



August 26, 2015

Via Email: publichearings@ils.ny.gov

New York State Office of Indigent Legal Services
80 S. Swan Street, 29th Floor
Albany, New York 12210

Re: Public Hearings on Eligibility for Assignment of Counsel

Dear Director Leahy, Board Members and Staff:

We write on behalf of Legal Services of Central New York, Inc. (LSCNY), to participate in your office's public hearings on the eligibility for assignment of counsel and to provide our organization's input to ILS in developing criteria and procedures for the assignment of counsel in criminal and family court proceedings. We offer our organization's observations on the processes currently in place for providing assigned counsel for mandated cases in central New York and our recommendations for establishing state-wide criteria for making these assignments in the future.

Legal Services of Central New York is a not-for-profit law firm which has served the residents of central and northern New York since 1966. We provide civil legal services to people who are indigent, elderly, disabled, or otherwise have difficulty with access to legal services and the courts. We currently have thirty-six lawyers serving a thirteen county region of Central New York. From our six offices in Syracuse, Utica, Binghamton, Oswego, Watertown and Cortland, we serve the following counties: Broome, Cayuga, Chenango, Cortland, Delaware, Herkimer, Jefferson, Lewis, Madison, Oneida, Onondaga, Oswego, and Otsego. Our priorities include providing access to essentials of life, including housing, income security, healthcare and education.

While LSCNY lawyers do not engage in criminal representation and only limited Family Court services, we often represent eligible clients who are improperly denied assigned counsel in these proceedings. We have advocated for eligible clients who have been denied representation by appearing in court, writing letters on their behalf, filing formal motions for the assignment of counsel, filing Article 78 proceedings to compel the assignment of counsel for eligible clients,

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and filing appeals of orders rendered without the benefit of counsel.

We have advocated for assignment of counsel in every one of the thirteen counties in which we practice, though most frequently in Onondaga and Oswego Counties. Each of the thirteen counties in which we practice has a different system in place for the provision of counsel in mandated cases. Each county uses different criteria to determine if counsel should be assigned. Some of our counties, such as Onondaga, Oswego and Cayuga, use an assigned counsel system. Other counties, such as Broome, Oneida and Jefferson, use a public defender system. Some counties also contract with institutional providers such as the Hiscock Legal Aid Society in Syracuse or the Legal Aid Society of Mid-New York in Binghamton for family court representation. All counties use some form of assigned counsel plan, at least for cases in which public defenders or contract agencies have conflicts of interests.

As a result, many different decision-makers, including judges, public defender offices, contract agencies, assigned counsel administrators, and attorneys themselves are involved in making eligibility determinations in the various counties. The different standards across the counties and the number of actors involved in eligibility determinations make for an often confusing patchwork for indigent representation in our region. Below are some of the common problems we have encountered in advocating for the appropriate assignment of counsel to eligible clients.

Home Ownership

One of the most frequent problems we have encountered are county policies that provide for categorical ineligibility for people who own homes. Although homes may be assets, they are not liquid assets. Nevertheless, some county programs will automatically disqualify a person if the family owns any home, regardless of the value or the circumstances. Homes are frequently encumbered by mortgages or liens, making them difficult or impossible to sell or borrow against. Often, a home will have a very low market value or the owner may have very little equity in the home, regardless of the home's value. In other cases, the household member seeking appointed counsel is not on the title to the home or shares title with another family member, thus restricting the ability to sell or borrow against the home. As a matter of public policy, a primary residence and reasonable household furnishings should not disqualify a person from the assignment of counsel. No one should be required to choose between having a home and having representation in a critical court proceeding.

Automobile Ownership

Similarly, some county programs will consider whether an assigned counsel applicant owns an automobile and the value of that automobile. Again, an automobile is not a liquid asset, and should not be considered in making a determination of eligibility for assigned counsel. In the counties we serve, where public transportation is often ineffective or even non-existent, an

automobile is often necessary in order to obtain and keep employment. An automobile which is necessary to sustain employment should not be considered in a determination of assigned counsel eligibility.

Parents' Income and Assets

Some county plans require consideration of income or assets of parents when the applicant is under the age of 21. In many cases, the applicant may be financially eligible for assignment of counsel based on his or her own income and assets, but are found to be ineligible after considering the income or resources of parents who may provide no support for an applicant who may be living independently of his or her parents. Insistence on obtaining financial information from an applicant's parents and reliance on cooperation from the parents in order to process an application for counsel, can create unacceptable delays in the assignment of counsel. In making eligibility determinations, the court should consider only the income and assets of the applicant, not the income or assets of family members over whom the applicant has no control.

Income and Assets of a Spouse

Similarly, in some Family Court cases, litigants have been denied counsel based on the income and assets of a spouse, including an adverse spouse. In many cases, especially where the spouse is an adverse party or in instances involving domestic violence, an applicant will not have access to the financial resources of a spouse. Where the applicant spouse is denied access to an adverse spouse's wealth, especially in cases of domestic violence, consideration of the adverse spouse's income and assets is neither appropriate nor just. The court should consider only the income and assets over which an applicant has control and not those of a spouse over whom the applicant exercises no control.

Non-Criminal Violations

In some courts, especially town and village courts in our region, defendants who are being charged only with non-criminal violations will be denied assigned counsel based on the mistaken belief that there is no entitlement to assigned counsel where the most serious charge is a violation. Some judges appear to operate under the mistaken belief that if they have no intention of sentencing a defendant to jail on a violation, then there is no entitlement to counsel. New York Criminal Procedure Law Section 170.10(3) specifically provides for the assignment of counsel to eligible defendants for all offenses, including violations.

Eligibility for Public Benefits

Some assigned counsel programs and courts will consider an applicant's food stamps as income for purposes of making an eligibility determination. Our office has encountered applicants who have been denied assigned counsel because they receive food stamps. Food stamp benefits under the Supplemental Nutrition Assistance Program (SNAP) are not income, but are benefits accorded to a household that does not otherwise have sufficient income to feed

itself. They should not be considered in determining ability to retain counsel. To the contrary, a determination by a county Department of Social Services or the Social Security Administration of entitlement to a means-tested public benefit, including SNAP, TANF, or SSI, should render an applicant automatically entitled to assignment of counsel. In these cases, a governmental entity has already determined that the household lacks sufficient income to meet its basic needs, much less retain counsel.

Non-County Residents

In one county in which our office frequently appears, clients have been advised that they are not entitled to counsel at county expense where they are not residents of the county in which the proceeding is pending. There is no basis in law to deny counsel to financially eligible non-county residents. This error has been corrected by the courts when brought to their attention.

Delegation of Decision-Making Authority

The determination of eligibility for assigned counsel requires the Court's assessment of an individual's financial ability to retain counsel after properly considering the applicant's income, liquid assets, debts, expenses, seriousness of the case, and cost of counsel, among other factors. The relevant inquiry is whether the applicant has the ability to retain private counsel, rather than the much lower standard of indigency. New York County Law Section 722. Unfortunately, several counties in our region have improperly delegated the determination of financial eligibility to assigned counsel programs and their personnel. Too often, these assigned counsel programs have used "bright-line" tests, such as a percentage of federal poverty guidelines or home ownership, to make eligibility determinations.

When courts have overruled determinations of ineligibility by a local assigned counsel plan, they have been criticized for overspending county funds. The ultimate obligation to make eligibility determinations belongs exclusively to the court. Assigned counsel and public defender programs should have no more than an administrative role in gathering the relevant information for the court to make its determination.

Conclusion

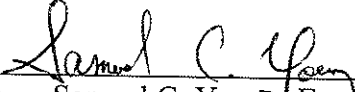
It is our experience that the processes and standards for assignment of counsel vary dramatically across the courts in our thirteen counties, and certainly even more so across New York State. The disparity in eligibility standards from county to county, and even court to court, creates confusion and uncertainty for criminal and family court litigants, judges, institutional providers, and attorneys. When our office has become aware of eligible applicants being denied assigned counsel, we have petitioned the courts for assignment of counsel. The courts have almost always assigned counsel. We undoubtedly encounter only a fraction of the cases in which eligible applicants are improperly denied assigned counsel. Without advocacy from organizations like ours, or firm direction from the State, these practices will continue.


In order to guide local courts, indigent defense organizations, and assigned counsel programs and to insure that criminal and Family Court litigants' constitutional and statutory rights are protected at a uniformly robust level throughout New York State, we urge ILS to adopt mandatory state-wide criteria and processes for the appointment of counsel in our criminal and family courts.

We thank the New York Office of Indigent Legal Services for holding these hearings, and for inviting organizations such as ours to be a part of this process. We are prepared to work with your office to help develop appropriate criteria and procedures to insure that all New Yorkers are timely provided with the necessary and critical representation that they deserve, and that our federal and state constitutions, statutes and decisional law mandate they receive.

Very truly yours,

LEGAL SERVICES OF CENTRAL NEW YORK


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