



NEW YORK STATE BAR ASSOCIATION

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Mr. William J. Leahy
Executive Director
New York State Office of Indigent Legal Services
80 S. Swan St., 29th Floor
Albany, NY 12210

Dear Mr. Leahy:

This letter is submitted by the New York State Bar Association in response to a request from the New York State Office of Indigent Legal Services for comments/testimony regarding the issues involved in determining financial eligibility for the appointment of assigned counsel. As part of the settlement in *Hurrell-Harring v. State of New York*, the State Office of Indigent Legal Services has been tasked with developing criteria and procedures to provide guidance in determining whether persons seeking the appointment of assigned counsel are financially unable to afford retaining private counsel. Hearings are being held in all judicial districts outside New York City.

The New York State Bar Association has a long and robust history of commitment to improving access to justice for those with limited resources and to supporting efforts to ensure that inability to afford retained counsel is not an impediment to securing mandated counsel. Among the many committees and sections involved in these issues at the Association are the Criminal Justice Section, the Committee to Ensure Quality of Mandated Representation, the Committee on Legal Aid, the Committee on Children and the Law and the Task Force on the Family Court, which collaborated to articulate the appropriate policy on behalf of the Association for this submission.

These comments focus on two aspects of the issues involved in determining financial eligibility for the appointment of assigned counsel: 1) the standard for eligibility and 2) the mechanism for screening for financial eligibility. The Association has well-developed policy relating to these issues emanating from the 2013 report of the Task force on Family Court and the Standards for Providing Mandated Representation, last revised in March 2015, developed by the Committee to Ensure Quality of Mandated Representation.

STANDARD FOR FINANCIAL ELIGIBILITY

Recommendation 14, contained in the Final Report of the New York State Bar Task Force on the Family Court, calls for greater consistency in the determinations of eligibility for appointment of assigned counsel from jurisdiction to jurisdiction as well within a given jurisdiction. The Standards for Mandated Representation developed by the Committee to Ensure Quality of Mandated Representation and adopted by the New York Bar Association call for that consistency and expediency as well (Standards C-3 and C-5 adopted by the New York State Bar Association in 2005).

While the New York State Bar Association believes that the criteria considered should be uniform statewide, actual determinations need to reflect the ability of a given individual having a constitutional right to counsel to retain competent counsel. Thus geographical nuances-- including differences in the cost of living and the cost of retaining counsel--the nature of the charge, the complexity of the matter, and the severity of the charge must be taken into account in making a determination as to the right to appointment of assigned counsel. All of these factors should be fully articulated in the written standards for determining eligibility.

Consideration should be given to establishing a presumptive financial eligibility standard which would serve as a baseline for eligibility determinations but not as a ceiling for these determinations. Some have suggested utilizing 250 per cent of the federal poverty guidelines. Other possibilities include the Self-Sufficiency Standard for New York State, prepared in 2010 for the New York State Self-Sufficiency Standard Steering Committee (Community Action Association) on a county-by-county basis. Another possible source is the standards established by the Interest on Lawyer Accounts Fund (N.Y. Comp. Codes R. & Regs, 22 Section 7000.14) which build in flexibility and discretion in application.

A hard and fast rule applied to assets, other than available income, is unwise, as well. For example, the ownership of an automobile essential for an individual's employment should not be a bar to securing appointed counsel. Nor should the ownership of a home without further inquiry serve as a bar.

Further, in the case of a minor, an individual under the age of 21, the determination of eligibility should be based on that persons individual financial ability to retain counsel. The constitutional right to counsel is a personal right. *See, Fullan v. Commissioner of Corrections of State of N.Y.*, 891 F.2d 1007, *cert denied* 496 U.S. 942; *People v. Ulloa*, 1 A.D.3d 468 (2d Dept. 2003). The income of a minor's parents should not be considered available to the defendant in a criminal proceeding for the purpose of determining eligibility. A parent is under no obligation to hire counsel to represent a minor child in a criminal proceeding

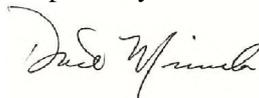
It is important to distinguish this standard for eligibility from that of "indigence". Adopting statewide standards will clearly result in an increase caseload to providers of mandated representation. A system that expands eligibility must be accompanied with provisions to ensure that the increased case load does not become an "unfunded mandate".

MECHANISM FOR SCREENING FOR ELIGIBILITY

The New York State Bar Association supports the position that screening for financial eligibility is properly the function of the judicial system with the possible use of a third party neutral to interview and make recommendations and not of the individual attorney or institution assigned to provide representation. Any further screening beyond the Judiciary should be fair, free of conflict and consistent. Utilizing the provider of counsel, whether institutional or individual, to ascertain financial eligibility is unwise because it promotes both actual and apparent conflict. Depending on the nature of the contract for provision of legal services, the screening determination may add to the revenues of the provider or strain the resources of the provider. Furthermore, where counsel is seeking to create a relationship of trust for representation in the matter, close questioning about income and assets is likely to create distrust.

On behalf of the New York State Bar Association, I thank you for the opportunity to express the position of the Association and its 74,000 members.

Respectfully,



David P. Miranda