender is wrongfully denying their
21 representation, then I do believe the case could go
22 before the judge, the client could understand that the
23 information that was gathered will be provided to the
24 court, but only to the court and only for the purpose
25 of determining eligibility.

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2 Now, the judge can look and decide if the
3 public defender is wrongfully denying representation.
4 If the court feels that way, the court could appoint
5 counsel and that person will be represented.

6 So at the first instance, I think it's
7 important that this committee think about when it's
8 establishing the guidelines the importance that counsel
9 has before the arraignment, critical stages, eye
10 witness, identification proceedings, interrogations,
11 that that person needs counsel and if they want
12 counsel, it shouldn't be stopped by virtue of the fact
13 that you haven't been appointed yet by a judge at the
14 arraignment.

15 I'm sure many of you are aware of the case
16 in New York City where the district attorney was
17 putting a person in an office adjacent to the
18 arraignment courtroom and telling defendants this was
19 their last opportunity to speak to them to get their
20 side of the story out. Well, the Court of Appeals has
21 just said that is wrong, can't be done, but why was it
22 being done? That's the question.

23 Why was it being done? Because indigent
24 defendants didn't have counsel. They had to wait for
25 the judge to say, "I'm appointing you." That's wrong.

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2 It's just absolutely wrong.

3 Now, to move on from that issue of who
4 should be doing it, I know I've used the word a few
5 times, and incorrectly probably, of "indigency," but
6 the statutes do too and therein lies the problem.

7 722 of the County Law is clear. It
8 upholds the standard of Gideon. A person is unable to
9 afford counsel. That's the standard, but when you read
10 Section 717 of the County Law it says, "The public
11 defender shall represent, without charge, at the
12 request of the defendant" - and those are key words,
13 "at the request of the defendant" - "or by order of the
14 court each indigent defendant."

15 So they pop the word "indigent" and then
16 they refer to 722 which never uses the word "indigent."

17 So it's their conclusion that if you can't
18 afford counsel, you're indigent, and indigency has
19 created a lot of problems because people think you just
20 need to be beyond unable to afford counsel.

21 I mean, it's a level of poverty that's
22 true poverty I guess and it causes problems. The word
23 "indigency" causes a tremendous number of problems.

24 I can't tell you how many times, literally
25 hundreds of times I would have a client in Monroe

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2 County who was clearly eligible by any reasonable
3 standard of unable to afford counsel using federal
4 poverty guidelines, whatever you want to use, and then
5 I would call a county where my client also had other
6 charges pending in a nearby county, and it could extend
7 out to the Southern Tier, but any place, and I would be
8 told they're not eligible here.

9 "What?"

10 "They're clearly" -- "no, no, no. We have
11 a different standard in our county. Our county is \$90
12 a week."

13 "\$90 a week? Where did that come from?"

14 "That's what I was told to do by our
15 county executive or county legislature."

16 \$90 a week. Some places, \$75 a week.
17 Another, \$100 a week. You're talking \$5200 a year.
18 That is so far below the federal poverty guidelines
19 it's crazy, but that's what I would be told and so we
20 can't represent this person.

21 I said, "Where are they?"

22 "Well, they're still sitting in jail
23 waiting for a lawyer." No joke.

24 It's a sad situation because people said
25 they're not indigent. It's not unable to afford a

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2 lawyer. They clearly were unable to afford a lawyer.

3 So I would ask, you know, that this group
4 when it's developing guidelines to try to get away from
5 the term "indigency" and look at ability to afford
6 counsel and recognize potentially the bad language in
7 the statute and seek the -- ask the legislature to
8 consider amending the language they use because it
9 really is creating a tremendous amount of confusion.

10 The next issue that came across my desk
11 more times than I would like to have had it do so is
12 parental income. Rochester is blessed with some very
13 fine educational institutions; the University of
14 Rochester, RIT, Brockport State and the list goes on,
15 nearby Geneseo State, and students might from time to
16 time have some indiscretion and find themselves facing
17 law enforcement and the court system and then we would
18 be asked to go to the jail.

19 They're in jail, interview them, find out
20 they don't have a job. They're full-time students.
21 They have no money and now we have to check with the
22 parents, and I would always say, "Why do we have to
23 check with the parents?"

24 It certainly wasn't my desire to have to
25 do that. It is my personal belief that the right to

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2 counsel is personal.

3 I cannot find a way and I've even tried
4 what I considered to be some interpretive reading of
5 the constitution that some of our Supreme Court judges
6 like to do from time to time and I don't find it in
7 there where right to counsel is a familial right and
8 it's the family's right to have an attorney for their
9 kid.

10 It's the individual defendant's right, but
11 yet I was directed and told, "Parental income is going
12 to be considered. That was the will of our county
13 administration."

14 So I said that's what I will do, and just
15 one example, "Oh, Public Defender, he got arrested,
16 huh? Well, I'm not going to tell you anything."

17 "What? We need to know this."

18 "No. I'm going to teach him or her a
19 lesson. I'm going to let him sit in jail for a while
20 and think about it," and I would try to explain to the
21 parents why there are other ways to discipline or have
22 your child held responsible.

23 "Please. You don't understand what it's
24 like to be in a jail cell. You've probably not been in
25 one. I am in the jail all the time seeing clients.

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2 This is not a place for your son or daughter to learn a
3 lesson. That's not the way to do it."

4 Most times I could convince them to
5 cooperate so we could proceed, but there were times
6 they did not and I decided that we're just going to go
7 over and get -- represent the kid, tell the judge the
8 parents are uncooperative, but we're not going to deny
9 counsel, but it's things like that.

10 There are parents who don't want to pay so
11 they won't even return your calls. What does that do?
12 Causes delay. How can you get to the court?

13 Having to consider that, again, I think is
14 wrong, but I think that in most jurisdictions, I'm not
15 positive about this, but from people I've talked to
16 across the state, they face the same dilemma. Why do
17 they face the dilemma? It's pretty simple. The
18 counties are under serious financial burdens right now
19 and any place where money is available they will go to
20 and they believe this is a source of revenue for the
21 county, albeit maybe not huge amounts of money, but
22 it's a source of revenue.

23 They really don't like having to provide
24 defense services. They can be very costly. They would
25 prefer to keep them done as cheap as possible and as a

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2 result we have this situation where parental income is
3 being requested and then if they don't cooperate it
4 brings us to the next issue of 722-d orders.

5 Many courts in our jurisdiction, when the
6 parents either didn't cooperate or had some resources,
7 but didn't step up and the public defender had to get
8 in because they weren't cooperative, would have the
9 public defenders provide representation and then in
10 conclusion order the parents to pay some amount of
11 money, 500, a thousand, whatever the number is the
12 judge came up with.

13 We had a number of civil lawsuits brought
14 challenging that in Monroe County. County Law
15 Department had to defend those.

16 My position on the 722-d's was, I am not a
17 collection agency. So I immediately turned those
18 orders over to the County Law Department so as not to
19 create any conflict with a client that I had
20 represented and it was up to them to do the collections
21 and see what they could do to recover the money ordered
22 in the 722-d's, but when you look at 722-d of the
23 County Law, in my opinion it is worded such that the
24 public defender is to provide the representation and
25 then if during the pendency of that representation it

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2 is learned that that person has some ability to pay,
3 that can be brought to the attention of the court. Not
4 in the very first instance where everybody knows what's
5 happening today.

6 Nothing changed in most of these cases.
7 The judge sometimes just wanted a public defender
8 appointed so the person's right to counsel is
9 protected, but we couldn't gather the information from
10 the parents and so it was appointed pursuant to 722-d.

11 Again, to my thinking it's a fairly sloppy
12 procedure and one that has been sort of allowed to
13 survive because of the financial crush on counties.

14 I think those are the topics that I wanted
15 to cover about eligibility, but I also wanted to make
16 available to you any questions -- the time to ask me
17 any questions because it's 30 years of doing this work
18 and having parents on my phone on a daily basis that I
19 thought might be helpful to you.

20 MR. DOYLE: Great. Thank you, Mr. Nowak.
21 I have a question for you.

22 MR. NOWAK: Sure.

23 MR. DOYLE: It's my understanding that
24 it's the Defenders Association as well, their position
25 that the eligibility determination should be made by

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2 the provider.

3 MR. NOWAK: It is. And I'm not submitting
4 any written materials because obviously I'm retired as
5 public defender and the materials submitted by the
6 Defenders Association are fine by me since I'm its
7 president.

8 MR. DOYLE: Yes. I've heard some people
9 argue for something -- someone other than the provider
10 system, either the court system, like some modified
11 version of the federal system, or some other agency,
12 and the main argument seemed to be, it's an
13 administrative burden to the providers that they
14 shouldn't have to undertake, or two, that it creates
15 conflicts either in a legal sense or, more
16 appropriately, just sort of an atmosphere of conflict
17 from the beginning for a provider to have to be sort of
18 quizzing their potential client about finances and sort
19 of sets off the relationship on the wrong foot.

20 How would you respond to those points?

21 MR. NOWAK: I guess I'm going to reflect
22 back a good 25 years now. It would be a burden on any
23 agency to do the eligibility determination, to gather
24 all the information and try to verify it.

25 The court makes the determination - and I

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2 had this discussion with just about every
3 administrative judge in Monroe County during my tenure
4 - where we would have to gather the information, give
5 it to the judge so the judge could make the
6 determination, and I'd say, "I'm just going to close
7 down that section of my office and have the paralegals
8 do paralegal work for me as opposed to eligibility for
9 you because you're the one making the determinations.
10 So you hire the staff."

11 Well, they didn't want to do that because
12 they weren't going to get the money.

13 So I don't care where you go. It is a
14 burden.

15 Then I would just ask, which entity in the
16 entire State of New York in the United States of
17 America cares about the rights of that defendant more
18 than the defender? I submit to you, there are none.

19 Everyone else has some type of a
20 conflicting position and there is no one that looks out
21 for the rights of a defendant who is charged with a
22 crime more than the defense attorney. That is why they
23 are the ones.

24 Yes, it's going to be a financial burden,
25 but somebody in the government, whether it's done by

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2 the court system, by the probation department, you name
3 it, they've got to provide the resources. Why not give
4 the resources to the entity whose duty it is to
5 represent that client and who in this state does so
6 zealously for their client? It doesn't make any sense.

7 I forgot the first part of your question.

8 MR. DOYLE: And the second part then, in
9 your experience, if the sort of first interaction that
10 the provider has with a client is asking them for
11 records and things like that, does that set the
12 relationship off on the wrong foot or not in your
13 experience?

14 MR. NOWAK: Again, I don't think it does
15 and that's what reminded me about 25 years ago.

16 I went to the New York State Civil Service
17 Commission because the individuals who do the financial
18 eligibility determination in the public defender's
19 office of Monroe County are noncompetitive positions.

20 They had taken the position, civil service
21 test, and my application for them to be noncompetitive
22 or exempt was denied and I appeared before the State
23 Civil Service Commission. It was probably a good day
24 for me in that maybe I was more eloquent than I usually
25 am, but one of the members of the commission said, "I

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2 never thought about it like that," and I said, "You
3 can't test" -- "you can test a person's knowledge of
4 the law, the ability to gather facts, all of that
5 stuff. You can't test the manner in which they
6 approach someone in a holding cell where there could be
7 vomit all over the floor, not the prettiest place in
8 the world, yet they walk in with an ability to walk in
9 to the individual and say, 'I need to do this. We're
10 here to help you. Let's sit down and talk,' and then
11 they explain why they're there." When I hired people
12 for that job, that was my number one goal.

13 A lot of the other stuff that you look at,
14 it was how do they handle and deal with people. Do
15 they have empathy and compassion, because that is what
16 is needed at that moment in time.

17 We would have many young college students
18 from Geneseo, Brockport State Criminal Justice
19 Departments do internships at the public defender's
20 office and I would meet with those students every time
21 they would finish their internship and every one of
22 them, every individual I ever talked to said, "The
23 people in your intake section are just absolutely
24 unbelievable. They're terrific and I learned so much."

25 I will never forget a student who came in

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2 to see me and the interview was of Arthur Shawcross and
3 that student came back and said to me, "He didn't seem
4 strange. He didn't seem unusual. He seemed like a
5 normal person," and I said, "He is a person. That's
6 why." It's just that they were expecting, they told
7 me, something like a monster to be here. It was
8 nothing like that, and they said the manner in which
9 our staff approached everyone in the holding areas is
10 the way it should be.

11 So I can only tell you that civil service
12 positions or who does it -- I would be willing to bet a
13 lot of money that it wouldn't be done that way by a lot
14 of other agencies, and that is, when a person who is in
15 custody needs attention and compassion and empathy when
16 they're in a holding cell in a very difficult
17 environment to have somebody come in to say, "I care
18 about you. I'm here to help you," not, "I'm here to
19 screen you out," which is what just about how every
20 other agency would approach it.

21 MR. DOYLE: And this is my last question,
22 I don't mean to take all the time , but so when the
23 people from your office, your former office, would have
24 this eligibility meeting conversation, they often would
25 not only be obtaining information for eligibility, they

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2 would be answering questions, they would be providing
3 the support --

4 MR. NOWAK: There were paralegals who
5 could say, "Your lawyer's going to be out in court when
6 you get out there. We're going to set up an
7 appointment and try to get you out today, find out
8 about bail. Can you post any kind of bail? If you
9 can't, we'll have to push to get you on pretrial
10 release," but they would explain what was going to be
11 happening besides just gathering the eligibility
12 information to answer and put at ease the client, "Yes,
13 there is a lawyer. That lawyer's out in court. You
14 haven't seen that person yet, but they'll be there,"
15 and they would get to court well before court started.

16 They would be doing these interviews well
17 before court began so that when court started they had
18 the docket and they knew who was going to be called
19 first and they'd call those names. So the court, when
20 it started, would have those eligibilities done.
21 They'd be provided to the assistant public defender in
22 the courtroom.

23 MR. DOYLE: This is really the beginning
24 of representation and the provision of service.

25 Other panel members?

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2 MS. MACRI: Thank you, Ed, for being here
3 today. We really appreciate you taking the time to
4 especially share your insight from all the experience
5 you've had.

6 I wanted to ask you, you started off your
7 discussion regarding the delay that is caused when we
8 have to deal with the assignment process to determine
9 eligibility and then to be formally assigned by a
10 judge.

11 We've had prior speakers at some of our
12 past hearings from civil legal service agencies who
13 have basically been told, you know, when we certify
14 that we are representing a client, it's basically known
15 to the folks that we work with that we have screened
16 them and we determined them to be eligible for our
17 services.

18 Do you think that that kind of baseline
19 protocol would be something that would be best to be
20 adopted for our defender community where if a defender
21 automatically appears on a case they're sort of
22 certifying that, yes, we've done the job of screening
23 them and you should basically follow our --

24 MR. NOWAK: Yeah.

25 MS. MACRI: -- you know, advice that this

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2 person has been screened and is eligible unless the
3 court would otherwise want some more information which
4 then, as you mentioned, would be adopted in
5 confidentiality?

6 MR. NOWAK: Yeah. I mean, I do think that
7 anything that allows the defense -- and not to put the
8 client in a position of, you're different than other
9 clients. Because you're poor, we have to go through
10 this process for you, but if somebody can retain an
11 attorney and just walk in with their lawyer, but
12 everybody else that can't afford that private lawyer
13 has to go through a different process and appears to
14 everyone in the court to be different.

15 So the system the civil legal services
16 have where they just step up because they've made that
17 determination now to everyone in the court system
18 doesn't look different than any other case and I think
19 anything that gets away from treating poor people
20 differently is better for all of us.

21 MR. DOYLE: Angela?

22 MS. BURTON: Mr. Nowak, thanks again for
23 all of your input and insight and I just wanted to kind
24 of build on the question about the who.

25 With respect to -- you mentioned that in

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2 many jurisdictions it's the judges who are the default
3 as far as officially appointing counsel and making that
4 final determination and maybe I should know this
5 already, but I don't, it's a two-part question, is
6 there some legal basis in statute that leads to that
7 understanding, and if so, would we need to pursue some
8 sort of legislative change to clarify that aspect if we
9 were to --

10 MR. NOWAK: Yeah, there is case law. It
11 starts out -- I think it's page 1 of the Defenders
12 submission that highlights all of the cases in the
13 State of New York that talks about the judge's duty to
14 make sure the defendant is represented by counsel and
15 is eligible for counsel, but as I said, the conflict
16 would be in the statute where when you look at Section
17 717, it says, "The public defender shall represent,
18 without charge, any" -- "at the request of a
19 defendant." It doesn't say -- and then, "or by
20 appointment by the court." So it's an either/or.

21 Yet in our state, it's tended to be a
22 situation where the court is deemed to be the
23 appointing authority, and in fact, I know that the
24 Defender paper that has been given to you was also
25 given to the committee to ensure quality mandated

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2 representation.

3 I noticed -- yesterday I got a response
4 from someone on the committee who happened to be an
5 assistant district attorney prior to his now being a
6 judge who took strenuous objection to anyone but a
7 judge appointing counsel, and we all know in this state
8 it is the judge who has the responsibility to protect
9 the constitutional rights of the defendant. So I need
10 to read some of his decisions to make sure the 4th
11 Amendment is being expanded to protect the rights of
12 defendants, but I'm sure I won't find that.

13 Sorry for being facetious.

14 MS. BURTON: I did have one other --

15 MR. DOYLE: Sure.

16 MS. BURTON: -- follow-up question as
17 well.

18 With respect to jurisdictions where there
19 may not be a public defender, I mean, there are some
20 counties that it's an assigned counsel system, and in
21 those jurisdictions do you have suggestions for who or
22 what entity might be, other than the judge, that might
23 be appropriate for determining eligibility?

24 MR. NOWAK: I should be the last person to
25 be telling the Office of Indigent Legal Services that

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2 we need a statewide public defender system.

3 I know that Chief Judge Kaye said that in
4 her Blue Ribbon Panel Report from the Kaye Commission
5 many years ago, but we see how quick the state is to
6 spend the resources as the counties are to providing,
7 you know, quality legal services to defendants.

8 It's got to go to that method of
9 representation. I mean, dealing with our broken system
10 you're going to have broken results, and in assigned
11 counsel counties, I don't see how you can do it except
12 have the administrator of the program take on the
13 additional responsibility of gathering that
14 information, but then depending on the nature of that
15 administrator and the nature of the county executive
16 and that relationship, things could not be very good
17 where one looks at their job as to save the county's
18 resources as opposed to providing services.

19 So we heard from a great example where the
20 emphasis is on representing defendants with quality in
21 Ontario County, but that is not the case in many, many
22 other counties where the focus is on saving money and
23 denying representation whenever possible and that's
24 going to be a very difficult situation in an assigned
25 counsel county.

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2 MS. WARTH: And I do want to follow up on
3 that and swing back to something that you alluded to
4 earlier, that your experience has been that in some
5 counties the decision about eligibility seems to be
6 made with an emphasis on screening out rather than
7 screening in --

8 MR. NOWAK: Absolutely.

9 MS. WARTH: -- and that your office worked
10 hard on screening in.

11 MR. NOWAK: Correct.

12 MS. WARTH: Can you speak briefly to some
13 of the factors that you think -- you know, you spoke
14 eloquently about who makes a decision.

15 Can you speak briefly about some of the
16 factors that should be considered in the decision about
17 who is --

18 MR. NOWAK: Well, it's basically to see if
19 there are assets that you believe the person has that
20 would enable them to afford a lawyer and that's --
21 that's really -- to me it's not that hard.

22 MS. WARTH: Right.

23 MR. NOWAK: When you look and they have
24 debts and, oh, this person and these bills and those --
25 and you add them all up and you look, well, they're

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2 living hand to mouth. There is no money.

3 Where is, if it's a felony charge, the
4 money for the retainer going to come from? It's
5 clearly not there. So it is this idea of where can the
6 money come that this person has to afford a lawyer and
7 if they have it, they're not eligible.

8 We certainly use the federal poverty
9 guidelines as a measuring stick and we would vary it
10 for felonies and misdemeanors, different percentages.
11 It's not always 125. It could be 175, 150 depending on
12 the kind of case, and in areas like New York City where
13 cost of living and everything is so much higher, it has
14 to be a higher standard, and every area of the state
15 does have different standards of living in those
16 counties.

17 So that needs to be considered, but it
18 basically comes down to, you look at the series of
19 financial data that your client has given you and is
20 there money there for them to be able to afford a
21 lawyer.

22 I remember situations where friends of a
23 client would come in and say, "We're going to post the
24 bail to help this person out." Well, if they couldn't
25 afford \$500 bail, where is the money for the lawyer

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2 coming from?

3 I mean, they don't become that difficult a
4 decision in real life when you have the information.
5 It really is not that hard a decision if you look at it
6 based on the ability to afford a lawyer, but then we
7 had situations where that happened and then the judge
8 says, "I want a 722-d order for the county for the bail
9 money," and the friends are screaming, "I didn't want
10 to pay for a lawyer. I was expecting to get my money
11 back."

12 Those are other very interesting cases
13 along the way.

14 MS. MACRI: Can I ask a quick follow-up to
15 that?

16 So did you also take into consideration
17 the complexity of a case?

18 So obviously, for example --

19 MR. NOWAK: Absolutely.

20 MS. MACRI: -- the idea of retaining an
21 attorney in a misdemeanor case may be different than
22 retaining an attorney in a complex felony case.

23 MR. NOWAK: Absolutely. Yeah. That to me
24 was -- the fee would also be very different. So that's
25 why you have to look at it that way.

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2 I mean, if a person is charged with a
3 misdemeanor, their retained counsel fee would be far
4 less than somebody charged with an armed robbery. That
5 has to be a factor that you're looking at.

6 MR. DOYLE: As to those counties that --
7 where they would look at \$90 a week, the attorneys
8 normally -- private attorneys normally expect their fee
9 upfront. They're not going to take \$10 a week on an
10 assignment.

11 MR. NOWAK: Right.

12 MR. DOYLE: Pat?

13 MS. WARTH: Just curious, do you try to
14 keep your finger on the pulse of what private attorneys
15 are charging for cases around the county to give you a
16 sense of what really truly is the ability to pay?

17 MR. NOWAK: Yes. Got to do that.

18 MR. DOYLE: Any other questions?

19 MR. DAVIES: I just had a quick one, if
20 you don't mind.

21 MR. DOYLE: Sure. Please. Last one.

22 MR. DAVIES: I was just wondering, you
23 alluded to the possibility of, if somebody's found
24 ineligible, they then have to go to the judge and ask
25 for a reconsideration.

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2 I was just wondering, how does that work
3 and is there any assistance for that person or they're
4 on their own for that one?

5 MR. NOWAK: Basically it would work
6 whereby the person from the office who gathered the
7 information would say to the judge, "Judge, this person
8 is just outside of the guidelines for representation by
9 the public defender."

10 We would use that kind of code language to
11 say that there is some ability to afford counsel. So
12 we could say, "They're outside of the guidelines," and
13 the judge would say, "All right. Can I see that
14 information," and the judge might say, "No. I'm going
15 to appoint the public defender," and then a 722-d, and
16 then at the end of the case, might say, \$250, 500,
17 whatever the judge determined at the end, but we would
18 at least give the judge a head's up that there might be
19 some ability to retain an attorney and the judge would
20 then say, "Let me see the" -- and some judges would
21 say, "No. I'm still going to appoint the public
22 defender."

23 It became their call because that was the
24 way that we had to operate here.

25 MR. DAVIES: Thank you.

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2 MR. DOYLE: Mr. Nowak, thank you very
3 much.

4 MR. NOWAK: Thanks for your time.

5 MR. DOYLE: Our next witness is Timothy
6 Donaher who is the current public defender of Monroe
7 County.

8 MR. DONAHER: Thank you for the
9 opportunity for testifying today. As I indicated to
10 Ms. Macri, I don't have any prepared remarks. I'm here
11 to answer any questions that you may have both as
12 public defender of Monroe County -- I also should let
13 you know that as president of the Chief Defenders
14 Association of New York we will be submitting some
15 written comments by the 26th. So we are working on
16 that right now as we speak.

17 So as you know, I'm currently Monroe
18 County Public Defender. I know that Ed gave you some
19 insight into how the office has been operating for a
20 number of years. I know that since Ed has left we've
21 made some changes to how eligibility determinations are
22 done largely in order to comply with our obligations on
23 the Counsel at First Appearance Program.

24 Again, I wasn't here for all of
25 Mr. Nowak's testimony. Did he give you an overview of

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2 how the office operated as far as how eligibilities
3 were done when he was public defender?

4 MR. DOYLE: A little bit about the
5 process, but not in detail, but we're interested to
6 know how it's done now.

7 MR. DONAHER: Okay. I actually only made
8 three copies of some documents. I don't know who wants
9 to share, but I have three copies of packets that I'm
10 going to give you.

11 MS. MACRI: Thank you.

12 MR. DONAHER: I'll give you a brief
13 overview about how eligibilities are currently done and
14 actually I would like to touch on a couple things that
15 Mr. Nowak did raise.

16 As he did mention, we do have a staff of
17 paralegals that are charged primarily with the
18 responsibility of assisting clients in obtaining
19 information in order to make an eligibility
20 recommendation to court.

21 Now, historically, these paralegals would
22 do two types of interviews: In-custody interviews,
23 where they would go to the jail after the person is
24 arrested, receive the list from the jail of who's been
25 received. They would interview those persons for

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2 eligibility and then a staff person would be in our
3 arraignment courts in city court, both Part 1 and Part
4 5 - Part 1 being the misdemeanor arraignment court,
5 Part 5 being the felony arraignment court - and make a
6 recommendation to the court on whether or not we think
7 the client is eligible.

8 The second type of eligibility would be
9 out-of-custody eligibility that would occur. Clients
10 are not held in jail. They'd be provided an appearance
11 ticket. They would be instructed by the court to come
12 down to the public defender's office after they've been
13 arraigned and be interviewed for eligibility.

14 When out-of-custody eligibilities are done
15 - you'll see on that cover sheet that I've provided you
16 - the clients are basically told, "We're going to
17 collect information from you to make a recommendation
18 to the court. We don't make the final determination.
19 It's up to the court to make that determination. If we
20 say that we're recommending you're not eligible, please
21 try to go talk to counsel, bring information of your
22 attempts to do so to your next court date."

23 That's done in order for the client to
24 basically say, "I've done my best to try to obtain
25 counsel. I can't do so," and we are normally in those

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2 instances assigned 722-d.

3 That general process was modified
4 significantly once we implemented the Counsel at First
5 Appearance Program as you may or may not know.

6 Monroe County is now providing counsel at
7 town and village court arraignments seven days a week,
8 24 hours a day. So the attorneys are now charged with
9 the responsibility when they appear to do those
10 arraignments, to do those eligibilities right away with
11 the client.

12 So all of the town court eligibilities,
13 misdemeanor violations, felonies, all the ones in
14 custody, all the ones out of custody, all the ones that
15 are being done on appearance ticket dockets are all
16 being done largely by the attorneys. We do have some
17 of the paralegals trying to assist in busier courts in
18 the town and village courts.

19 So we've transitioned a little bit away
20 from having the paralegals do 100 percent of the
21 eligibilities to having the attorneys do the
22 eligibility.

23 Now, there are pros and cons. One of the
24 significant pros is the eligibility is done right away.
25 There is no delay in the possibility of being assigned

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2 an attorney by the public defender's office.

3 For instance, we're showing up right at
4 arraignment. We're saying we're eligible. We are
5 immediately being appointed as opposed to showing up,
6 having the client go back to the public defender's
7 office, be interviewed for eligibility, show up at the
8 next court date, make a recommendation and say, "Okay.
9 They're eligible, Judge," and then get appointed.

10 We can immediately begin representation of
11 all of our cases as soon as we make that recommendation
12 to the court.

13 What is the downside? The downside is, is
14 the greater number of people that you have doing
15 eligibilities, the greater disparity you may have in
16 the application of what are right now relatively
17 subjective principles on determining who is eligible.

18 I mean, we do use 125 of the federal
19 poverty guidelines and we tell all the staff, "Please
20 take into account other types of expenses." In fact, I
21 included in the memo that I did, note 9, trying to
22 advise the staff of, these are what you should take
23 into account, extraordinary medical expenses, but also
24 certain assets that you should weigh. For instance, if
25 there's homeownership, how much of the homeownership

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2 equity should you weigh depending on the complexity of
3 the case.

4 My own personal opinion when I'm hearing
5 you inquire about who should be doing the eligibility
6 determinations - and this is a debate, frankly, that's
7 raging amongst the board members of the Chief Defenders
8 Association - I do know in some counties the judges do
9 it and some of the providers in those counties are very
10 happy with the judges doing it because it does
11 alleviate some of the concerns that you mentioned of
12 that potentially adversarial relationship with the
13 client, and I imagine that in a perfect world, if the
14 courts were staffed with dedicated professional staff
15 persons who were capable of applying standards
16 objectively, then I would say that that makes a lot of
17 sense, but we don't live in a perfect world and
18 ultimately I would have great concerns if you were to
19 recommend that the court system or another agency be
20 charged with that responsibility.

21 The concern I have regarding the court
22 system is - I'm sure they would tell you - they don't
23 have any staffing that can do this professionally --
24 well, I don't mean to impugn the court system, but
25 promptly, and we really need a very prompt

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2 determination of eligibility. You don't want clients
3 sitting in jail for a couple of days when somebody gets
4 to them in order to do eligibility.

5 The second concern that I have is, is we
6 have a variety of different types of courts. We have
7 86 separate judges in Monroe County and unless the
8 standards that you promulgate are very objective, you
9 will have 86 different interpretations of what those
10 standards are. You will be compounding the problem in
11 my opinion as opposed to resolving the problem.

12 The other reality is that a lot of town
13 court judges don't show the patience that maybe other
14 judges would have in doing these eligibilities,
15 certainly in the middle of the night, and the other
16 thing that you need to be aware of, if you are going to
17 recommend that the judiciary do this or an independent
18 agency, our clients have limited transportation.

19 Oftentimes if they can't get there by bus,
20 they're not going to get there. It's very difficult
21 for them to arrange child care or having friends take
22 them. They don't have cars that are often reliable.

23 We ran into real problems when the RTS,
24 the Rochester Transit Service, stopped bus routes to
25 Greece Town Court. So our clients were having a very

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2 challenging time getting to court, let alone showing up
3 at another agency that isn't on the bus route to have
4 them screen eligibility.

5 If you were to recommend that a county
6 agency do it, I have great concerns on that. I think
7 most counties in an attempt to save money would defer
8 to any existing agencies such as probation which
9 obviously doesn't have our client base at heart.

10 So I think that because we're not in a
11 perfect world I would recommend providers do it for the
12 same reason Mr. Nowak has said.

13 MS. MACRI: Can I ask some follow-up to
14 that?

15 MR. DONAHER: Sure.

16 MS. MACRI: The notion that you've got the
17 attorneys right now conducting the eligibility, is this
18 the same kind of information that, can I presume, and I
19 shouldn't, but I will, that would be helpful to them
20 when they're representing the client at arraignment?

21 MR. DONAHER: Absolutely. If you take a
22 look at the second sheet of that handout that I
23 provided you, that's a copy of our revised eligibility
24 form that we use.

25 The information that we collect, and

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2 there's a dual purpose, obviously to collect financial
3 eligibility information, but it's also information
4 about whether they're a U.S. citizen, whether they have
5 a predicate offence, whether they're on probation or on
6 parole, all the information relative to making a
7 determination.

8 Now, certainly there's a flip side to that
9 as well. By including it on our single form it becomes
10 an attorney record. It's insulated from any FOIL
11 request, although we're not subject to FOIL, but DA
12 subpoena. That ugly issue has cropped up across the
13 state where DAs try to obtain this information.

14 So you consider it client information and,
15 thus, strictly confidential.

16 MR. MACRI: And a follow-up to that as
17 well, have you still had to collect documentation from
18 them after the initial arraignment?

19 So the attorney interviews them at
20 arraignment, is there any follow-up, well, we'd to like
21 to see the pays stubs or --

22 MR. DONAHER: No. Very rare. It does
23 happen, but it's very rare. It happens normally in the
24 family court context.

25 Family court, as you know, can be very,

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2 very contentious between the parties and if the
3 opposing party believes that the other side can retain
4 counsel, they are not shy about bringing that up, and
5 oftentimes we will then get challenged in open court
6 and there will be an order -- ordered in court and the
7 court will say, "Well, Staff Attorney, would you follow
8 up on that," and then we may ask for documentation, but
9 the vast majority of our client base is eligible
10 without having to do any detail analysis of their
11 finances. So we do not ask for that.

12 The one area that we do is parental income
13 for those under 21 and I would like to make a few
14 comments on that.

15 I'm an outlier as far as providers go. I
16 do think we should do parental income and spousal
17 income to clients for a couple of reasons. The first
18 reason is, as far as children, it is a legal obligation
19 of parents to pay for necessary expenses. I find it
20 quite odd that we are trying to claim that legal
21 expenses aren't necessary. I do recognize that
22 certainly a right to counsel is a personal thing.

23 The second reason is a practical reason.
24 Recently, I don't want to necessarily go into the case
25 itself, but we had a case where a crying mother came in

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2 and her son was arrested for murder and I believe he
3 was 17 or 18. So technically the juvenile offender
4 requirements or delinquent requirements of notifying
5 parents were in play and she wanted to assert the right
6 to counsel.

7 Historically, Monroe County followed the
8 procedure of, well, let's go to the Part 1 assignment
9 judge, and with all due respect to the court system,
10 some judges that were in Part 1 were more responsive
11 than others and oftentimes we would seek Part 1
12 assignment orders in these types of cases and the judge
13 would delay, not intentionally or otherwise, but there
14 would be a delay while the person is being
15 interrogated.

16 In this particular instance, the mother
17 said, "My son has been represented by you before," and
18 we did an interview of eligibility and the parents had
19 no income, so we asserted the right to counsel
20 immediately, called up the Rochester Police Department
21 and said stop interrogating the client.

22 The attorney, Roger Brazill, my first
23 assistant who made that phone call ultimately was later
24 accused of OGA -- oh, actually, I don't want to
25 misspeak -- they, RPD, wanted to file charges against

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2 him for OGA.

3 MS. BURTON: I'm sorry. OGA?

4 MR. DONAHER: I'm sorry. Obstructing
5 governmental administration.

6 Thankfully our DA was sane and agreed not
7 to pursue that, but the reason I believe that story is
8 relevant is, the reason we asserted the right to
9 counsel on behalf of the minor child is on a facile
10 argument, that because parents are responsible for the
11 legal services of their children they can vicariously
12 assert the right to counsel, and although that's not
13 legally dispositive, if an attorney appears on a case,
14 if we were just to show up and say, "We're representing
15 the person," it's not the court's prerogative or the
16 district attorney's prerogative to say, "Well, can you
17 really? I mean, is that really kosher?"

18 Once we're in, we're in, but we have to be
19 cognisant of the public perception. We have to be
20 cognisant of police departments and what they're going
21 to scream about, what the DAs are going to scream about
22 in public.

23 So as a result of that case I did a memo
24 which is the third page of that handout that I gave you
25 that said that we are no longer going to Part 1 judges

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2 any more. Any time a client requested assignment, any
3 time anybody is charged with the responsibility for
4 that client - for instance, a parent of a minor child -
5 if they request counsel that are otherwise eligible, we
6 immediately assert the right to counsel.

7 As I said, although it's not dispositive,
8 I'm wondering if you were to promulgate the standards
9 that said you do not impute parental income, would that
10 cause an issue if we were to now say, "Well, your
11 Honor, it's not a 15 or 16 year old. It is a 19, 20
12 year old. The parents are here wanting an attorney and
13 we asserted the right to counsel."

14 Now, as I said, the attorney will be in
15 the case and it's not necessarily going to legally
16 effect the case, but I think publically people will say
17 that you can't have it both ways.

18 So I believe all of that parental income
19 should be imputed. I also, in noting the otherwise
20 excellent work that the New York State Defenders
21 Associations has done on this issue, believe spousal
22 income should be imputed to spouses.

23 I think that ultimately if you promulgate
24 standards that will have a financial impact on
25 counties, and I think that it will, this is going to be

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2 seen as an unfunded mandate, and if you call for in
3 your mandate that you don't impute spousal income no
4 matter how much money the spouse makes, I think you're
5 making a mistake publicly and politically.

6 I also think rationally most people would
7 think that if their spouse makes \$100,000 and they stay
8 at home and care for the kids that that spousal income
9 should be imputed to the spouse that was staying home
10 and caring for the children and unfortunately picked up
11 an arrest for whatever charge. So I don't think that
12 that makes sense politically.

13 Next question.

14 MS. WARTH: Just to follow up on the
15 spousal income, would you consider any exceptions to
16 that? For example --

17 MR. DONAHER: Sure. Complainant. The
18 spouse is a complainant.

19 MS. WARTH: Right.

20 MR. DONAHER: Certainly. And I don't want
21 to underscore this. Most providers that adopt that
22 view will say that if the spouse is without counsel or
23 the child is without counsel, we'll immediately step in
24 and take the case. We're talking about obtaining
25 reimbursement for the 722-d order.

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2 So that's the position that I take.

3 MS. BURTON: Tim, you mentioned some
4 differences in family court and criminal court and I
5 know that Adele Fine who is the head of that unit isn't
6 here today, but perhaps you could speak to us about
7 what those differences might be and whether or not the
8 recommendations you're making with regard to criminal
9 court are also the same recommendations you would make
10 with regard to family court.

11 MR. DONAHER: Well, that's an interesting
12 perspective. If there's an adversarial relationship
13 amongst current spouses that are in family court
14 pursuant to matrimonial action, we would probably have
15 a significant amount of leeway to the spouse that
16 doesn't have an income stream, but as you know,
17 certainly in matrimonial actions, one spouse is
18 normally charged -- the spouse that is seen to have
19 significantly greater assets is often charged with the
20 responsibility of paying for legal counsel for the
21 other spouse's representation.

22 That rarely is an issue in family court.
23 Most of the time, whenever you have any well-to-do
24 couple that's in a matrimonial action, Supreme Court
25 takes jurisdiction. They handle these types of issues,

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2 but there are other sensitivities in family court.

3 As I said earlier, these are cases that
4 often have a lot of tension involved, so one side is
5 oftentimes looking to gain a tactical advantage. So
6 they complain about our representation and then we need
7 to ensure the court that that person is, in fact,
8 eligible.

9 Another thing I'd like to underscore, we
10 carry on this tradition that it has to be an absolute
11 case by case analysis and that can place you oftentimes
12 in an uncomfortable position.

13 We represented a sheriff's captain who was
14 charged with rape of an inmate and we assumed
15 representation because I did a detailed analysis of her
16 finances and, frankly, she could not afford counsel,
17 but that didn't stop the sheriff from publicly coming
18 out and saying, "She made more money than I did last
19 year. How can she get representation in the public
20 defender's office"?

21 Obviously you should do what you think is
22 principled and what is correct in order to provide the
23 representation that should be provided to our client
24 base, but you have to be cognisant of the political and
25 public view and not that that should necessarily inform

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2 your decisions, but you will -- if you promulgate
3 standards, that will put providers in a difficult
4 position having to explain, why are you representing
5 this child when both of the parents, you know, make
6 \$150,000 a year.

7 That's going to be an uncomfortable
8 position for the providers and, as I said, I don't
9 agree with that position legally anyway.

10 Any other questions?

11 MS. BURTON: Just wanted to follow up with
12 one last question. The same question that I asked of
13 Mr. Nowak with respect to counties where there may not
14 be a public defender or an institutional provider and
15 often in some counties, although there may be a public
16 defender that provides counsel to criminal defendants,
17 the family court assignments are for 18B attorneys, and
18 so I'm just wondering, for those sorts of situations
19 where there's not a public defender in place, what
20 might you suggest as an alternative for the entity or
21 person who would do the eligibility determination if
22 you have any sort of --

23 MR. DONAHER: Well, since we don't live in
24 a perfect world and, as I said, I don't want to impugn
25 any judges or any other agency, I do agree with

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2 Mr. Nowak that 99 times out of 100 the provider has the
3 interests of the client at heart.

4 I think it's very rare that providers are
5 looking to -- I do believe that it does occur, but it's
6 relatively rare where they are looking to minimize
7 their caseloads by rendering people ineligible when
8 they otherwise should be eligible.

9 So I would recommend in those types of
10 counties that the providers be provided the financial
11 resources that they would need in order to conduct
12 those eligibilities.

13 MS. BURTON: The individual attorney, in
14 other words, which that would be the provider?

15 MR. DONAHER: Well, most of those
16 instances are 18B I would think. So you would say to
17 the 18B panel administrator, "We're going to give you
18 staffing in order to conduct those eligibilities."

19 For instance, and certainly right now in
20 Monroe County, another change we've made is we now have
21 staff persons in the Hall of Justice conducting these
22 eligibilities. So as soon as the person were to file a
23 petition where they would otherwise be potentially
24 eligible for representation, they're told to go right
25 across the hall and be interviewed for eligibility so

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2 we can promptly determine that.

3 We have an attorney there working with
4 Charles Noce, the conflict administrator, when we
5 determine there's a conflict just to make sure there's
6 an attorney right away on the first court date.

7 So in those counties where there's an 18B
8 administrator I don't see it being a herculean task in
9 adding a staff person if funding's provided to do those
10 eligibilities. They tend to be smaller counties with
11 lower caseloads.

12 MR. DOYLE: Any last questions?

13 MS. WARTH: One last quick question.

14 MS. MACRI: Make it two. Sorry.

15 MS. WARTH: I had a defense attorney say
16 to me the other day that it's his belief that if people
17 truly can pay for counsel they will and they won't want
18 to turn to the public defense system. Would you agree
19 with that or disagree?

20 MR. DONAHER: Largely, yes. I do think
21 that there are clients who try to avoid payment and I
22 hate to keep picking on family court, but we do tend to
23 see that in family court more than in the criminal
24 court system and we have been confronted with that.

25 I'm sure Mr. Nowak will tell you stories

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2 where it is clear we determine the client has been
3 hiding assets and it places us in an uncomfortable
4 position on how we handle that, and normally it would
5 be a conversation with the clients saying, "You're
6 really not eligible. You need to go and obtain an
7 attorney. This places us in a bad situation and
8 obviously we made representation to the court based on
9 your misrepresentations and although we're not sworn
10 to, we certainly have an ethical obligation to tell the
11 truth to the judges."

12 So it does happen, but I generally do
13 agree with that statement, if they have the resources,
14 they would for a variety of reasons, some of which, of
15 course, there are certain denotations involved in being
16 a public defender, "Oh, you're not my attorney. You're
17 working for the government."

18 MS. WARTH: Right. He's paying you.
19 You're beholden to the state.

20 MR. DONAHER: Exactly. So they do tend,
21 if they have the resources, to retain counsel, yes.

22 MS. MACRI: A brief follow-up because I
23 wanted to actually just briefly address the 722-d
24 orders.

25 MR. DONAHER: Sure.

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2 MS. MACRI: It's kind of a bifurcated
3 question.

4 The first is, your staff, are they advised
5 or trained to continue to review eligibility throughout
6 their representation or is it if something comes up
7 that makes them think that they need to review the
8 eligibility determination?

9 The second question, if that determination
10 is made during representation, what is the process?

11 MR. DONAHER: As far as your first
12 question, it's the latter as opposed to the former.

13 Normally if something will happen in the
14 scope of the representation they'll say, "Wait a
15 minute" - a light bulb will go off - "there's something
16 seriously wrong here where this person has assets."
17 That's relatively rare.

18 We usually determine pretty early on in
19 the process either through a complaint by opposing
20 counsel in family court or in instances where we're
21 thinking to ourselves, you know, something is not right
22 here, and we do have some assets in which we can do
23 some financial searching and we can see, you know,
24 well, yeah, they own a house, they own a business, and
25 then we'll pull the client in and have that decision.

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2 So the 722-d orders that are generated in
3 midstream, so to speak, in the middle of representation
4 is relatively rare.

5 722-d orders, however, we do receive at
6 the beginning of representation and one area that is
7 just now getting those in greater numbers is through
8 our Counsel at First Appearance Program.

9 When we show up and the person is grossly
10 over the recommended guidelines we will, in fact, say
11 to the person, "We can do this representation" -- or we
12 do the arraignment, "We will do the arraignment for
13 you, but we will charge you \$50 if you would like us to
14 do it," and that's going to be a 722-d order. We are
15 going to ask for it and that's largely for a couple of
16 reasons.

17 The reality is, is if we're there and the
18 person's ineligible, the judge is going to be like,
19 "You're doing it anyway. You're not going anywhere."

20 So you're there, do the arraignment, and
21 in an effort to try to avoid that, "Why are you doing
22 an arraignment, Donaher, for people who are clearly
23 ineligible," we say, "Well, at least we're trying to
24 get some revenue out of this."

25 The second instance where we're assigned

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2 722-d orders are those persons that are over the limit
3 and they say they can't obtain and they've provided
4 proof, and oftentimes judges will do one of two things,
5 the straight 717 assignment or they'll say, okay,
6 722-d.

7 Those second types of 722-d's are largely
8 uncollectible. They sit in a drawer for the most part.
9 Ironically we actually have instances where judges will
10 try to punish clients through 722-d's which causes us a
11 great amount of concern.

12 We'll submit an order, for instance, or
13 maybe 150 bucks on a case because what we normally do
14 when we're assigned is we ask for reasonable counsel
15 rates and then a judge will say a thousand dollars and
16 it's just like, oh, my Lord, that's not fair and we
17 have to figure out how to handle that, but for the most
18 part it's relatively rare where we have a 722-d
19 assignment where it's even collectible outside of those
20 \$50 one-time orders.

21 MS. MACRI: But you're not responsible for
22 collecting the money from the 722-d's?

23 MR. DONAHER: No. The law department
24 handles that.

25 MR. DOYLE: Okay. Thank you very much.

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2 We appreciate your testimony.

3 MR. DONAHER: Thank you.

4 MR. DOYLE: Our next witness is Andrew
5 Correia the first assistant public defender of Wayne
6 County.

7 MR. CORREIA: Hello.

8 MR. DOYLE: Welcome, Mr. Correia. Thank
9 you very much for coming.

10 MR. CORREIA: Glad to be here. I think I
11 know almost everybody. I think we've met before.

12 MR. DOYLE: We did, yes. Nice to see you
13 again.

14 MR. CORREIA: So I thought that -- I don't
15 have any prepared material. I think there's a lot of
16 material out there about eligibility already.

17 MR. DOYLE: Tell us a little bit about
18 Wayne County.

19 MR. CORREIA: Yes, I'll tell you a little
20 bit about Wayne County.

21 So the one report that I did go back and
22 review is the 2008 Brennan Center report that I thought
23 was excellent on all the issues that I really want to
24 talk to you about today, but let me tell you about
25 Wayne County.

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2 We seem to be kind of a unique county in
3 the sense that it's a somewhat rural upstate county and
4 there are no cities in Wayne County which impacts
5 almost every aspect of our practice, our attempts to
6 rule out counsel at arraignment. It's hard to get a
7 grip on those kinds of programs when there really is no
8 forum in which there's centralized arraignments.

9 Now, that fact impacts eligibility because
10 we have 22 justice courts, all village and towns, very
11 few lawyer judges and we have had to continually work
12 with them to deal with the eligibility process.

13 Now, we handle about 2,000 cases a year in
14 our office and we have three full-time lawyers and six
15 part-time lawyers and we have four staff and an
16 investigator and we're also fortunate enough to have a
17 sentence mitigation expert who has a Master's of Social
18 Work in our office and that is our entire staff.

19 So I normally don't say this publicly, but
20 our caseloads are fairly manageable in our office
21 because of that, so that leads us to make some
22 different decisions about eligibility because, in part,
23 we think it's right and because we can and we think it
24 comports with the law.

25 So I'm not going to go so far to say that

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2 Wayne County is the perfect world that Mr. Donaher was
3 talking about, but I do have some difference of opinion
4 with him about some of those issues, but let me tell
5 you about how eligibility actually functions.

6 If we get clients who are arraigned and
7 jailed, if they're in jail, they presumptively qualify.
8 Now, if we manage to secure their release, a financial
9 affidavit is in the file and it's expected that a
10 financial affidavit will be filled out the next time
11 the office meets with the client. At that point it
12 would normally be an attorney meeting.

13 That has caused some issues, this
14 presumptive qualification, because we've had people in
15 jail who probably had means or would have access to
16 means if they were not in jail, but as long as the law
17 is inability to obtain counsel, my response to that has
18 been, they're unable to obtain counsel at this point.

19 Now, when they get out, if they're able to
20 obtain counsel, then we're out and we certainly review
21 their finances once they're on the street.

22 More typically, someone will be charged
23 appearance tickets, show up for arraignments, get an
24 adjournment. They'll report to our office to open a
25 file.

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2 Now, the local courts have been asked to
3 use a document that we've created that is kind of a
4 preliminary assignment to our office and they've been
5 pretty good about doing it, but we have to remind them
6 sometimes. There are a few judges who do an initial
7 financial qualification colloquy with a client and
8 that's where the 125 percent federal guidelines can
9 become a little dangerous because I don't think they
10 apply those with the subtlety and the complexity that it
11 should be to really determine whether someone is able
12 to obtain counsel.

13 So I don't think there's many, but I think
14 there are some clients who are turned away from our
15 office initially by this kind of cursory judicial
16 review.

17 I've heard judges say, "Well, okay. You
18 make too much. You're over the guidelines. You have
19 to get your own lawyer."

20 Now, those stories usually play out. The
21 person's not able to obtain counsel, the issue is
22 usually revisited, we find out about it, we intervene,
23 we do our eligibility. This all happens because we can
24 in our office.

25 Okay?

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2 So let's say they show up at our window in
3 our office. They usually hopefully come with their
4 paperwork, the charges. Our staff asks them to fill
5 out a financial affidavit which used to be sworn to,
6 but is no longer for a variety of reasons, but so now
7 they fill out the financial affidavit and the staff
8 does an initial determination. They use the federal
9 poverty guidelines as kind of a marker.

10 If they're well within that, then there's
11 no question. If they're close to the line or somewhat
12 over or even if they're over by a lot, they are
13 instructed to consult with one of the attorneys in the
14 office, whoever is available, and we take into account
15 other expenses and if there are assets and equity, all
16 the stuff that you've already heard about, all the
17 variables that go into determining whether someone's
18 able to obtain counsel.

19 We take into consideration the severity of
20 the case. We take into consideration what we think,
21 you know, what private counsel is realistically going
22 to charge, but I don't, frankly, spend a lot of time
23 trying to figure that out because that's unknowable for
24 me. I've never taken a retainer from anyone in my life
25 for anything and counsel in Wayne County is maybe going

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2 to charge something maybe something different from what
3 Rochester is going to charge.

4 We just had a case where somebody retained
5 a lawyer for \$5,000 in Rochester, but that was only up
6 to grand jury, and once the case was indicted - I guess
7 that's part of the retainer agreement - they're out,
8 they're indigent, we're in. So we inherit this case.

9 So I don't put a lot of stock in trying to
10 guess at numbers. If it's unable to obtain counsel, if
11 they're far over, we do what you've already heard
12 about, go try to get a lawyer. We advise them to go to
13 two or three attorneys, get numbers. Your next court
14 date, show up to court either with your lawyer or an
15 explanation for why you were unable to obtain counsel,
16 and if the court sees fit to assign us at that point,
17 we accept the assignment.

18 We have had cases where we've had to go
19 back through and re-evaluate.

20 Mr. Donaher talked about family court
21 situations. Actually, it's interesting, it wasn't that
22 long ago where we had a case where the opposing party
23 in the family court didn't like the fact that the
24 person was charged with a crime and obtained counsel
25 from our office. So we got these reports about, well,

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2 they have this, they have that, and, you know, it
3 doesn't have to be that extreme, but if the client
4 obtains a job, which we're very happy about as the case
5 is pending, then we have to review how much they're
6 making.

7 Sometimes it comes up because, frankly, we
8 don't re-evaluate unless we find some -- hear some
9 reason why we should. So sometimes it gets to the
10 point where there's a probation report done and the
11 person's income comes up on the probation report and
12 the judge wants to know, why are you representing this
13 person, and then we -- that triggers the re-evaluation
14 and, frankly, we can exercise some discretion there.
15 Depending on which way the case is going to go we will
16 sometimes stay with the case unless it's just
17 absolutely way out of bounds for eligibility.

18 So that's basically how eligibility works.

19 Do you have any questions about the
20 process in our office before I get to other points I
21 want to make?

22 MS. BURTON: Yes. I just had a quick
23 question.

24 So we heard some testimony at other
25 hearings about concerns about gaming the system and

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2 fraud and people who really can afford counsel at some
3 point in time.

4 Have you experienced that as a huge
5 problem or a small problem in your county?

6 MR. CORREIA: I would say a small problem
7 at best. I mean, my county is, generally speaking,
8 pretty poor and, you know, there's not a lot of people
9 willing to commit fraud to obtain public defenders in
10 my county.

11 So it may be a problem elsewhere. It
12 really is not a significant problem in Wayne County,
13 and when -- you asked about process, like what do you
14 do. Well, there have been situations where we have
15 asked for from the client, which we don't do at every
16 case, tax returns, current pay stubs.

17 We want to keep representing you, but if
18 you are truly making this much money, we have a problem
19 with that and we think you're able to obtain counsel
20 and we need to get that, and there's only been one
21 case -- and I've been in the Wayne County Public
22 Defender's Office now 14 years with a little break and
23 only once have we gotten to the point where we actually
24 got so adversarial with a client about it that we moved
25 to withdraw because the client was unwilling to provide

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2 us with the information that we felt that we needed to
3 determine eligibility.

4 That's once in many, many, many thousands
5 of cases over the years, so I don't see it as a problem
6 in our county.

7 MS. BURTON: Thank you.

8 MS. MACRI: Just a follow-up to that, the
9 collection of documents when you have asked for them,
10 do you just review them, do you keep them in the file,
11 and I ask this question for the obvious reason, as you
12 know, are they then susceptible, has anybody requested
13 them for review outside of your office?

14 MR. CORREIA: No. We haven't had that
15 kind of situation. Because of the situations in other
16 counties where just a simple financial affidavit and
17 fraud has been alleged or information is on there that
18 other people would like access to for whatever reason
19 in the criminal justice testimony, we altered it. So
20 it's not a sworn-to document any more.

21 Financial information like that from the
22 client we treat as 100 percent confidential and they
23 would have to -- there would have to be some kind of
24 judicial order that we contest before we even consider
25 turning it over.

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2 MR. DOYLE: Andy, so you're with the
3 public defender's office. You're the main provider
4 felony and misdemeanor representation --

5 MR. CORREIA: Right.

6 MR. DOYLE: -- in criminal cases. Who is
7 the secondary conflict defender?

8 MR. CORREIA: In Wayne County there is an
9 Assigned Counsel Program, just private counsel on the
10 list.

11 MR. DOYLE: Is there an administrator?

12 MR. CORREIA: There's an administrator.

13 MR. DOYLE: Who is that?

14 MR. CORREIA: Bruce Chambers is the
15 administrator of the Assigned Counsel Program.

16 MR. DOYLE: Is he an attorney?

17 MR. CORREIA: He is an attorney, yes.

18 MR. DOYLE: Does he have a second job or
19 is that his only job?

20 MR. CORREIA: No. He has his own private
21 firm and that is kind of a secondary job. He takes
22 assignments himself as well.

23 MR. DOYLE: Who does eligibility screening
24 for cases that are going to go to his program?

25 MR. CORREIA: We do. We are the only

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2 entity in the county that does the eligibility
3 screening for any cases. There is no re-eligibility
4 screening.

5 MR. DOYLE: Is there a third office or is
6 it just your office and the assigned counsel?

7 MR. CORREIA: For criminal cases, correct.
8 Right, there is no third. There's no conflict
9 defender. There's no other entity.

10 Family court, just as a separate matter,
11 private not-for-profit contracts with the county to
12 take the bulk of that and then there are individual
13 assignments through county court in conflict situations
14 that are also run through the Assigned Counsel Program.

15 The Assigned Counsel Program, they also
16 handle our conflict appeals. So they handle appeals,
17 conflict family court, conflict criminal and then we
18 handle the bulk of the criminal parties.

19 MR. DOYLE: But you do eligibility for
20 all?

21 MR. CORREIA: Right.

22 MR. DOYLE: Has that ever been an issue --
23 you're doing eligibility on a case that's going to be
24 going to someone else, has there ever been any type of
25 conflict or thought that there's anything

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2 inappropriate? And I'm not suggesting there is, it's
3 just an interesting situation.

4 MR. CORREIA: Do you know something?

5 MR. DOYLE: No, no, no.

6 MR. CORREIA: I'm kidding.

7 MR. DOYLE: No, it's just interesting --

8 MR. CORREIA: I can say no to that.

9 MR. DOYLE: Okay.

10 MR. CORREIA: We have not run into any
11 problem with us being the point of determination of
12 eligibility other than, "I don't want to do it," which
13 is one of the points I'd like to get to once we're done
14 answering question about how Wayne County works, but
15 we're the only ones that really truly determine it and
16 the 18B has been -- just taken that. Our determination
17 carries throughout the process basically. Nobody
18 re-determines it.

19 I mean, I can't speak for him what he
20 instructs his attorneys. If some new financial
21 information comes in, what their process is, if it
22 needs to be re-evaluated, but basically we do the
23 screening, they accept the case as a conflict.

24 MR. DOYLE: Pat, do you have a question?

25 MS. WARTH: Andy, you weren't here

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2 earlier, but there was a question posed to a previous
3 speaker about whether or not having the provider get
4 that information and make that determination can
5 potentially put the provider against the client.

6 So I'm curious as to your thoughts on that
7 and whether you think that actually sometimes just the
8 opposite happens because during the course of asking
9 these questions you're learning a lot of life history
10 information and personal circumstances about the
11 individual.

12 So I'm curious as to what your take on
13 this is.

14 MR. CORREIA: Well, there's definitely an
15 overlap that all the information you're gathering about
16 their finances is vital information related to them and
17 their life and their family support and what their home
18 life is like and what their educational -- all that
19 information that any good lawyer is going to get from
20 the client as they continue to represent them.

21 I do think that it creates a conflict and
22 I want to tell you a couple reasons why.

23 I used to work in New Hampshire when I
24 first started and New Hampshire is not a perfect world
25 either, but New Hampshire Public Defender is a private

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2 entity that contracted with the state to represent
3 indigent defendants all over the whole state, multiple
4 offices, essentially a Legal Aid type of model, but in
5 New Hampshire the courts had the absolute obligation to
6 do the eligibility screening, and I've been in both
7 places now and I can tell you that I liked that model
8 much better.

9 Now maybe they were able to attribute the
10 resources to -- allocate the resources to carry that
11 out, but if it's done correctly, the cases come to our
12 office and we never have to deal with the finance
13 issue.

14 This case has been assigned to us. We
15 have to be on the alert for a change in financial
16 situation. We have to do that, but we didn't deal with
17 eligibility at all and I can tell you that I felt the
18 difference when I first came to New York that we had to
19 screen people out financially and put them on the spot
20 a lot. I mean, you open with an adversarial
21 relationship to an extent.

22 I also think it's the court's job to do
23 that. I mean, I agree with the Brennan Center report
24 that recommends that the court should do it.

25 So this may be pie in the sky, I get that,

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2 but the problem is, I have felt the conflict in our
3 office at times when we have to do this determination
4 and it's susceptible, and this goes back to caseload,
5 again, in offices where you are truly swimming in cases
6 and you have a large number of attorneys that all have
7 a gigantic caseload.

8 If it's left to the individual office
9 devices, decisions will be made that maybe are not the
10 best for the client and it's easy with tens of
11 thousands of cases to decide that eligibility is not
12 the priority here. What the priority is, I have way
13 too many cases and this case sounds like it's close to
14 the line, so it's got to go, and to remove that
15 entirely from the process, I would be very, very happy
16 about that.

17 Now, it would be interesting to see it
18 ruled out in my county with our 22 justice courts, our
19 32 judges and the education that they would require to
20 do that, searching inquiry when we have probably four
21 or five lawyer judges, and, of course, being a lawyer
22 isn't the silver bullet for, you know, responsible and
23 rational behavior, but on this area you hope that it
24 would help.

25 We have many, many lay judges who will try

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2 to do the right thing. They really will. It's asking
3 a lot of them, but that's where determination should be
4 made, is on the bench I believe.

5 MS. WARTH: Can I follow up on that,
6 because that's really interesting and it's a point of
7 view that's different than one that was expressed
8 earlier. So I want to dig in deep a little bit to it.
9 I mean, this is the type of thing that's incredibly
10 helpful, to get these different points of views.

11 So that point of view that was expressed
12 earlier was that the entity that's most aligned with
13 the best interests of the person who is arrested is --
14 the only entity that's most aligned with the best
15 interest of the person arrested is the public defender
16 or the provider, and so that's the entity that's in the
17 best position to make that determination in a way
18 that's most respectful of that person, but I also hear
19 what you're saying about, you know, that can create
20 some tension between the provider and the arrested
21 person.

22 So I'm sort of curious as to what your
23 thoughts are on that and you expressed some concerns
24 about courts making that determination too.

25 MR. CORREIA: Well, sure. I mean, there's

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2 never going to be -- you know, someone said earlier, I
3 think Mr. Donaher said that, you know, you'll have 86
4 judges making 86 different determinations. Well, how
5 many different determinations do we have being made
6 right now, I mean, under the current system? A lot.

7 MS. WARTH: Right.

8 MR. CORREIA: So I mean, I guess I
9 understand that we are closest to the client and I
10 believe that everyone tries to act in a client's best
11 interest when making these determinations, but as long
12 as the system is generally as broken as it is, it is
13 too much of a temptation for the eligibility process to
14 be infiltrated by other concerns that should not be
15 there, and also, this causes a concern about
16 confidentiality of information.

17 So we're in possession and we're subject
18 to collection of this information that may or may not
19 be relevant to other issues and make us witnesses in
20 cases and have us to fight off subpoenas and things
21 like that which, because we care about our clients, we
22 will do, you know, and it just opens up this whole
23 world that we don't really need to get involved in, but
24 if you can't manage -- it all goes back to caseloads.
25 If you can't manage the caseloads to make it work, then

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2 the temptation will always be there to skew
3 eligibility.

4 Now, don't get me wrong, the justice
5 courts that I've learned to navigate, even though
6 they're anachronistic and bizarre in many ways to the
7 best interest of my clients, the same thing with
8 eligibility. It has been hoisted upon us and the
9 culture is that we do it. So we do navigate it to the
10 best interest of our clients right now to protect them,
11 and in our county, we're fortunate that we are able to
12 err on the side of eligibility at every opportunity.
13 We take as many cases as we can justify.

14 If we had many, many, many more cases than
15 I can guarantee you, eventually that would change and
16 it would not be in the best interest of the clients.
17 It would be in the best interest of the individual
18 attorneys who are trying to survive day to day and do
19 the best that they can for their clients.

20 MS. WARTH: Thank you.

21 MR. DOYLE: Other questions from the
22 panel?

23 MR. DAVIES: Just one. You said earlier
24 that case severity could be considered in the process.
25 I was just wondering, is that part of a formula? How

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2 is that done?

3 MR. CORREIA: No formula. There is, you
4 know, the federal guidelines that we begin with that
5 are kind of -- there's a gradation to them depending on
6 the severity of the case and, you know, it's part of
7 the problem.

8 The more serious the case, the more
9 likely. If it's anywhere in the ballpark of
10 eligibility in our office, we're going to take it. If
11 you're charged with murder, you're probably indigent no
12 matter what. Hardly anybody can afford competent
13 counsel for a murder case unless your family is going
14 to start refinancing homes and things like that if
15 you're going to get decent counsel.

16 Listen, there is no formula. All I can
17 tell you is that because we have kind of, I'm going to
18 call it, the Stockholm syndrome of being in justice
19 courts and eligibility, we have to do this. We have to
20 navigate the system in a way that makes normal sense
21 and legal sense to us.

22 We do consider that, but it doesn't have
23 to get too serious before people in my county --
24 they're not going to be able to pay the \$5,000 to get
25 counsel on a nonviolent B drug felony. That may be

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2 run-of-the-mill cases elsewhere. In my county, you're
3 probably indigent if you got a nonviolent B felony
4 which is not going to pay the bill to get it done. So
5 we consider that.

6 The only other thing I want to say -- does
7 that answer your question?

8 MR. DAVIES: It does, thank you.

9 MR. CORREIA: I'm not here to pick a fight
10 with Tim Donaher, but we also have the luxury of not
11 considering parental income and I just want to tell you
12 why briefly.

13 It's the whole caseload thing, of course,
14 because we can make that determination, but part of me
15 says that, well, let's talk law first.

16 The current law in the 4th Department --
17 there is case from out of Syracuse - I believe the name
18 is Roulan, R-o-u-l-a-n, I think - where this was
19 discussed about the Onondaga County Assigned Counsel
20 Program. It doesn't say that parental income must be
21 considered. It says that the Assigned Counsel Program
22 may consider parental income.

23 Now, we don't. We don't because we can
24 and we don't because it's our feeling that as long as
25 children are charged as adults, we treat them as

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2 adults.

3 Talk to me after we raise the age. Maybe.
4 We will re-evaluate the situation, but if a 17 year old
5 comes into our office with a misdemeanor charge that
6 could saddle them, you know, depending on their
7 circumstances with their record and the parents are
8 unwilling or reluctant or part of their parenting
9 decision is to punish the child by forcing them to have
10 a public defender and they're not going to obtain
11 counsel, we are willing to take that case. We
12 basically consider eligibility as if they're adults.

13 Now, we talk to the parents about it and
14 my standard line has kind of changed into over time,
15 "If you can afford counsel, you should obtain counsel,"
16 and we talk to them about it, but if they're going to
17 be left without counsel, we consider their eligibility
18 based on their own facts, and I think that's what the
19 Brennan Center report recommends as well.

20 MR. DOYLE: Is there any experience in
21 your county with 722-d orders?

22 MR. CORREIA: Yes, in the past. It's
23 historical experience.

24 Let me flip back to New Hampshire briefly
25 on that issue because New Hampshire had this unique

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2 thing, well, at least unusual to me, but kind of this
3 Orwellian office called -- the Office of Cost
4 Containment is what they called that.

5 So defendants were actually charged for
6 representation. I can't remember the fees any more
7 now, it's been so long, but different rates for
8 felonies and misdemeanors, and they were sent a bill
9 and if they didn't pay, eventually even after the case
10 had been resolved they were haled into court to answer
11 to the Office of Cost Containment.

12 Every year it was a debate about whether
13 the Office of Cost Containment would be able to collect
14 enough money to justify its own existence and every
15 year it was a horse race. I'm not sure they ever came
16 out ahead. So I think of that when I think about the
17 utility of 722-d orders.

18 It used to be in Wayne County that they
19 would be occasionally entered and my understanding is
20 that it fell to the county attorney to collect those
21 fees and eventually the county attorney asked them to
22 stop ordering them because they were unsuccessful and
23 it was unproductive and it was not worth the time and
24 energy to collect.

25 Again, you're talking about a county where

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2 there's a lot of poverty and it's very hard to squeeze
3 blood from that stone when there's so many other people
4 in line for that money with surcharges and fees and
5 things being the way they are.

6 So to my knowledge, I haven't seen a 722-d
7 order in my county probably in the last decade that I
8 know of.

9 MR. DOYLE: All right. Are there
10 questions?

11 Anything else?

12 Okay. Andy, thank you very much. We
13 appreciate your testimony.

14 MR. CORREIA: Thanks for your time.

15 MR. DOYLE: We're going to take a very
16 quick five minute break and then we have two witnesses
17 left when we come back. So I appreciate your
18 indulgence and we'll take five minutes.

19 MS. MACRI: And we'll also open up to
20 folks that might want to make some comments after the
21 two that are left to speak.

22 MR. DOYLE: Yes. Let Joanne know if
23 anyone would like to speak.

24 (Recess taken.)

25 MR. DOYLE: Before we introduce the next

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2 speaker, I did want to note for the record the presence
3 of William Leahy, the Director of the State Office of
4 Indigent Legal Services, who is here. I didn't
5 introduce him before because he's not on the panel, but
6 he is here and will stay as long as he can. I know he
7 has another important appointment later on.

8 He's been the director since 2011 and we
9 hope he will be the director for much longer than that.
10 We're not letting him go.

11 Thank you, Mr. Leahy, for being here.

12 Our next speaker is Leanne Lapp, the
13 public defender of Ontario County.

14 We heard wonderful things from Mr. Garvey
15 about Ms. Lapp and now he's not here so you're free to
16 respond and say whatever you want about him, but
17 welcome. Thank you very much and thank you for your
18 patience.

19 MS. LAPP: Good afternoon. I had some
20 semi-prepared remarks and then I kind of scribbled all
21 over them.

22 So I'm just going to talk and if there's
23 any questions you have, please don't hesitate to
24 interrupt me, but as you know, my name is Leanne Lapp
25 and I am the Ontario County Public Defender. I have

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2 been for a little over four years now. For a brief
3 period I was acting before that, but I'm the second
4 public defender from Ontario County. Our office was
5 opened in 2010.

6 So we tend to have a little more
7 transition than other offices because we're just kind
8 of figuring things out as we go along and the issue of
9 eligibility is one that I know I personally struggled
10 with a lot when I took over because I re-evaluated the
11 criteria that we had, the formula that we had and tried
12 to figure out what the law required and also what was
13 kind of morally the right thing to do and what worked
14 for our office, and so we've had a fair number of
15 changes over the years, much to the chagrin of my
16 staff, but they put up with me, and so I guess I would
17 start just by saying a few things about how we do it
18 now.

19 There's not really one way we do it now,
20 but generally speaking, we have three investigators on
21 staff which is a number of I'm very proud of who do the
22 bulk of our in-custody eligibility screenings. So
23 they'll go to the jail, sometimes a secretary -- their
24 secretary will go with them, and interview people for
25 eligibility determinations.

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2 The reason I've done this instead of
3 having a paralegal do it which is what we did before is
4 because the investigators are really skilled at talking
5 to people and how to frame questions and it develops a
6 rapport with the clients and hopefully the clients will
7 be working with the investigators in the future. So it
8 kind of gives them a chance to get to know each other a
9 little bit, but it also doesn't put the attorney in a
10 position of, from the very first meeting, asking about
11 personal things like income. So it kind of meets two
12 goals.

13 Now, sometimes we do have attorneys doing
14 the initial eligibility determinations. Typically
15 those are followed up by an investigator, though not
16 always. Those would be circumstances where an
17 attorney's in one of the courts and there's somebody
18 who was just arrested and is coming in to be arraigned.
19 We like an attorney to interview them before that
20 happens or if it's someone -- an attorney who is doing
21 an arraignment through our Counsel Arraignment Program
22 and we have a rather extensive program as well.

23 We are in all the courts seven days a
24 week. We have some courts that are regularly
25 scheduled, some arraignments that are regularly

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2 scheduled, but we also have an on-call program which
3 obviously is unexpected. You go out when you get a
4 call.

5 So some of the interviews are done in that
6 way, and then we also have folks who call in who are
7 not in custody and are interviewed either by an
8 investigator or their secretary or from time to time
9 one of the attorneys if someone's not available.

10 So that's generally speaking how the
11 interview process takes place.

12 Now, in terms of how we determine
13 eligibility, I know Mr. Garvey referenced the 125
14 percent of the poverty guidelines. That is the base
15 level for misdemeanors and violations, but we do have a
16 graduated system based on seriousness of the offense,
17 and that was something I instituted because to me
18 125 percent on a homicide case or a complex drug case
19 or sex offense or something like that is unreasonable
20 and these guidelines are treated as a floor, I guess is
21 what I would call it for lack of a better term, to
22 screen in people who fall below them.

23 So the initial interviewers can screen
24 people in. If they fall below the guidelines, we take
25 them. If they fall above the guidelines, unless it's,

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2 you know, like 5 or \$10, they all come to me, all of
3 them, and the reason I instituted that was because I
4 wanted to take the subjectivity out of the equation so
5 that it would be different people with different
6 opinions and feelings on what eligibility means looking
7 at different applications and just to give it all some
8 kind of consistency. So that's how I do it.

9 Obviously we're a smaller office, so I'm
10 not looking at thousands of applications. I suppose in
11 a larger office that would be unworkable, but for us it
12 works, and we have an appeal process. If people are
13 unhappy with the determination that's made, they can
14 speak to me. If they don't like what I have to say,
15 then I will refer them to a judge. We will advise the
16 judge that the person was over our guidelines and
17 explain why and then the person is told that they can
18 tell the judge why they think they should be eligible,
19 and that process I believe is on our website as well.
20 So that is available to people.

21 My suggestion to this panel is that
22 whatever criteria you do set in terms of a guideline,
23 if you decide to set an amount, like a number, numbers
24 are nice because it makes it easy to screen people in
25 that way, but I do think there needs to be other

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2 factors taken into account.

3 Our economy is obviously difficult for a
4 lot of people right now. People have kids over 21
5 moving back in into the home and living with them and
6 they're supporting these kids and a lot of them aren't
7 kids any more. So you know, we'll take that into
8 account.

9 Elderly parents coming to live with the
10 family, medical bills that are sizeable, DMV fines and
11 fees - some of them can get rather sizeable - and
12 restitution amounts that are due and owing that can be
13 in the six figures, I mean, there are a number of
14 things that come up that we will take into account and
15 I guess my recommendation would be, if there is a
16 number, that there just be some flexibility for whoever
17 is doing the determination to take other factors into
18 account as well.

19 Does anybody have any questions at all
20 about that part?

21 MR. DOYLE: I was interested, you said you
22 review all of them that are more than 5 to \$10 over the
23 125.

24 MS. LAPP: Yes.

25 MR. DOYLE: How much of your time do you

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2 think it takes on a weekly basis reviewing these
3 applications?

4 MS. LAPP: My gosh, I mean, it's not that
5 much and I suppose it depends on how many there are.

6 What I'll do is, I'll look them over and
7 then if someone is in a position where they have a lot
8 of debt, sometimes we'll ask for some documentation for
9 that. Sometimes not.

10 I mean, some of them are pretty easy
11 calls, but some of them aren't, and then, you know, in
12 those cases we can send people out to talk to a few
13 different attorneys which you've heard other providers
14 talk about today, so I won't get into all that, but
15 just to determine how much people are charging and
16 whether that person's able to afford to retain.

17 MR. DOYLE: Would it be closer, for
18 example, to like 5 to 10 percent of your time --

19 MS. LAPP: No.

20 MR. DOYLE: -- versus 50 percent?

21 MS. LAPP: Oh, my gosh, no. Maybe
22 15 minutes a day. It doesn't take that long.

23 MS. WARTH: So it sounds like, from your
24 perspective, a pretty streamlined process would be one
25 that's a two-step process really, which is, the first

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2 step is, you know, the numbers, and if somebody falls
3 below that guideline or close to it, there's no further
4 inquiry needed. They're in. They get that counsel.

5 MS. LAPP: Right.

6 MS. WARTH: For people that fall above
7 that guideline, now you start to take into account
8 other factors?

9 MS. LAPP: Right. And I mean, I should
10 say that if someone has, say, a large settlement in the
11 bank or something like that, we would look at that even
12 if they fall under the income.

13 MS. WARTH: Right.

14 MS. LAPP: So I mean, there are outliers.
15 It doesn't happen very often, but it has, but generally
16 speaking, yes, and it kind of has a built in appeal
17 process to it because if there's an initial finding
18 from a staff member of, quote, ineligibility based on
19 the numbers, then I look at it and then they can appeal
20 from there if they don't like how that turns out.

21 MS. WARTH: It's almost like an
22 administrative appeal than it is a judicial appeal.

23 MS. LAPP: Right. Right. And I guess two
24 administrative appeals really, but so that's how we do
25 it.

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2 MR. DAVIES: I heard you describe this
3 would be for the in-custody clients. What is the
4 difference if you're out of custody?

5 MS. LAPP: The review process is the same
6 for everybody.

7 MR. DAVIES: I'm just wondering how the
8 initial eligibility information is gathered if
9 somebody's not there in jail for you to visit.

10 MS. LAPP: Then they call in. Usually
11 they'll call in. Otherwise, if we have an attorney
12 who's in court and meet someone in court who has to
13 appear that day, they'll do sort of a preliminary
14 interview, but I mean, our attorneys don't have the
15 time to do a full-blown eligibility.

16 I mean, our form is pretty -- I haven't
17 seen Tim's lately, but it's probably similar. There's
18 a lot of questions in there about criminal history,
19 personal history.

20 Our investigators ask for numbers from
21 other family members which is really useful when you
22 can't find somebody six months later. I mean, there's
23 a lot of reasons we have the investigators doing it.

24 So it's a very long answer for a very
25 short question, but either people can call in or an

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2 attorney can begin to interview them in court and then
3 give them the number to call.

4 So usually it's a call. Sometimes people
5 walk in too which is great and we'll interview them in
6 person.

7 MR. DOYLE: Joanne?

8 MS. MACRI: Couple questions, Leanne.

9 The baseline that you -- sort of the floor
10 that you presumed here or proposed for your county, is
11 it something that you sat down with your county and
12 actively talked about or was it something that you sort
13 of advised the county, this is what we think should be
14 the baseline?

15 MS. LAPP: A lot went into it. I spoke
16 with other providers to see what other providers were
17 doing and I looked at -- this was a few years ago, but
18 you know, there are reports online that talk about how
19 much rent costs in Ontario versus Monroe, how much the
20 cost of living is. I mean, stuff like that, I looked
21 at that. I took that into account.

22 I tried to get an idea from some of our
23 private -- formerly private attorneys who work with the
24 PD's office now as to what the going rate was for
25 retaining attorneys because I didn't know and then I

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2 just came up with it and then, you know, passed it on
3 to the administration.

4 It wasn't -- I mean, they weren't
5 micromanaging me about it at all.

6 MS. MACRI: The form to collect the
7 information, the financial information, is it something
8 that the client has to execute to have to sign?

9 MS. LAPP: No. We fill it out for them
10 and we actually ask them a question right in there, "Is
11 this okay if we use the information gathered in the
12 course of this interview to advocate for you or in the
13 course of your representation," because it's my
14 position that the information should be privileged and
15 private and confidential.

16 We have been subpoenaed before to turn
17 over records. We've been able to fight that off, but
18 you know, the way I see it is, if I were a private
19 attorney and a client walked in off the street to talk
20 to me about retaining me, even if they didn't retain
21 me, my paperwork would be subjective to subpoena. So I
22 don't know why it should be any different if I'm a
23 public entity.

24 So we don't have them -- it's not an
25 affidavit or anything like that , but we fill out the

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2 form which it makes sense in the jail because there's
3 the glass and they can't fill it out themselves.

4 MS. MACRI: The appeal process, are you
5 ever asked to provide that same financial form or any
6 collective documents to the court if determination is
7 reviewed and they're -- excuse me, if determination is
8 appealed to a judge?

9 MS. LAPP: I have not myself. I've had
10 other attorneys talk to the judges about whether they
11 wanted to assign us to someone and I can't speak to
12 what they were or not asked to provide to the judge,
13 but I haven't been asked to do that, no.

14 MS. MACRI: Okay. Thank you.

15 MR. DOYLE: Leanne, you have a conflict
16 defender office?

17 MS. LAPP: That's correct.

18 MR. DOYLE: And I assume you probably also
19 have an 18B panel for -- are there also cases where you
20 need a third lawyer?

21 MS. LAPP: Right. And that's overseen by
22 the conflict defenders office.

23 MR. DOYLE: Who does the eligibility
24 screening for those two providers?

25 MS. LAPP: Well, we do the eligibility

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2 screenings for all of the criminal cases. If there
3 were a situation that came up where I thought it was
4 inappropriate to do multiple people -- you know, to
5 interview multiple people and I was able to catch that
6 before the interview was done, I would send it right to
7 the conflict defender. She's literally right down the
8 street from me, but we do the criminal eligibility
9 information.

10 We do have one family court attorney who
11 represents clients of the public defender's office past
12 or present, so we take some family court interviews,
13 but not many. Most of the family court interviews go
14 to the conflict defenders office.

15 MR. DOYLE: Any other questions?

16 MR. DAVIES: I have a quick one. You
17 mentioned that you have graduated guidelines for
18 different seriousness of cases.

19 MS. LAPP: Yes.

20 MR. DAVIES: Are they different numbers?

21 MS. LAPP: Yes.

22 MR. DAVIES: What are the different
23 numbers?

24 MS. LAPP: I think it's 125 for
25 misdemeanor violations, 160 for D&Es, all DWIs, sex

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2 offenses of a certain level, and I believe it's
3 misdemeanor sex offenses and maybe D&E sex offenses,
4 and then 170 for the more serious charges and family
5 court.

6 I'm probably leaving something out. I
7 should have brought the form with me.

8 MS. WARTH: By D&Es, you mean Class D
9 Class E felonies?

10 MS. LAPP: Yes.

11 MS. MACRI: Would you be willing to share
12 that information with our office, I mean, just a
13 breakdown of the --

14 MS. LAPP: Sure. I think you might have
15 it already, but if you don't, I'm happy to share
16 whatever I have.

17 MS. MACRI: Thank you.

18 MR. DOYLE: Anyone else?

19 Ms. Lapp, thank you very much.

20 MS. LAPP: Oh, I wasn't done.

21 MR. DOYLE: I'm sorry. I thought you were
22 done.

23 MS. LAPP: I know you're probably hungry,
24 but I just have a couple quick points and then I'll go
25 away.

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2 Another recommendation that I have for
3 this panel is that the determination should remain with
4 the provider, and I suppose there's some counties where
5 it works out wonderfully to have the judge do it or a
6 third party, but I have some concerns about that
7 personally.

8 First, I think it's the most efficient way
9 to do things. We usually are the first person to
10 encounter the client, and I believe, as Mr. Nowak said,
11 that entry of counsel at the earliest possible moment
12 is incredibly important, especially if someone's under
13 investigation, and we do take investigations in our
14 offices as well and it's imperative to have an attorney
15 during an investigation in my opinion and I would hate
16 to be in a position where I had to turn people away or
17 had to send them to some other party.

18 Also, if a judge is put in a position
19 where they have to engage in discussion with a client
20 about finances and assets and that type of thing, I see
21 a real problem in cases where you have a welfare fraud
22 allegation or some other financial allegation against
23 the person or where the individual being interviewed
24 works, quote, off the table -- or under the table.
25 That can get people in trouble.

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2 I've seen people say all kinds of things
3 that they do for their form of employment and some of
4 those probably wouldn't be best said in court.

5 So again, we keep things confidential and
6 privileged which is, in my opinion, how things should
7 be. A private client would not be forced to reveal
8 these personal criteria to a judge in open court or
9 otherwise and I don't think that people should have to
10 do that just because they're poor.

11 I think that's -- I think that's about it
12 other than to say -- I would just add that I think
13 provision of counsel is a necessary thing. It's a
14 necessary service like other necessary services are and
15 should be treated as such and I would just hope that
16 any recommendation made by this panel would also be
17 accompanied by a recommendation that whatever changes
18 might need to be made be funded and supported by the
19 State of New York as it should be.

20 So that's all I have unless you have any
21 other questions for me.

22 MS. WARTH: I do want to follow up on the
23 issue as to who's making the recommendations to the
24 court because under the law the court's the final
25 decisionmaker.

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2 MS. LAPP: Right.

3 MS. WARTH: It's clearly a hot topic and
4 we've gotten several different opinions and views which
5 is why we're doing this. It's great that we're getting
6 that information.

7 What would you say in response to, I think
8 you heard Andy earlier say, well, he's concerned that --
9 he had two concerns about why he would recommend that
10 the providers get out of the business of making these
11 determinations.

12 One was earlier on you're sort of hitting
13 the client against the provider, his first concern;
14 second concern was, when it works well, providers don't
15 screen out to manage caseloads, but when caseloads get
16 really high the temptation is there to screen out to
17 manage caseloads.

18 What are your thoughts about those two
19 issues?

20 MS. LAPP: The second issue first, I
21 guess, I mean, I admittedly am lucky. I have 11
22 attorneys. I'm supported by my administration. We're
23 well-funded, but whenever you have people involved in
24 these things, people will all come into -- whatever
25 they're looking at with their own biases I suppose and,

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2 for lack of a better term, agendas.

3 I would echo what Mr. Nowak said. I think
4 that the institutional providers are the people whose
5 job, whose goal, whose -- I mean, our whole purpose in
6 existing is to support people in need of a defense and
7 there's no other agency that can say that.

8 We are tasked with the responsibility of
9 engaging in the defense of individuals without
10 conflict. It's an ethical obligation that we have and
11 that we should give deference to as we're obligated to
12 do and I would hate to think that providers would be
13 screening people out for any reason other than that
14 they're not eligible.

15 I mean, if that incentive is there, it's
16 unfortunate, but that's one more reason why the state
17 should properly fund offices so that the caseload
18 burdens aren't there, but I just don't see anyone else
19 who would be better suited to do it.

20 And again, I mean, we use this information
21 for other purposes other than just deeming eligibility.
22 It makes our bail advocacy more effective. These are
23 questions that we need to ask people any way. We need
24 to know if someone's employed. We need to know how
25 long they've been there, what their job is.

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2 You need to get to know your client to
3 best advocate for them and to best advocate for their
4 release which is usually the first thing we're doing.
5 So the information is useful to us, in addition to the
6 fact that it's useful to the legal system because we
7 can take a position on whether or not we think a court
8 should appointment us.

9 I forgot what your first -- what the first
10 point was.

11 MS. WARTH: Actually you just answered it
12 through what you just said. That speaks directly to
13 that.

14 MS. LAPP: Okay. And just briefly on
15 722-d's, I know that you have had some questions about
16 that. We do have some of them, not many.

17 One thing I would just ask that you think
18 about is - I don't know if this committee intends to
19 take a position on 722-d's, but they seem to have been
20 a rather hot topic - there are some occasions where
21 people are perhaps over guidelines and in a normal
22 circumstance able to retain counsel, but some people
23 are arrested in such a state mentally that they're not
24 really capable of retaining counsel on their own even
25 if they could do it financially, and quite a few of our

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2 722-d's have been people with income, retirement, SSI
3 combined with assets or whatever that might put them
4 over our guidelines, but we'll step in because those
5 people aren't in a position to retain at that
6 particular time, but at the same time, you know, the
7 government, our agency, the tax payers should get some
8 reimbursement for that because the person is able to do
9 it.

10 So it suits both needs. It's the right
11 thing to do, but also the tax payers are reimbursed for
12 the service, and then later on, if someone's able to
13 retain counsel for them or they become stable and able
14 to retain, that's great, but I would just add that to
15 the discussion that was previously had about 722-d
16 orders.

17 MS. MACRI: Now that you've opened up that
18 door, just out of curiosity, have you had any
19 enforcement issues with the 722 orders in your county
20 or --

21 MS. LAPP: No. Our county attorney's
22 office, I mean, we talk to them about it, but they
23 do -- what efforts are made are undergone by that
24 office.

25 MR. DOYLE: Other questions?

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2 Okay. Ms. Lapp, anything else?

3 MS. LAPP: No, I'm done. Thank you.

4 MR. DOYLE: We appreciate your testimony.

5 Thank you for coming and your patience.

6 Our next speaker is Kaelyn Rich with the
7 New York Civil Liberties Union, Director of Genesee
8 Valley.

9 Ms. Rich, welcome. Thank you for coming
10 and thank you for your patience.

11 MS. RICH: Not at all. It's actually very
12 interesting. I hope you enjoyed yourselves because
13 I've enjoyed myself. I was really glad to see a lot of
14 our region represented, not just Monroe. It's really
15 exciting.

16 So I know you've been hearing from folks
17 across the state. I'm going to be brief. You kind of
18 already know what we have to say, but I'm here to
19 reiterate it.

20 As you know, the NYCLU is the New York
21 State affiliate of the American Civil Liberties Union.
22 We're a 50,000 member organization across the State of
23 New York with eight offices and we do have an office
24 here in Rochester, New York that covers nine counties
25 of the Genesee Valley area including Genesee,

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2 Livingston, Monroe, Ontario, Orleans, Steuben, Wayne,
3 Wyoming and Yates Counties and as you also know, the
4 NYCLU is counsel to the class of criminal defendants
5 who are eligible for defense services in the five
6 counties - Schuyler, Suffolk, Washington, Onondaga and
7 here in Ontario - in the Hurrell-Harring versus State
8 of New York lawsuit which gave rise to this, as you've
9 said before, that we're discussing here today.

10 So I'm going to be really brief because
11 I'm more interested in hearing from these folks out in
12 the field and I think you've already heard what we have
13 to say.

14 Two main points: One which has really
15 been driven home today I think by hearing about how
16 different the eligibility requirements are from county
17 to county within this small region -- and I'm sure as
18 you're traveling across the state you're hearing lots
19 and lots of different stories, the good, the bad, the
20 ugly about how this is being done.

21 So my first point is about the incoherence
22 of New York's methods of determining eligibility
23 requirements and we want statewide reform in this which
24 the prior speaker also spoke to, not just in the five
25 counties involved in the Hurrell-Harring lawsuit.

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2 So as you've heard today, eligibility
3 determinations are made inconsistently across the
4 state. Decisions might be made by the arraigning
5 judge, by probation or pretrial services or by staff in
6 institutional provider services. There may be a formal
7 written application as we've seen some of those today
8 or it may be just an informal oral inquiry or there may
9 be written criteria or there may be none.

10 So in Genesee Valley, counties that allow
11 the assigned counsel administrator to make eligibility
12 determinations have no uniform guidelines. So in
13 addition to having varying poverty level thresholds, as
14 we've heard today, some counties fail to consider other
15 factors that affect an individual's financial
16 situation. Therefore, a defendant may qualify for
17 appointment of counsel on one county, but may not
18 qualify in a neighboring county.

19 In other counties, judges make initial
20 eligibility decisions based on their subjected
21 determinations of a defendant's financial status.
22 These problems that arise from the lack of
23 standardization are then further compounded by the fact
24 that most defendants have no avenue for judicial
25 appeal.

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2 ILS should promulgate flexible statewide
3 standards to address these issues. If regional
4 variance is allowed, it should be evidence-based, for
5 example, economic evidence of the cost of lawyers and
6 cost of living and the region should be clearly
7 defined.

8 The purpose of standards is to ensure the
9 integrity of future decisions, not merely to address
10 the problems of the past.

11 In the course of gathering information
12 about how determinations are made ILS should not lose
13 sight of how the fractured and irregular nature of the
14 system in itself is an irrefutable argument for the
15 promulgation of comprehensive statewide standards.
16 Like any other such determination it must be subject to
17 judicial review.

18 Denials of eligibility should be made in
19 writing, provided in court or by proof of service to
20 the defendant and accompanied by information about how
21 to appeal that decision.

22 Procedural fairness is a cornerstone of
23 the criminal justice system. Consistent procedures are
24 needed for both the perception and the reality of
25 justice.

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2 The second point we'd like to make today
3 briefly is that statewide standards are needed to
4 prevent wrongful denials of counsel.

5 So we believe eligibility standards must
6 focus not only on who is eligible, but also on how
7 determinations are made. We talked a lot about this
8 today.

9 In the NYCLU's investigation of public
10 defense services across the state we documented
11 policies that on their face deny counsel to people who
12 cannot afford a lawyer. These include policies denying
13 counsel merely because of ownership of an illiquid
14 asset such as a home or a car that is necessary to work
15 or to attend school, account only for income and not
16 for debt obligations, punish people under 21 if they
17 cannot provide proof of their parents' indigence and
18 completely fail to account for the actual cost of
19 obtaining representation on the charges filed and we've
20 talked about -- heard about all these issues today.

21 Too often the NYCLU has documented
22 examples where people under 21 or minors are wrongfully
23 denied counsel because of limited application
24 procedures that do not accurately reflect the
25 defendant's financial and familial circumstances. This

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2 is a significant problem in Monroe County where
3 persons' under 21 parental information is used to make
4 an eligibility determination despite estrangement or
5 the parents' refusal to aid the young person.

6 In addition to addressing these documented
7 wrongful denials of counsel, ILS should adopt standards
8 to ensure against other types of wrongful denials
9 commonly observed around the country.

10 ILS must ensure that eligibility standards
11 and procedures account for the defendant's actual
12 financial status so that individuals are not left in
13 limbo because of their perceived circumstances.

14 And that's really it. I mean, I think
15 you've heard kind of from the horse's mouth how it's
16 working, how it's not working.

17 I want to thank you for coming out today
18 and thinking about this as an opportunity for real
19 statewide reform to just -- instead of just closing
20 some of these gaps, to actually set new precedents for
21 how we do this work going forward.

22 So thanks for being here today. We look
23 forward to working with you and continuing to discuss
24 eligibility standards with you across the state and
25 ensuring our criminal justice system doesn't punish the

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2 poverty and protects people's constitutional rights.

3 So thank you very much for your time.

4 MR. DOYLE: Great. Any questions?

5 Okay. Thank you, Ms. Rich, for your
6 testimony, and Ms. Rich, I just want to thank you and
7 also thank the NYCLU for their important contributions
8 obviously to this is issue and all of the issues of
9 indigent defense.

10 MS. RICH: Thank you very much.

11 MR. DOYLE: So our next witness is Marcea
12 Clark Tetamore, if I'm pronouncing that correctly, who
13 is the Livingston County Public Defender.

14 MS. TETAMORE: I wasn't going to speak,
15 but after listening to everyone else, I think the small
16 rural counties need to be heard.

17 Wayne County is similar, yet different, so
18 I wanted you to hear from the southern part of this
19 district.

20 I was appointed in July of 2000 as the
21 first, so far only, full-time public defender. They
22 had a part-time public defender previous to that. When
23 I came in it was a rough transition. The previous
24 public defender was not happy to leave, so I was left
25 with nothing except his very upset secretary.

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2 So a lot of what I have done over the last
3 15 years has been trial and error. I do follow
4 125 percent of the guidelines which I get from NYSDA
5 every year. I do not give a variation based on crimes.

6 We have approximately 64,000 people in our
7 county. We have no cities. We have approximately 23
8 village and town courts. We have a multi-bench court
9 where we have two judges. They each have their own
10 family court. They each have their own county court.
11 We also have a child support magistrate that appears
12 every day. We have two prisons and we also handle
13 parole revocations.

14 When someone comes into jail, if it is a
15 parole revocation they are automatically eligible. We
16 don't even ask for an application. If it is a parole
17 denial appeal for the two prisons, they are
18 automatically given counsel. If they are arrested and
19 incarcerated for a felony, they are presumed to be
20 indigent at first glance. We still need the
21 application which includes background information,
22 charges, along with their income information.

23 If they are married, we look to the spouse
24 unless the spouse was a victim. If they are under 21,
25 we do look to the parents unless the parents are the

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2 victims.

3 Our county seat is Geneseo and there is a
4 SUNY college there which attracts a lot of young people
5 with very wealthy parents and they seem to generate
6 their significant amount of crime. So we do look to
7 that and there are kids that come to the window saying,
8 "I don't want my parents to know," and we tell them,
9 "If you want a public defender, your parents are going
10 to be informed because we will need their income
11 information."

12 Along with the application we ask for pay
13 stubs, tax returns. If you pay child support, you get
14 a credit for that. So we ask proof of what your
15 current child support payment is. If you receive child
16 support, it is not deemed to be income to you because
17 that's for the children.

18 We do look at assets such as equity and
19 houses, any settlements or bank accounts. We ask for
20 three months of bank statements. We look to public
21 assistance, food stamps, and we require written
22 documentation of all of those.

23 Again, if you're in jail, you're deemed
24 eligible. We will step up and do a felony hearing or a
25 preliminary hearing and look to eligibility down the

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2 road. If you're in jail on a misdemeanor, because our
3 misdemeanor courts don't meet very often you're not
4 automatically presumed to be indigent. We will ask for
5 documentation to that.

6 If it's an under 21 and the parents refuse
7 to give income information, we will look to be assigned
8 by the court, and I'll talk about 722-d's in a minute.

9 In family court - generally they're not in
10 jail, but sometimes they are - we seek the same
11 information. When that information comes in we have an
12 application. If you appear at the window, the
13 paralegal or the clerk typist will interview you and
14 write notes on the application.

15 As a result of our notes, I view that as
16 attorney/client privilege. We have not been subpoenaed
17 and I have not been forced to turn that information
18 over.

19 Then the application and all documents go
20 to the paralegal. She reviews each and every one of
21 those applications at least once, generally more than
22 once. As of July 24th of this year we've received over
23 a thousand applications so far. After she reviews them
24 they come to me and I review them with the supporting
25 documentation. No other attorney in my office reviews

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2 them. No other attorney has the guidelines.

3 So the discussions today where there might
4 be some type of conflict between the attorney and the
5 defendant or respondent or petitioner, I don't think it
6 exists. If anything, we get attitude from people who
7 are denied. I never get attitude from people who are
8 approved.

9 And the attorneys will have the
10 application -- they might have the notes and the
11 application, but they generally don't have a lot of the
12 supporting documentation. We return that to the
13 client. So I don't see that as being an issue. So it
14 only goes between the paralegal and me for final
15 determination.

16 I'm pretty black and white. I go by the
17 guidelines. If you're \$100 over the guidelines and I
18 look at your application and you're on DSS, you're
19 going to get approved.

20 We have these two judges and the child
21 support magistrate and I believe, personally, the
22 722-d's in my county are abused. We will get 10, 15
23 722-d's on a Wednesday after family court's happened on
24 a Tuesday. Some of those people have not even filled
25 out the application. A significant amount of them are

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2 over income, and by over income, I mean, 35,000,
3 48,000, \$67,000 over income.

4 I disagree with one of the previous
5 speakers on the wording of "indigent" versus "ability
6 to afford an attorney."

7 If someone asks an individual, "Can you
8 afford an attorney?" Their answer is going to be no.

9 My answer today would be, "No, I can't
10 afford an attorney." Whether I'm indigent is another
11 whole story and I believe if you are indigent you're
12 not entitled to a free lawyer at the expense of the
13 county, especially if you're \$67,000 over income.

14 We will get 722-d orders. Right now we
15 probably have approximately 6 to \$7,000 of outstanding
16 orders. My county attorney will not attempt to collect
17 them, so we try, not very successfully. I think we've
18 received \$38 from our collection agency so far this
19 year and about 250 as a result of paralegal's work. So
20 I think that those are abused at least in my county.

21 I do agree there are instances where they
22 should be given and done, but I have some problems with
23 the way they're done currently. So that's how we
24 determine eligibility.

25 If someone's a thousand -- oh, and every

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2 denial of an application goes to the court, the
3 court -- the defendant or respondent or petitioner, and
4 if it's a criminal case I think it goes to the DA and
5 it will say, so-and-so's applied, eligibility based on
6 a family of four is X. Your assets or income is listed
7 as Y, therefore you are over the income by X amount of
8 dollars and you do not qualify.

9 We tell people who call and complain about
10 not being approved that they can go to the judge and
11 talk to the judge. We don't put it in our letters.

12 If they're within a couple thousand
13 dollars of being over income, I expect the appointment,
14 but I want the judge to do that. I don't want to take
15 that burden. If they are significantly over income, I
16 believe that they should hire counsel. We're a small
17 rural county. We don't have a lot of attorneys and
18 those attorneys depend on primarily work in our county
19 and neighboring counties for their source of income.

20 So I have some problems with people who
21 are definitely over income and getting a free lawyer,
22 to say nothing of our caseloads.

23 In the 15 years of doing this, it has
24 never once occurred to me to deny someone to reduce my
25 caseload, and listening to it today was kind of

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2 enlightening because I never thought about it. I
3 couldn't even imagine doing it like that.

4 Yes, we are overworked and our caseloads
5 are heavy and we are understaffed. We have three
6 full-time attorneys and I'm one of them. We have four
7 part-timers. I have a secretary and a paralegal and it
8 wouldn't even dawn on me to do that, to screen someone
9 for that purpose.

10 I do go by the guidelines and then I put
11 the burden on the courts to do the assignments, and
12 like I said earlier, I expect them to assign.

13 I would like -- if there's any change to
14 the statutes I would like them to say "indigent" and
15 not "ability to afford" because "ability to afford" is
16 a very subjective statement.

17 One of the problems with our local
18 judges -- we have very few lawyer judges in the
19 outlying towns and villages and one of the problems is,
20 they'll say to the defendant, "Can you afford an
21 attorney?"

22 "No."

23 "Okay. I'll appoint."

24 They don't do any type of indigency or
25 financial questions. They just assign. So I have some

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2 concerns about that.

3 All of our courts have applications for
4 our services and we will tell someone who says that
5 they've got court tonight, "Well, go to court, grab the
6 application. It will tell you" -- "it does say exactly
7 what we want you to supply to us, bring it in and we'll
8 provide it. We'll look through it."

9 I would ask this panel to allow the
10 providers to continue doing the referrals and the
11 investigations for a couple reasons. Number one, there
12 was a comment I think from Mr. Correia about
13 distances -- or no, I guess it was Mr. Donaher. We
14 have no bus service in Livingston County to speak of,
15 so if there were an independent agency, clients
16 couldn't get there.

17 Right now we will e-mail applications. We
18 will fax applications. We will mail applications.
19 They're outside my office door, so if the building's
20 open you can grab them and slip them under our door.
21 We can turn an application around in a day if we have
22 to.

23 I don't think an independent agency could
24 provide that kind of service. I don't think they would
25 care if they provided that kind of service.

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2 We have clients who literally will show up
3 at 3:30 having court at 4:30 saying, "I need an
4 attorney."

5 "Well, if you haven't provided me your
6 information, you're not going to have an attorney
7 there. If you provided it, I will do everything in my
8 power to get someone on board if you qualify." So I
9 would ask that it stay with the providers.

10 We have a conflict office that is at a
11 contract with the county. It's a Legal Aid Society, so
12 to speak. If there is a conflict after them, they then
13 assign it out. We don't have a formal assignment
14 process because our bar association's not approved the
15 plan six years later.

16 I do all the evaluations for
17 qualifications and then once it goes to the attorney,
18 the attorney really doesn't know.

19 If we get calls from the other side, which
20 quite often happens in family court, about how does
21 this person qualify for a free lawyer, we will
22 investigate and we would ask for a 722-d if they come
23 into money or they hit assets. It doesn't happen very
24 often. Primarily our 722-d's are from the beginning
25 because the judges want someone there. They want to

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2 make their court run easier and that's what a lot of
3 this is based on.

4 If this panel raises the eligibility
5 standards, I would ask that the ILS board consider
6 giving money to the counties with a specific direction
7 that is to hire attorneys. My paralegal and clerk
8 typist cannot give legal advice over the phone. I
9 don't have any investigators. I would kill for an
10 investigator. My paralegal or my clerk typist call the
11 jail every morning when we get the jail list.

12 So we don't have the resources, and if the
13 numbers are raised, I'm concerned about being able to
14 meet not only requirements of qualifying people, but
15 also the caseloads.

16 So I would ask that the board consider a
17 directive that this amount of money is specifically
18 used to hire an attorney or whatever that PD office
19 needs, whether they determine it's an investigator or a
20 secretary, but at this point in time I could use
21 another attorney because I do all the applications in
22 addition to carrying a caseload and all the other
23 administrative duties.

24 I can't think of anything else that wasn't
25 covered so far, so if there's any questions.

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2 MR. DAVIES: Can I ask specifically on
3 that last point?

4 Do you have a sense of how many cases
5 you -- how many clients -- applicants are denied right
6 now, so if the standards were changed, how many more
7 cases would you end up taking?

8 MS. TETAMORE: Well, I did numbers as of
9 July 24th for a public service meeting and we had over
10 a thousand applications as of July 24th. We had over
11 500 open files and I believe we had about 85 pending.
12 So approximately half.

13 Now, whether the half that were denied
14 were failure to complete the application process or
15 retain private counsel or may have been a case we
16 didn't represent on such as violations, I don't know,
17 but as of the end of July, we were about half, little
18 over half.

19 MR. DAVIES: So to take those extra cases,
20 possibly a bubbling of the attorney staff?

21 MS. TETAMORE: Probably. I would at least
22 believe 25 percent that may be hired.

23 MS. BURTON: I just want to follow up on
24 the point about the denials on the basis of failure to
25 provide all the supporting documentation.

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2 So you require at the initial submission
3 of the application along with the intake form the
4 various documents including pay stubs and income tax
5 returns and that sort of thing; is that correct?

6 MS. TETAMORE: If they call in, we will
7 tell them, "We can send you an application. These are
8 the documents we require." If they come to the window,
9 we will say, "These are the documents we require.
10 We'll write it down on a business card with our fax
11 number and our e-mails." We give them 15 days.

12 If it comes in the mail, we send them a
13 letter, "These are what we need. Provide it in 15
14 days." If after 15 days they've not provided it, we
15 send them a letter saying, "You're application's been
16 denied for failure to complete."

17 We just started that probably about five
18 or six years ago. That's had an amazing effect on
19 getting people off their butts and into our office. As
20 a result of them doing that, they generally qualify.

21 We run into people who are self-employed.
22 We do have people that are not being accurate with
23 their assets. I think the question was asked earlier,
24 do they want to have a private attorney, do they really
25 want a public defender . I find people who have money

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2 set aside for retirement, for a Disney World vacation,
3 don't want to hire an attorney and that's why we
4 require bank statements. I want to see how much money
5 is going in and where it's coming from and how much is
6 sitting there.

7 If you have overdraft fees every month,
8 then I know you're probably indigent. If you have
9 \$30,000 sitting in your savings account and you tell
10 me, "I don't want to use that because that's my
11 retirement" -- in our county the attorneys are not that
12 expensive. You can hire an attorney for less than
13 \$2,000. I appreciate the fact that you might want
14 retirement, but you're not indigent under our
15 guidelines.

16 MS. BURTON: And can you estimate about
17 how many of the denials end up being because of failure
18 to complete the application?

19 MS. TETAMORE: Probably a small amount.
20 Maybe 10 or 15 percent, maybe.

21 Now that we've started the follow-up
22 letter saying you're denied, it really has made a
23 difference where they realize, "Oh, I better do
24 something about it."

25 MR. DOYLE: Is there any concern in

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2 sending a copy of that letter to the DA if it's a
3 financial crime or welfare?

4 MS. TETAMORE: I don't think so because
5 our guidelines are based on the individual applying and
6 the people he or she is required to support; his or her
7 children, if they have custody of other grandchildren
8 or whatever, not necessarily a boyfriend, girlfriend,
9 that type of thing.

10 It gives our baseline for a family of X,
11 their income and what they're over and that's all it
12 gives. So I don't think there's an issue because it
13 would be information they would probably be able to
14 find easily.

15 MR. DOYLE: You haven't had a situation
16 where you've been subpoenaed or your office has been
17 subpoenaed because of one of those letters?

18 MS. TETAMORE: Not in the 15 years I've
19 been there.

20 MS. MACRI: Marcea, can I ask, the reason
21 for giving it to the DA, was it just the DA's request
22 or the court's recommendation?

23 MS. TETAMORE: Truthfully, I may be wrong
24 on whether it goes to the DA. I'm trying to think of
25 the carbon copies at the bottom.

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2 I think it does go to the DA to let them
3 know that they've applied and they don't qualify, and
4 also, if they're significantly over income and the
5 judge decides to appoint us, I do know the DAs objected
6 in the past surprisingly. If they're minimally over
7 income, I want the judge to appoint us.

8 So it's from more of an informational
9 purpose than anything else.

10 MS. MACRI: And can I ask a follow-up?

11 The 722-d orders, you said that both --
12 there's a collection done by the county, but also I
13 think you mentioned that even your paralegal might
14 or --

15 MS. TETAMORE: No collection by the
16 county. It's purely my paralegal sending letters and
17 then after a while we send it to a collection agency
18 which has not been very successful.

19 We're working on whether we can have the
20 orders filed as judgements, but we have not had a lot
21 of luck with that.

22 MS. MACRI: Was that something that your
23 county instructed you to do as just a way of trying to
24 figure out how to reimburse the fees?

25 MS. TETAMORE: It's just a way to try and

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2 figure out how to get some money back because it's
3 significant. I mean, I know it's over 5,000 and I
4 think -- that was as of last year's annual report and I
5 think we're probably closer to 7,000 at this point.
6 We're just not getting any money from it.

7 MR. DOYLE: Other questions?

8 Okay. Thank you very much. We appreciate
9 your time.

10 I believe our final witness is Velma
11 Hullum, if I'm pronouncing that correctly, who is here
12 from the New York State Defenders Association Clients
13 Advisory Board.

14 Welcome and thank you for your patience.

15 MS. HULLUM: Thank you. It was very
16 enlightening. I would've rather wrote my comments
17 after I heard all the other comments, so I'm not going
18 to add to it.

19 I did bring you guys my testimony --

20 MS. MACRI: Thank you.

21 MS. HULLUM: -- but I have another whole
22 testimony after I heard all the testimonies.

23 I just want to talk about rural areas and
24 Wayne County. I grew up in Orleans County, Albion, and
25 I think it's a whole new ball game when you're talking

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2 about all these things in those areas; transportation,
3 confidentiality, income.

4 I looked at the 125 percent of the poverty
5 guidelines. It's \$14,700 a year. I mean, you can
6 barely eat on that. How are you going to get an
7 attorney?

8 I think it's just -- it doesn't even make
9 sense to even start at that plaque. I mean, food
10 stamps start higher than that.

11 So I mean, I think that -- and I do agree
12 that it should be based on maybe county because if I'm
13 in New York City, the income is higher, but if I'm in
14 Orleans County, I'm probably making under 20 or \$25,000
15 a year and I think that's great money in Orleans
16 County.

17 80 percent of the people in Orleans County
18 transport outside of the county in order to work and
19 they're not making a lot of money. So if you're
20 talking about taking my automobile and looking at it,
21 because we got two or three of them, two of them are
22 probably not running and the ones that are running are
23 probably not worth paying an attorney. So I think a
24 lot of times they think I have assets and I really
25 don't have assets.

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2 I do think that there should be some
3 flexibility when you're looking at income and how is
4 that spent and I say that because I stopped working two
5 years ago. As a matter of fact, August 13 will be two
6 years, you know, roll my retirement over, it's sort of
7 laid back, and I was making over \$100,000 a year.

8 So now my income's different, you know,
9 but what shows on my W-2 says I'm still big time, but
10 in reality that was last year's money. I don't have
11 that money now and I think a lot of times if you're
12 looking at W-2s, you're looking at my income tax.
13 That's money that's over the heels.

14 I mean, I thought about it today. I never
15 had a credit card. I never used credit. I always paid
16 for things cash. I just had to have a stove because my
17 stove is 20 years old and I put it on the credit card.
18 I would have never done that before.

19 I think the idea is, is that you got to
20 look at where people are now and part of it -- and I
21 think it goes with a lot of services. I did human
22 services for the last 32 years.

23 So a lot of it is always looking at,
24 especially welfare, what somebody made last month.
25 Reality is where they are now when they are sitting in

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2 front of you and I think that's something that should
3 be taken into consideration.

4 I also think -- I heard some great things.
5 I love the guy from Wayne County. I think that --
6 because he's looking at everybody that comes in as
7 somebody who is in need and I think when you start at
8 that level and work you're way the other way, I think
9 the outcomes are more positive, and we're talking about
10 things that change people's lives.

11 I worked at a correctional facility. I've
12 talked to women who saw their attorney the day of court
13 where they had no relationship, and my thing is, is
14 that I think as a state we're paying a lot of money for
15 people who maybe wouldn't have been incarcerated had we
16 had an attorney there at the beginning because, God
17 knows, with other things going on now, as a black woman
18 in this, hey, I'm going to put my hands up and be
19 guilty quick, whatever at that point that maybe I think
20 gets me through.

21 The income levels, of course, a lot of
22 people do a lot of different things to make money and
23 sometimes we're shocked and I think having it done by
24 the provider, I agree, I think that's a person who
25 really cares about getting that person through the

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2 system. They're going to have more compassion and I
3 think when you meet people with compassion you get
4 compassion.

5 The last thing that I want to say is, I
6 think that all this stuff is great, but I think you
7 talked about in the end collecting the data and I think
8 collecting the data is great, but what are you going to
9 do with the data?

10 Are you really going to evaluate these
11 offices to make sure that these things are really
12 happening?

13 I mean, things are great on paper. We see
14 it all the time, but how do you ensure that it's
15 happening?

16 I mean, people talk -- the first gentleman
17 that got up and talked kept saying how great things
18 were in his county. That's his perception. That's his
19 county, but I might be that person that kind of thinks
20 it's the worst county yet.

21 So the idea is, is that the standards that
22 are developed I think should be statewide standards
23 that everybody has to meet and those offices that are
24 not meeting those statewide standards, what do we do to
25 make sure that they are, keeping them in line and

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2 regulating, just checking to make sure and knocking on
3 people's doors to make sure, hey, is this being done,
4 because as you can see from all the counties you've
5 been to - I've looked at your sheet, you've been
6 everywhere - it's almost like being in a different
7 world every time you step out and maybe we can do more
8 things that are more standard so that there are things
9 that we have to do.

10 I just think a measurement must be done
11 and there has to be somebody who we can call who is
12 accountable when you're not meeting that measure, that
13 we don't just sweep it under the rug. Otherwise you've
14 wasted all this time that you've done here.

15 Although I got a free lunch yesterday
16 because I came early, I was so excited, the idea is, is
17 that I think that will only bring about change if we
18 can hold people accountable, and that's the last thing
19 I want to say.

20 MS. MACRI: I want to thank you for taking
21 the time out to be here today and share some of your
22 perspectives especially from Orleans.

23 I know our public defender was here
24 earlier and he wasn't able to stay from Orleans County,
25 he had another engagement, but I wanted to ask you, in

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2 the work that you've done have you ever encountered
3 individuals who were really delayed because they were
4 waiting to be determined whether they were going to get
5 a lawyer or not?

6 Was there a delay in those processes?

7 MS. HULLUM: Well, you know, just recently
8 one of my nephews who works for Chrysler got charged
9 with a rape charge and he just had started work and he
10 didn't have money, but of course, he couldn't get a
11 public defender because he had a job, a really good
12 paying job, but it was \$10,000 and the only reason he
13 got money for an attorney is because he had his brother
14 and other family members who pooled together to bring
15 that money for him.

16 I mean, in the end the case was over and
17 done. I don't think it would have happened that way
18 had he not been able to get that attorney. Other
19 things would have been done, but the idea was that he
20 was able to get it fast so he didn't have to spend any
21 time in jail where he lost his job, but if you got to
22 spend the time to put that money together -- we all
23 know we've got to beg family members. It's when you're
24 going to get it back.

25 See, my rule is, I don't think that I

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2 would expect it back because I don't want to break up
3 the family. I watch enough Judge Judy. So if I give
4 you money, it's given, but the idea is, is that a lot
5 of family members are struggling too, so it's not like
6 they have the money. He had a brother that could give
7 him the money.

8 Now, he wanted to pay the \$10,000 back,
9 but the idea is, is that it would have been a whole
10 different thing. He's been on this job about three
11 years. They did throw the case out, but the idea is,
12 is that it would have been a totally different case.
13 He would have been unemployed. So you're talking about
14 a whole different scenario.

15 A lot of times we don't understand the
16 urgency of the person standing in front of us even
17 though it looks like on paper I might have this, and I
18 think that's why you really need to have some kind of
19 flexibility where you're looking at what really is the
20 reality because on my W-2 last year it said I made
21 \$98,000 last year. I don't know where that came from,
22 but the idea is, is that right now I'm on a fixed
23 income based on what my new income is and I'm
24 re-adjusting to that and I think it's the same thing
25 with families, is that sometimes we look like we got

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2 more or maybe at one time we did have more, but I think
3 you have to look at what's in front of you, but
4 definitely, you've got to have some measures and hold
5 people accountable.

6 MS. MACRI: Thank you.

7 MS. BURTON: I don't have a question, but
8 I did want to just express my appreciation for you
9 bringing up the aspect of monitoring and accountability
10 because that really is not something that we've had a
11 lot of conversation about throughout these hearings,
12 and I think that it's one thing, like you said, to put
13 measures and standards in place, but it's another thing
14 to collect the information to find out how things are
15 actually going and to try and figure out what to do
16 when things aren't going the way they should be going.
17 So I appreciate that.

18 MS. HULLUM: Yeah. And even for the ones
19 who are doing a great job, I think just having other
20 offices listening to what other people are doing opens
21 the doors. Sometimes we think we're doing it the right
22 way. I know in Human Services I always knew I did it
23 the right way until I went to a conference and I heard
24 somebody else who was doing something new and
25 different, and I think having those sessions where you

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2 bring people together is a great opportunity to share
3 ideas and highlight those who are.

4 I just think we like to be praised and I
5 think that our public officials are no different,
6 especially when you pay them a lot of money, but I'm
7 going to leave you what I wrote up and what I wrote up
8 is just perfect. You guys don't have to change it.
9 Just make it do exactly what this says.

10 MS. MACRI: And if you or anyone has any
11 additional comments or submissions, we're taking them
12 until August 26th.

13 MS. HULLUM: Oh, super. Super.

14 MS. MACRI: So we'll take what you have.

15 MS. HULLUM: Thank you, guys.

16 MS. MACRI: Thank you.

17 MR. DOYLE: I want to thank all of the
18 witnesses and our spectators and some of whom stayed
19 all the way to the end. This has been very
20 informative.

21 MS. MACRI: Actually, let me ask, is there
22 anyone else?

23 Chuck? Anyone?

24 MR. NOCE: I just want to make a brief
25 comment.

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2 MR. DOYLE: Oh, please. Yes, yes.

3 MS. MACRI: Please. Come on up.

4 And if anybody else would like to make any
5 comments before we break.

6 MR. NOCE: I am Charles Noce. I am the
7 Monroe County Conflict Defender and the Monroe County
8 Administrator of the Assigned Counsel Program. So I
9 have a different perspective in terms of what goes on
10 relative to eligibility.

11 First, Tim Donaher, his office does all of
12 the eligibility that comes into my office and I get the
13 cases coming in in two different aspects: One, I've
14 got staff attorneys, nine of them, who get cases
15 brought over from the PD's office. We determine
16 nothing to do with eligibility, but conflict.

17 "Can my staff represent this person?"

18 If the answer is no, it then goes to my
19 other hat which I've spoken publicly before. I
20 personally believe that 13 years ago when this office
21 was created there shouldn't be one person with both of
22 these hats, but that being said, I do my best to then
23 assign the case through my office to an attorney who is
24 on the panels that we have created.

25 So when I have to think of the question,

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2 is the public defender's office doing a good job
3 determining eligibility, and by that I mean, they are
4 not taking cases that they shouldn't, my measure of
5 that is, I was in private practice for 35 years. I
6 started in the PD's office when I first got out, but I
7 oversee 170 private attorneys.

8 I remember when I started as an assistant
9 public defender private attorneys coming into court
10 seeing the stack of files on my court table and saying,
11 "Are all of those eligible," and I would say, "Take
12 half of them."

13 I mean, it was their concern that -- what,
14 "I'm taking business away from you? Really? I mean,
15 you're missing the boat here," but my thought is, I've
16 been on the job just under three years and I haven't
17 had a complaint from a private attorney that, you know,
18 "Chuck, I got this file" -- but mind you, they don't
19 see the financial information, nor does my staff, but
20 to think somebody would have complained in three years
21 that I'm representing this person, "I don't know who
22 determined he or she is eligible, but I don't believe
23 they are," I think that's a good affirmation that the
24 public defender's office is doing a good job and that
25 is possible in light of things that Tim said here

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2 today.

3 I was involved when they were able just
4 nine months ago to get a paralegal working on this
5 floor so that somebody can go from the clerk's office
6 in family court right to that paralegal for
7 eligibility. It was wonderful.

8 One, you had to have the County of Monroe
9 backing it up, which they did, but boy, it really has
10 helped in the sense of the process because so many
11 times people would leave this building having gone to
12 the clerk's office and then were told to go to 10 North
13 Fitzhugh Street three blocks north, they wouldn't get
14 there.

15 First of all, unfortunately North Fitzhugh
16 and South Fitzhugh are at one corner. You could get
17 messed up right there. Secondly, people procrastinate.
18 The day before the court appearance they'll show up.
19 So to have somebody right here on this floor is, quite
20 frankly, heaven-sent. I know the judges appreciate it.

21 The only other thing I would like to say
22 is, it's probably going to irritate two groups right
23 now, judges, but at this stage of my career I don't
24 want to say I don't care, but I don't care, but all the
25 years, one of the character flaws that I've always

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2 found with the court is lack of patience.

3 If I had to say -- one of my memories is
4 they don't want to adjourn a case to determine counsel.
5 They want that done yesterday, and if a process was
6 done to bring that to the court to let the court
7 determine it, I'll tell you right now, that would not
8 be well-received in my opinion because I think of it,
9 if a judge -- and I hate to put them all in the same
10 kettle, but they just want to get the case moving, get
11 the case disposed of and trust that maybe this issue is
12 being handled in a professional and in a fair way.

13 The other thing that I just want to
14 mention because it came up and I didn't know it would
15 come up until I got into this position is that somebody
16 will get assigned to represent somebody, and it happens
17 on felony cases, not misdemeanor cases, and the client
18 will run out of money.

19 Now, shame on that private attorney who
20 drafted his or her retainer agreement in such a way
21 that, I don't know, it calls for, "I'll do this much
22 and when you're out," but I'll get a phone call - and
23 it happened in my first six months on the job - from
24 the judge, "Chuck, I'd like to" -- "you've ran out of
25 money. I'd like to assign this attorney to the case

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2 now."

3 "No."

4 I've had to tell them no for a variety of
5 reasons.

6 MS. BURTON: You mean, the same attorney
7 who had been retained?

8 MR. NOCE: Same attorney who had been
9 privately been retained, Angela --

10 MS. BURTON: Yeah, yeah.

11 MR. NOCE: -- and it really irritated me
12 because of 35 years as a private attorney, number one,
13 and then number two, really?

14 The horse is out of the corral and now
15 we're bringing him in and it's going to be coming out
16 of my budget?

17 The process is, Mr. Donaher's office
18 determines eligibility and conflict. Then when he
19 determines somebody's eligible and there's a conflict,
20 it comes to me.

21 So I had to tell these judges, "Well, it
22 has to go back to Mr. Donaher's office."

23 "Well, what do you mean?" I said,
24 "Because maybe he does not have a conflict if you think
25 there is an eligibility question now."

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2 "Oh, I don't understand that."

3 "Well, no, you don't, but, you know, since
4 I'm the last guy to be thrown the ball and I'm holding
5 it, I'm not picking it up."

6 Quite frankly, my complaint is not with
7 the judge - the judge is probably, as I said before,
8 not wanting to think we're going to have to go back to
9 square one on this case, let's keep the continuity
10 going - but with the attorney because, look, not to say
11 that I did it the right way, but, you know, it said,
12 "That would be the total fee. That would be" -- and
13 you know, there were cases over 35 years, if you looked
14 at it on a case by case basis, I made a lot of money
15 because through whatever strategies I used I disposed
16 of the cases quickly and then there were other cases I
17 looked back on and I said, "Wow, did I lose money on
18 that case?"

19 That's what happened based on my accepting
20 the case and drafting the retainer agreement.

21 The last thing is, and this came up and I
22 don't know where -- somebody got creative over this,
23 but somebody is privately retained and the judge will
24 sign a 722-c order to allow for investigator services,
25 expert witnesses on a privately retained case and I

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2 resisted.

3 I said, listen, again, and maybe it's
4 because I came from where I came, you know, public
5 defender, private practice, back into the system, that
6 if that attorney drafted his retainer in a way that
7 didn't mention disbursements and witnesses and
8 transcripts and investigators, shame on him.

9 Now is the time that either you pony up
10 the money or guess what, you're getting yourself set up
11 for a nice habe later on, but it's those kinds of
12 little wrinkles that I've experienced second in line.

13 You know, when I got the notice on this I
14 knew that there really wasn't anything because I don't
15 determine eligibility. I do turn to my staff attorneys
16 and say to them, especially family court, I mean, I --
17 I didn't practice here for a lot of reasons, but
18 things -- one, the cases go on forever and things
19 change.

20 So my thought is, if there's significant
21 change in financial circumstance, I told my staff
22 attorneys, you know, consider bringing something like
23 that to the court's attention because even -- not
24 talking about bringing in other attorney, maybe there
25 could be a 722-d order, and I'm talking about

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2 significant change. I'm not talking about just a shade
3 of gray.

4 So I really have been interested in
5 hearing -- I can support everything that the ladies
6 have said and Andy has said. The rural counties,
7 that's tough. That's tough because of so many reasons.
8 I've heard everything from transportation to resource.

9 You know, Tim Donaher kept using the
10 expression "perfect world." We don't have it here, but
11 it's pretty good.

12 MS. MACRI: Well, let me ask you, Chuck,
13 with respect to Monroe, if there were a chance that the
14 responsibility would be divided up between public
15 defenders and, let's say, an Assigned Counsel Program
16 administrator, do you think that would be an acceptable
17 sort of situation here in Monroe?

18 MR. NOCE: No, I don't, and Joanne, I
19 wouldn't because I don't have the resources. When I
20 got there there were three support staff. It's now
21 five and a half, thanks to ILS. There is 11 attorneys.
22 That's it.

23 I have -- there's no secretaries per se in
24 the office. There's no investigators in the office. I
25 mean, you know, we contract out my attorneys.

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2 So to put another, you know, brick on the
3 shoulder, you got to do eligibility, no, and that's why
4 I made the comment about I believe Tim's office is
5 doing a wonderful job because I would be hearing about
6 it --

7 MS. MACRI: Otherwise, yeah.

8 MR. NOCE: -- if he wasn't.

9 MR. DOYLE: Chuck, one of the concerns,
10 and maybe it's just theoretical and never comes to
11 pass, but one of my concerns would be, you have an
12 agency, a provider, in this case, Tim, a wonderful
13 office, and he runs it well --

14 MR. NOCE: Yeah.

15 MR. DOYLE: -- but you have them with a
16 client that, they have a conflict, they can't
17 represent, that they're going to be sending to you, but
18 they're screening them and they're obtaining
19 information.

20 Have you ever had a situation arise where
21 that in any way posed any problem where information
22 that was obtained was used in a trial --

23 MR. NOCE: No.

24 MR. DOYLE: -- or used against your client
25 or anything like that?

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2 MR. NOCE: And again, I have to defer to,
3 I don't know if just under three years - I started
4 October 1st of '12 - is enough of a measure of time, I
5 think it is, but if something is going to happen, it
6 should happen in three years. Nothing's happened.
7 Nothing's happened.

8 So that's why I'm saying, it may not be
9 Tim's perfect world, but it's working smoothly here and
10 we've done things in cooperation with each other.

11 The issue just presented itself six months
12 ago that he appears in court, he's got an eligible
13 client, but they determine a conflict, not a felony
14 case, immediately, and then you got an assistant DA,
15 because you've got an in-custody defendant, that hands
16 that defendant his grand jury notice to put the case in
17 in 72 hours.

18 We got together and then my office,
19 because of that, because it's an exceptional situation,
20 we fast track those cases and we assign somebody who is
21 downtown who is willing to take the case and on the
22 panel and is going to go to that jail and advise that
23 client of his or her grand jury rights.

24 So there's cooperation between our two
25 offices. It's only adversarial in the sense that we

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2 might be representing co-defendants and that's about as
3 far as it goes. It's a good relationship.

4 MS. BURTON: Chuck, I wanted to go back to
5 something you said about the case where -- the 722-c
6 order --

7 MR. NOCE: Right.

8 MS. BURTON: -- on a privately retained
9 case, partly with respect to investigators and other
10 things.

11 So the question I think that that raises
12 is, when you talk about ability to afford an attorney,
13 in some cases, and maybe in many cases, you're not just
14 talking about buying the attorney, you're talking about
15 buying all of the additional supports that may be
16 necessary to prosecute the case or --

17 MR. NOCE: Definitely.

18 MS. BURTON: -- to offend the case?

19 MR. NOCE: Definitely.

20 MS. BURTON: So when we're talking about
21 using a certain level of the guidelines or whatever
22 that number might be, it's not just based on, can you
23 retain an attorney, can you pay the retainer fee right
24 now, right, you're talking about, are you able to
25 sustain not only throughout the entire case whatever

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2 the cost may be for the attorney, but also other costs
3 that might be incidental -- or not incidental, but
4 integral to the defense?

5 MR. NOCE: Yes. Incidental, but
6 necessary.

7 MS. BURTON: Right. Right.

8 MR. NOCE: And quite frankly, I think if
9 an attorney who is worthy of being called a trial
10 attorney didn't do what we're trained to do, and that's
11 to investigate and research and ensure if there's
12 defenses and you need to bring in expert witnesses,
13 wow, you know, you're dropping the ball.

14 So yeah, it's not just the fee, and that's
15 why I really have a problem, and again, it's my
16 judgement, you quote a fee to your client, that money
17 runs out, my attitude is, you're in the case. Don't go
18 trying now to pass this off to a public defender or to
19 an Assigned Counsel Plan. That's not fair.

20 And I'll tell you, the first six months I
21 had four judges on felony cases try to get me to -- and
22 actually tried to -- they called me up to have me
23 assign those attorneys, and I said, no. I never got
24 another call. I never got another call. I think they
25 understood.

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2 MR. DOYLE: That issue arose in federal
3 court in Buffalo and ended up going to the Second
4 Circuit and the Second Circuit affirmed the district
5 court judge who said, "You got in the case. That's
6 it."

7 MR. NOCE: I believe it. I believe that
8 should be the case.

9 MR. DOYLE: Any other questions?

10 Okay. Thank you very much. You've been
11 very helpful.

12 MR. NOCE: Thank you.

13 MR. DOYLE: Anybody else?

14 All right. Well, really, we want to thank
15 everyone, all of our speakers, everyone who came and
16 attended and I want to thank all the panel members for
17 their insightful questions, and with that, we'll close
18 the hearing.

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2 REPORTER CERTIFICATE

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4 I, Margaret R. Crane, do hereby certify that I did
5 report in stenotype machine shorthand the
6 proceedings held in the above-entitled matter;
7 Further, that the foregoing transcript is a true and
8 accurate transcription of my said stenographic notes
9 taken at the time and place hereinbefore set forth.

10
11 Dated Tuesday, August 18, 2015

12 At Rochester, New York

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14
15 S/ Margaret R. Crane

16 _____
17 Margaret R. Crane
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